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*488 U.S. 469, *; 109 S. Ct. 706, **;*
*102 L. Ed. 2d 854, ***; 1989 U.S. LEXIS 579*

CITY OF RICHMOND, APPELLANT v. J. A. CROSON COMPANY

No. 87-998

SUPREME COURT OF THE UNITED STATES

488 U.S. 469; 109 S. Ct. 706; 102 L. Ed. 2d 854; 1989 U.S. LEXIS 579; 57 U.S.L.W. 4132; 53 Fair Empl. Prac. Cas. (BNA) 197; 48 Empl. Prac. Dec. (CCH) P38,578; 36 Cont. Cas. Fed. (CCH) P76,005

October 5, 1988 Argued
January 23, 1989, Decided

PRIOR HISTORY:

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

DISPOSITION: 822 F. 2d 1355, affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant city challenged decision of the United States Court of Appeals for the Fourth Circuit that reversed decision of trial court when it struck down minority set-aside program of a city ordinance because it violated both prongs of strict scrutiny under Equal Protection Clause of U.S. Const. amend. XIV.

OVERVIEW: Appellant city council adopted a plan that required prime contractors to whom the city awarded construction contracts to subcontract at least 30 percent of the dollar amount of the contract to one or more Minority Business Enterprises. The purpose of the plan was to promote wider participation by minority business enterprises in the construction of public projects. Appellee contractor brought an action under 42 U.S.C.S. § 1983, arguing that the ordinance was unconstitutional on its face. The district court upheld the ordinance but the appellate court, on remand, found it to be unconstitutional. The Supreme Court upheld the decision of the appellate court. The Court found that none of the evidence presented by appellate pointed to any identified discrimination in the construction industry. Because appellant had failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race, the Court found the ordinance to be unconstitutional.

OUTCOME: The Supreme Court affirmed the decision of the appellate court when the Court found, because appellant city failed to identify the need for remedial action in the awarding of its public construction contracts, its treatment of its citizens on a racial basis violated the dictates of the Equal Protection Clause.

CORE TERMS: contractor, set-aside, classification, contracting, remedial, Fourteenth Amendment, construction industry, ordinance, racial discrimination, prime, race-conscious, equal protection, race-based, racially, disadvantaged, statistical, societal, bid, discriminatory, strict scrutiny, basis of race, minority-owned, locality, fixture, dollar, remedial action, nonminority, narrowly tailored, race-neutral, remedying

LexisNexis(TM) HEADNOTES - Core Concepts - Hide Concepts

Constitutional Law > Equal Protection > Scope of Protection

HN1 It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees.

Constitutional Law > Congressional Duties & Powers > Necessary & Proper Clause

HN2 Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may authorize and induce state action to avoid such conduct.

Constitutional Law > Equal Protection > Race

HN3 The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body.

Constitutional Law > Equal Protection > Scope of Protection

HN4 Congress, unlike any state or political subdivision, has a specific constitutional mandate to enforce the dictates of U.S. Const. amend. XIV. The power to enforce may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations.

Constitutional Law > Equal Protection > Scope of Protection

HN5 Correctly viewed, U.S. Const. amend. XIV, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.

Constitutional Law > Equal Protection > Scope of Protection

HN6 That Congress may identify and redress the effects of society-wide discrimination does not mean that, a fortiori, the states and their political subdivisions are free to decide that such remedies are appropriate. U.S. Const. amend. XIV, § 1 is an explicit constraint on state power, and the states must undertake any remedial efforts in accordance with that provision.

Constitutional Law > Equal Protection > Scope of Protection

HN7 A state or local subdivision, if delegated the authority from the state, has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction. This authority must be exercised within the constraints of U.S. Const. amend. XIV § 1.

Constitutional Law > Equal Protection > Scope of Protection

HN8 The Equal Protection Clause of U.S. Const. amend. XIV provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.

Constitutional Law > Equal Protection > Level of Review

HN9 Absent searching judicial inquiry into the justification for race-based measures, there is simply no way of determining what classifications are benign or remedial

and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to smoke out illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen fit this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Constitutional Law > Equal Protection > Level of Review

HN10 The standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.

Constitutional Law > Equal Protection > Scope of Protection

HN11 The factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary. But when a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals.

Constitutional Law > Equal Protection > Race

HN12 A governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists.

Constitutional Law > Equal Protection > Race

HN13 Where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination under Title VII. But it is equally clear that when special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.

Constitutional Law > Equal Protection > Race

HN14 In the employment context, it has been recognized that for certain entry level positions or positions requiring minimal training, statistical comparisons of the racial composition of an employer's work force to the racial composition of the relevant population may be probative of a pattern of discrimination. But where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.

Constitutional Law > Equal Protection > Race

HN15 Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate.

Constitutional Law > Equal Protection > Race

HN16 But the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification.

Constitutional Law > Equal Protection > Race

HN17 Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime

contractors, an inference of discriminatory exclusion could arise.

Constitutional Law > Equal Protection > Race

HN18 Local government is not powerless to deal with individual instances of racially motivated refusals to employ minority contractors. Where such discrimination occurs, a city would be justified in penalizing the discriminator and providing appropriate relief to the victim of such discrimination. Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified.

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DECISION: Fourteenth Amendment's equal protection clause held violated by Virginia city's requirement that non-minority-owned prime contractors on city construction contracts must provide at least 30 percent set-aside to minority subcontractors.

SUMMARY: In 1983, a Virginia city council adopted, in an ordinance, a minority business utilization "set-aside" plan, which required non-minority-owned prime contractors awarded city construction contracts to subcontract at least 30 percent of the dollar amount of the contract to one or more minority business enterprises from anywhere in the United States, with each such enterprise being at least 51 percent owned and controlled by United States citizens who were blacks, Spanish-speaking persons, Orientals, Indians, Eskimos, or Aleuts. In the public hearing which preceded the ordinance's adoption, there was no direct evidence of race discrimination on the part of the city in letting contracts, or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors, but (1) proponents relied on a study which indicated that, while the city's general population was 50 percent black, only 0.67 percent of the city's prime construction contracts had been awarded to minority businesses in the 5-year period from 1978 to 1983; (2) it was established that a variety of contractors' associations had virtually no minority businesses within their membership; (3) the city's legal counsel indicated that the ordinance would be constitutional, under the United States Supreme Court's decision in Fullilove v Klutznick (1980) 448 US 448, 65 L Ed 2d 902, 100 S Ct 2758 (holding that the equal protection component of the due process clause of the Federal Constitution's Fifth Amendment was not violated by a federal set-aside requirement (42 USCS 6705(f)(2)) that 10 percent of certain federal public works grants be awarded to minority contractors); and (4) a council proponent, who expressed familiarity with practices in the construction industry, said that the general conduct of the construction industry in the area, in the state, and around the nation was one in which race discrimination and exclusion on the basis of race were widespread. After the adoption of the ordinance, the city issued an invitation to bid on a project for the provision and installation of certain plumbing fixtures at the city jail, and the only bidder was a company, which, although having contacted some minority subcontractors, submitted a proposal that did not include sufficient minority subcontracting to satisfy the ordinance. The company requested a waiver of the set-aside requirement, but the city eventually (1) denied the company's request, and (2) informed the company that the city had decided to rebid the project. Shortly thereafter, the company brought an action against the city in the United States District Court for the Eastern District of Virginia, and included a claim, under 42 USCS 1983, that the ordinance was unconstitutional both on its face and as applied, under the equal protection clause of the Federal Constitution's Fourteenth Amendment. The District Court, however, upheld the plan in all respects. On appeal, the United States Court of Appeals for the Fourth Circuit initially affirmed the District Court's judgment (779 F2d 181). However, after the Court of Appeals' judgment had been vacated and remanded by the Supreme Court for further consideration (478 US 1016, 92 L Ed 2d 733, 106 S Ct 3327), the Court of Appeals reversed the District Court's judgment and ordered the case to be remanded, on the ground that the ordinance

was invalid under the equal protection clause (822 F2d 1355).

On appeal, the United States Supreme Court affirmed. In an opinion by O'Connor, J., a portion of which (Parts I, III-B, and IV) was joined by Rehnquist, Ch. J., and White, Kennedy, and Stevens, JJ., and constituted the opinion of the court, it was held that the Fourteenth Amendment's equal protection clause was violated by the city's set-aside ordinance, for (1) with respect to the inclusion of blacks, the city had failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race, because there was nothing approaching a prima facie case of a constitutional or statutory violation by anyone in the city's construction industry, where none of the evidence presented by the city pointed to any identified discrimination in the city's construction industry, and because past societal discrimination alone could not serve as the basis for such a rigid racial preference; (2) with respect to the inclusion of Spanish-speaking persons, Orientals, Indians, Eskimos, or Aleuts, there was absolutely no evidence of past discrimination against such persons in any aspect of the city's construction industry; (3) the random inclusion of racial groups that as a practical matter might never have suffered from discrimination in the city's construction industry suggested that perhaps the city's purpose was not in fact to remedy past discrimination; and (4) the 30 percent set-aside was not narrowly tailored to remedy the effects of any prior alleged discrimination. In another portion (Part II) of the opinion, O'Connor, J., joined by Rehnquist, Ch. J., and White, J., expressed the view that (1) there was a difference between the authority of Congress and the authority of states and their political subdivisions to identify and redress the effects of societywide racial discrimination, where 5 of the Fourteenth Amendment grants Congress a specific mandate to enforce its provisions, while 1 of the Fourteenth Amendment is a constraint on state power; but (2) a state--or local subdivision, if delegated the authority from the state--had the authority to eradicate the effects of private discrimination within its own legislative jurisdiction. Finally, in another portion (Parts III-A and V) of the opinion, O'Connor, J., joined by Rehnquist, Ch. J., and White and Kennedy, JJ., expressed the view that (1) under the equal protection clause, racial classifications were subject to a strict scrutiny standard which was not dependent upon the race of those burdened or benefited by a particular classification, for, absent searching judicial inquiry, there was no way of determining what classifications were "benign" or "remedial," and what classifications were in fact motivated by illegitimate notions of racial inferiority or simple racial politics; (2) even if a different standard might be applied in some cases, strict scrutiny was appropriate in the case at hand, where (a) blacks comprised approximately 50 percent of the city's population and held five of the nine seats in the city's council, and (b) heightened scrutiny had previously been applied to race-related systems of medical-school admissions and employee layoffs; (3) a state or local entity, however, was not precluded from taking action to rectify the effects of identified discrimination within its jurisdiction; and (4) even in the absence of evidence of discrimination, a city had at its disposal other, race-neutral devices, such as the simplification of bidding procedures, to increase the accessibility of city contracting to small entrepreneurs of all races; but (5) proper findings were necessary to define both the scope of any injury and the necessary remedy.

Stevens, J., concurring in part and concurring in the judgment, joined Parts I, III-B, and IV of the opinion of O'Connor, J., but also expressed the view that (1) the approach of the opinion of O'Connor, J., to the case at hand gave unwarranted deference to race-based legislative action that purported to serve a purely remedial goal; and (2) three aspects of the case were of special importance: (a) the city made no claim that the public interest in the efficient performance of the city's construction contracts would be served by granting a preference to minority business enterprises, (b) the case involved an attempt by a policymaking legislative body, rather than a better-equipped court, to fashion a remedy for a past wrong, and (c) the city's council, instead of carefully identifying the characteristics of the two classes of contractors that were respectively favored and disfavored by the ordinance, had engaged in the type of stereotypical analysis that was a hallmark of violations of the equal protection clause.

Kennedy, J., concurring in part and concurring in the judgment, joined Parts I, III-A, III-B, IV, and V of the opinion of O'Connor, J., but also expressed the view that (1) for the purposes of the ordinance at issue, it was sufficient to say that a state had (a) the power to eradicate racial discrimination and its effects in both the public and private sectors, and (b) the absolute duty to do so where those wrongs were caused intentionally by the state itself; (2) the Fourteenth Amendment ought not to be interpreted to reduce the state's authority in this regard, unless there was a conflict with federal law, or--as in the case at hand--a state remedy was itself a violation of equal protection; and (3) the ordinance in the case at hand was invalid under the Fourteenth Amendment, because the ordinance and the legislative record were open to the fair charge that the ordinance was not a remedy, but was itself a preference which would cause the same corrosive animosities that (a) the Constitution forbade in the whole sphere of government, and (b) national policy condemned in the rest of society as well.

Scalia, J., concurring in the judgment, expressed the view that (1) he agreed with much of the opinion of O'Connor, J., and, in particular, with the opinion's conclusion that strict scrutiny had to be applied to all governmental classification by race, regardless of whether the classification's asserted purpose was "remedial" or "benign"; but (2) under a distinction between federal and state (or local) actions based upon race--a distinction which rested not only upon the substance of the Constitution's Civil War Amendments (including the Fourteenth Amendment), but also upon social reality and governmental theory--there was only one circumstance, rather than broad remedial authority, in which a state might act by race to undo the effects of past discrimination--where the action was necessary to eliminate a state's own maintenance of a system of unlawful racial classification; (3) the set-aside in the case at hand was directly beneficial to the dominant political group, which happened also to be the dominant racial group; and (4) the company in the case at hand had a constitutional right to have its bid succeed or fail under a decisionmaking process uninfected with racial bias.

Marshall, J., joined by Brennan and Blackmun, JJ., dissenting, expressed the view that (1) the Supreme Court's decision marked a step backward in the court's affirmative action jurisprudence; (2) the case at hand was readily resolved, so long as one viewed the city's local evidence of discrimination against the backdrop of systematic nationwide racial discrimination which Congress, in enacting the 6705(f)(2) set-aside program, had identified in the construction industry; (3) the city's ordinance met the appropriate standard for applying the equal protection clause to an affirmative action program--that race-conscious classifications to further remedial goals must (a) serve important governmental objectives, and (b) be substantially related to achievement of those objectives; (4) requiring remedial measures undertaken by municipalities with black leadership had to face stiffer equal protection clause scrutiny than remedial measures undertaken by municipalities with white leadership unwarrantedly implied a lack of political maturity on the part of the nation's elected minority officials; and (5) nothing in the Civil War Amendments suggested that the states, in exercising their police power, were in any way constitutionally inhibited from working alongside the Federal Government in the fight against discrimination and its effects.

Blackmun, J., joined by Brennan, J., dissenting, joined the opinion of Marshall, J., and also expressed the view that, although the Supreme Court's opinion in the case at hand was a regression, he was confident that, given time, the Supreme Court one day again would do its best to fulfill the promises of the Constitution's preamble and of the guaranties embodied in the Bill of Rights.

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:

[*HN1]**
CIVIL RIGHTS §7.9

EVIDENCE §904.3
30 percent municipal set-aside to minority subcontractors -- equal protection --

Headnote: [1A] [1B] [1C] [1D] [1E] [1F] [1G]
The equal protection clause of the Federal Constitution's Fourteenth Amendment is violated by a city's minority business utilization "set-aside" plan--which, in an ordinance, requires non-minority-owned prime contractors awarded city construction contracts to subcontract at least 30 percent of the dollar amount of the contract to one or more minority business enterprises from anywhere in the United States, with each such enterprise being at least 51 percent owned and controlled by United States citizens who are blacks, Spanish-speaking persons, Orientals, Indians, Eskimos, or Aleuts--where (1) with respect to the inclusion of blacks, the city fails to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race, because there is nothing approaching a prima facie case of a constitutional or statutory violation by anyone in the city's construction industry, where none of the evidence presented by the city points to any identified discrimination in the city's construction industry, and because past societal discrimination alone cannot serve as the basis for such a rigid racial preference; (2) with respect to the inclusion of Spanish-speaking persons, Orientals, Indians, Eskimos, or Aleuts, there is absolutely no evidence of past discrimination against such persons in any aspect of the city's construction industry; (3) the random inclusion of racial groups that as a practical matter may never have suffered from discrimination in the city's construction industry suggests that perhaps the city's purpose was not in fact to remedy past discrimination; and (4) the 30 percent set-aside is not narrowly tailored to remedy the effects of any prior alleged discrimination. (Marshall, Brennan, and Blackmun, JJ., dissented from this holding.)

[*HN2]**
APPEAL §1662
mootness -- expiration of municipal ordinance --

Headnote: [2A] [2B]
The subsequent expiration of a city's minority business utilization ordinance does not render a controversy between the city and a company moot on appeal, where there remains a live controversy between the parties over whether the city's prior refusal, pursuant to the ordinance, to award the company a contract was unlawful and thus entitles the company to damages.

[*HN3]**
CIVIL RIGHTS §1
racial classification -- strict scrutiny --

Headnote: [3A] [3B]
Under the equal protection clause of the Federal Constitution's Fourteenth Amendment, strict scrutiny must be applied to governmental classification by race, regardless of whether the classification's asserted purpose is "remedial" or "benign." [Per O'Connor, J., Rehnquist, Ch. J., and White, Kennedy, and Scalia, JJ. Dissenting in part: Stevens, J. Dissenting: Marshall, Brennan, and Blackmun, JJ.]

[*HN4]**
CIVIL RIGHTS §6.4
racial quotas -- government contractors -- medical schools --

Headnote: [4A] [4B]
While the history of both private and public discrimination in the United States has contributed to a lack of opportunities for black entrepreneurs, such history, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in a particular Virginia

city; like the claim that past discrimination in primary and secondary schooling justifies a rigid racial preference in medical-school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota, for--like a theory that minority students are in need of "role models" to alleviate the effects of prior discrimination--a generalized assertion that there has been past discrimination in an entire industry (1) provides no guidance for a legislative body to determine the precise scope of the injury the legislature seeks to remedy, and (2) has no logical stopping point for relief.

[*HN5]**
CIVIL RIGHTS §1

EVIDENCE §904.3
declaration of remedial purpose -- weight -- validity of municipal set-aside to minority subcontractors --

Headnote: [5A] [5B] [5C] [5D]
With respect to the validity, under the equal protection clause of the Federal Constitution's Fourteenth Amendment, of a city's inclusion of blacks as a protected minority in an ordinance establishing a minority business utilization "set-aside" plan--which requires non-minority-owned prime contractors awarded city construction contracts to subcontract at least 30 percent of the dollar amount of the contract to one or more minority business enterprises from anywhere in the United States--a strong basis in evidence for the city's conclusion that remedial action was necessary is not provided by the city council's designation of the plan as "remedial," because such a designation is entitled to little or no weight; racial classifications are suspect, and simple legislative assurances of good intention cannot suffice.

[*HN6]**
EVIDENCE §904.3
discrimination in construction industry -- weight -- validity of municipal set-aside to minority subcontractors --

Headnote: [6A] [6B] [6C] [6D]
With respect to the validity, under the equal protection clause of the Federal Constitution's Fourteenth Amendment, of a city's inclusion of blacks as a protected minority in an ordinance establishing a minority business utilization "set-aside" plan--which requires non-minority-owned prime contractors awarded city construction contracts to subcontract at least 30 percent of the dollar amount of the contract to one or more minority business enterprises from anywhere in the United States--a strong basis in evidence for the city's conclusion that remedial action was necessary is not provided by the highly conclusionary statement of a proponent of a plan that there was racial discrimination in the construction industry in the area, the state, and around the nation--or by the city manager's view that racial discrimination still plagued the construction industry in another city--because such generalized statements are of little probative value in establishing identified discrimination in the ordinance-enacting city's construction industry.

[*HN7]**
EVIDENCE §904.3
disparity between minority contract awards and percentage of minority population -- weight -- validity of municipal set-aside to minority subcontractors --

Headnote: [7A] [7B] [7C] [7D] [7E] [7F] [7G]
With respect to the validity, under the equal protection clause of the Federal Constitution's Fourteenth Amendment, of a city's inclusion of blacks as a protected minority in an ordinance establishing a minority business utilization "set-aside" plan--which requires non-minority-owned prime contractors awarded city construction contracts to subcontract at least 30

percent of the dollar amount of the contract to one or more minority business enterprises from anywhere in the United States--a strong basis in evidence for the city's conclusion that remedial action was necessary is not provided by evidence that minority businesses received 0.67 percent of prime contracts from the city, while minorities constituted 50 percent of the city's population, for (1) without any information on minority participation in subcontracting, it is impossible to evaluate overall minority representation in the city's construction expenditures, where the city does not know (a) how many minority business enterprises in the relevant market are qualified to undertake prime or subcontracting work in public construction projects, or (b) what percentage of total city construction dollars minority firms receive as subcontractors on prime contracts let by the city; and (2) even though the set-aside, to a large extent, seems to rest on the unsupported assumption that white prime contractors will not hire minority firms, the complete silence of the record concerning enforcement of the city's own antidiscrimination ordinance--which prohibits both public-contract-award discrimination and public-contractor-employment discrimination--contradicts the theory that a tight-knit industry has prevented blacks from obtaining the experience necessary to participate in construction contracting, where the city points to no evidence that its prime contractors, in either their employment or subcontracting practices, have been violating the ordinance. (Marshall, Brennan, and Blackmun, JJ., dissented from this holding.)

[*HN8]**
EVIDENCE §852
low minority membership in contractors' associations -- relevance -- weight -- validity of municipal set-aside to minority subcontractors --

Headnote: [8A] [8B] [8C] [8D] [8E]
With respect to the validity, under the equal protection clause of the Federal Constitution's Fourteenth Amendment, of a city's inclusion of blacks as a protected minority in an ordinance establishing a minority business utilization "set-aside" plan--which requires non-minority-owned prime contractors awarded city construction contracts to subcontract at least 30 percent of the dollar amount of the contract to one or more minority business enterprises from anywhere in the United States--a strong basis in evidence for the city's conclusion that remedial action was necessary is not provided by evidence that minority-business-enterprise membership in local contractors' associations is extremely low, because (1) such evidence, standing alone, cannot establish a prima facie case of discrimination, where there are numerous other explanations for such a dearth of minority participation; and (2) for low minority membership in the associations to be relevant, the city would have to link low minority membership to the number of local minority business enterprises eligible for membership.

[*HN9]**
CIVIL RIGHTS §3

EVIDENCE §904.3
congressional findings of discrimination -- weight -- validity of municipal set-aside to minority subcontractors -- federal powers -- state and local constraints --

Headnote: [9A] [9B] [9C] [9D] [9E]
With respect to the validity, under the equal protection clause of the Federal Constitution's Fourteenth Amendment, of a city's inclusion of blacks as a protected minority in an ordinance establishing a minority business utilization "set-aside" plan--which requires non-minority-owned prime contractors awarded city construction contracts to subcontract at least 30 percent of the dollar amount of the contract to one or more minority business enterprises from anywhere in the United States--a strong basis in evidence for the city's conclusion that remedial action was necessary is not provided by Congress' findings--in connection with the enactment of a federal set-aside requirement (42 USCS 6705(f)(2)) that 10 percent of certain federal public works grants be awarded to minority contractors--that there had been

nationwide discrimination in the construction industry, because (1) the probative value of those findings for demonstrating the existence of discrimination in the city is extremely limited, where Congress, by its inclusion of a waiver procedure in the national program, explicitly recognized that the scope of the problem would vary from market area to market area; (2) while Congress was exercising its enforcement powers under 5 of the Fourteenth Amendment in making such findings, a state or local government needs to do more, under the constraints of the equal protection clause, than to find a congressional report on the subject in order to enact a set-aside program; and (3) the evidence of such congressional reports, like evidence as to the history of school desegregation in the city, does little to define the scope of any injury to minority contractors in the city, or the necessary remedy, for such factors could justify a preference of any size or duration. (Marshall, Brennan, and Blackmun, JJ., dissented from this holding.)

[*HN10]**
CONSTITUTIONAL LAW §318

COURTS §109.5

EVIDENCE §253
basis for legislative classification -- presumption -- deference --

Headnote: [10]
The factfinding process of legislative bodies is generally entitled to a presumption of regularity and to deferential review by the judiciary, but when a legislative body chooses to employ a classification which is suspect under the equal protection clause of the Federal Constitution's Fourteenth Amendment, the legislative body cannot rest upon a generalized assertion as to the classification's relevance to the legislative body's goals.

[*HN11]**
CIVIL RIGHTS §1

COURTS §71
race -- legislative or executive pronouncements of necessity -- inquiry --

Headnote: [11]
Under the equal protection clause of the Federal Constitution's Fourteenth Amendment, a governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists, for the history of racial classifications in the United States suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis.

[*HN12]**
CIVIL RIGHTS §68

EVIDENCE §852
statistics -- race discrimination -- relevance -- weight -- Title VII --

Headnote: [12A] [12B]
Where gross statistical disparities can be shown, such disparities alone, in a proper case, may constitute prima facie proof of a pattern or practice of discrimination, under Title VII of the Civil Rights Act of 1964 (42 USCS 2000e et seq.); however, when special qualifications are required to fill particular jobs, comparisons to the general population, rather than to the smaller group of individuals who possess the necessary qualifications, may have little probative value; thus--even though, for certain entry-level positions or positions requiring minimal training, statistical comparisons of the racial composition of an employer's work force to the racial composition of the relevant population may be probative of a pattern of

discrimination--the relevant statistical pool, for purposes of demonstrating discriminatory exclusion where special qualifications are necessary, must be the number of minorities qualified to undertake the particular task.

[*HN13]**
CIVIL RIGHTS §7.6

EVIDENCE §383
construction contractors -- inference of race discrimination -- city's compelling interest --

Headnote: [13]
With respect to low minority-business-enterprise membership in a city's local construction contractors' associations, if the statistical disparity between eligible minority enterprises and minority-enterprise membership is great enough, an inference of discriminatory exclusion can arise; in such a case, for purposes of the equal protection clause of the Federal Constitution's Fourteenth Amendment, a city has a compelling interest in preventing its tax dollars from assisting such associations in maintaining a racially segregated construction market.

[*HN14]**
CIVIL RIGHTS §1
state or municipal protection -- race-conscious relief -- constraints --

Headnote: [14]
Under the constraints of the equal protection clause of the Federal Constitution's Fourteenth Amendment, while the states and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, the states or their subdivisions must identify that discrimination, public or private, with some specificity before they may use race-conscious relief; the requirement that a city identify the discrimination the city seeks to remedy in its own jurisdiction is not a mere administrative headache or onerous documentary obligation, for it is important that the reasons for any racial classification be clearly identified and unquestionably legitimate, because (1) racial characteristics so seldom provide a relevant basis for disparate treatment, and (2) classifications based on race are potentially so harmful to the entire body politic. (Scalia, Marshall, Brennan, and Blackmun, JJ., dissented in part from this holding.)

[*HN15]**
CIVIL RIGHTS §7.9
municipal set-aside for minority subcontractors -- equal protection --

Headnote: [15A] [15B]
With respect to a city's minority business utilization "set-aside" plan--which, in an ordinance, requires non-minority-owned prime contractors awarded city construction contracts to subcontract at least 30 percent of the dollar amount of the contract to one or more minority business enterprises from anywhere in the United States, with each such enterprise being at least 51 percent owned and controlled by United States citizens who are blacks, Spanish-speaking persons, Orientals, Indians, Eskimos, or Aleuts--the plan is not narrowly tailored to remedy the effects of prior alleged discrimination, for purposes of the equal protection clause of the Federal Constitution's Fourteenth Amendment, where (1) the city does not appear to have considered the use of race-neutral means, such as a race-neutral program of city financing for small firms, in order to increase minority business participation in city contracting; (2) the 30 percent quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing, where the quota rests upon the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population; (3) the city's waiver system--unlike a system which allows a waiver where a minority enterprise's higher price was not attributable to the effects of past discrimination--focuses solely on the availability of minority business

enterprises; and (4) since the city must already consider bids and waivers on a case-by-case basis, it is difficult to see the need for a rigid numerical quota, and the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simple administrative convenience. (Marshall, Brennan, and Blackmun, JJ., dissented from this holding.)

[*HN16]**
CONSTITUTIONAL LAW §318
equal protection -- basis for classification --

Headnote: [16]
Under the equal protection clause of the Federal Constitution's Fourteenth Amendment, an interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who have truly suffered the efforts of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification.

SYLLABUS: Appellant city adopted a Minority Business Utilization Plan (Plan) requiring prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more "Minority Business Enterprises" (MBE's), which the Plan defined to include a business from anywhere in the country at least 51% of which is owned and controlled by black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut citizens. Although the Plan declared that it was "remedial" in nature, it was adopted after a public hearing at which no direct evidence was presented that the city had discriminated on the basis of race in letting contracts or that its prime contractors had discriminated against minority subcontractors. The evidence that was introduced included: a statistical study indicating that, although the city's population was 50% black, only 0.67% of its prime construction contracts had been awarded to minority businesses in recent years; figures establishing that a variety of local contractors' associations had virtually no MBE members; the city's counsel's conclusion that the Plan was constitutional under *Fullilove* v. *Klutznick*, 448 U.S. 448; and the statements of Plan proponents indicating that there had been widespread racial discrimination in the local, state, and national construction industries. Pursuant to the Plan, the city adopted rules requiring individualized consideration of each bid or request for a waiver of the 30% set-aside, and providing that a waiver could be granted only upon proof that sufficient qualified MBE's were unavailable or unwilling to participate. After appellee construction company, the sole bidder on a city contract, was denied a waiver and lost its contract, it brought suit under 42 U. S. C. § 1983, alleging that the Plan was unconstitutional under the Fourteenth Amendment's Equal Protection Clause. The Federal District Court upheld the Plan in all respects, and the Court of Appeals affirmed, applying a test derived from the principal opinion in *Fullilove, supra*, which accorded great deference to Congress' findings of past societal discrimination in holding that a 10% minority set-aside for certain federal construction grants did not violate the equal protection component of the Fifth Amendment. However, on appellee's petition for certiorari in this case, this Court vacated and remanded for further consideration in light of its intervening decision in *Wygant* v. *Jackson Board of Education*, 476 U.S. 267, in which the plurality applied a strict scrutiny standard in holding that a race-based layoff program agreed to by a school board and the local teachers' union violated the Fourteenth Amendment's Equal Protection Clause. On remand, the Court of Appeals held that the city's Plan violated both prongs of strict scrutiny, in that (1) the Plan was not justified by a compelling governmental interest, since the record revealed no prior discrimination by the city itself in awarding contracts, and (2) the 30% set-aside was not narrowly tailored to accomplish a remedial purpose.

Held: The judgment is affirmed.

JUSTICE O'CONNOR delivered the opinion of the Court with respect to Parts I, III-B, and IV, concluding that:

1. The city has failed to demonstrate a compelling governmental interest justifying the Plan, since the factual predicate supporting the Plan does not establish the type of identified past discrimination in the city's construction industry that would authorize race-based relief under the Fourteenth Amendment's Equal Protection Clause. Pp. 498-506.

(a) A generalized assertion that there has been past discrimination in the entire construction industry cannot justify the use of an unyielding racial quota, since it provides no guidance for the city's legislative body to determine the precise scope of the injury it seeks to remedy and would allow race-based decisionmaking essentially limitless in scope and duration. The city's argument that it is attempting to remedy various forms of past societal discrimination that are alleged to be responsible for the small number of minority entrepreneurs in the local contracting industry fails, since the city also lists a host of nonracial factors which would seem to face a member of any racial group seeking to establish a new business enterprise, such as deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures, and disability caused by an inadequate track record. Pp. 498-499.

(b) None of the "facts" cited by the city or relied on by the District Court, singly or together, provide a basis for a prima facie case of a constitutional or statutory violation by *anyone* in the city's construction industry. The fact that the Plan declares itself to be "remedial" is insufficient, since the mere recitation of a "benign" or legitimate purpose for a racial classification is entitled to little or no weight. Similarly, the views of Plan proponents as to past and present discrimination in the industry are highly conclusory and of little probative value. Reliance on the disparity between the number of prime contracts awarded to minority businesses and the city's minority population is also misplaced, since the proper statistical evaluation would compare the percentage of MBE's in the relevant market that are qualified to undertake city subcontracting work with the percentage of total city construction dollars that are presently awarded to minority subcontractors, neither of which is known to the city. The fact that MBE membership in local contractors' associations was extremely low is also not probative absent some link to the number of MBE's eligible for membership, since there are numerous explanations for the dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Congress' finding in connection with the set-aside approved in *Fullilove* that there had been nationwide discrimination in the construction industry also has extremely limited probative value, since, by including a waiver procedure in the national program, Congress explicitly recognized that the scope of the problem would vary from market area to market area. In any event, Congress was acting pursuant to its unique enforcement powers under § 5 of the Fourteenth Amendment. Pp. 499-504.

(c) The "evidence" relied upon by JUSTICE MARSHALL's dissent -- the city's history of school desegregation and numerous congressional reports -- does little to define the scope of any injury to minority contractors in the city or the necessary remedy, and could justify a preference of any size or duration. Moreover, JUSTICE MARSHALL's suggestion that discrimination findings may be "shared" from jurisdiction to jurisdiction is unprecedented and contrary to this Court's decisions. Pp. 504-506.

(d) Since there is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the city's construction industry, the Plan's random inclusion of those groups strongly impugns the city's claim of remedial motivation. P. 506.

2. The Plan is not narrowly tailored to remedy the effects of prior discrimination, since it entitles a black, Hispanic, or Oriental entrepreneur from anywhere in the country to an absolute preference over other citizens based solely on their race. Although many of the barriers to minority participation in the construction industry relied upon by the city to justify the Plan appear to be race neutral, there is no evidence that the city considered using alternative, race-neutral means to increase minority participation in city contracting.

Moreover, the Plan's rigid 30% quota rests upon the completely unrealistic assumption that minorities will choose to enter construction in lockstep proportion to their representation in the local population. Unlike the program upheld in *Fullilove*, the Plan's waiver system focuses upon the availability of MBE's, and does not inquire whether the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors. Given the fact that the city must already consider bids and waivers on a case-by-case basis, the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simply administrative convenience, which, standing alone, cannot justify the use of a suspect classification under equal protection strict scrutiny. Pp. 507-508.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE and JUSTICE WHITE, concluded in Part II that if the city could identify past discrimination in the local construction industry with the particularity required by the Equal Protection Clause, it would have the power to adopt race-based legislation designed to eradicate the effects of that discrimination. The principal opinion in *Fullilove* cannot be read to relieve the city of the necessity of making the specific findings of discrimination required by the Clause, since the congressional finding of past discrimination relied on in that case was made pursuant to Congress' unique power under § 5 of the Amendment to enforce, and therefore to identify and redress violations of, the Amendment's provisions. Conversely, § 1 of the Amendment, which includes the Equal Protection Clause, is an explicit constraint upon the power of States and political subdivisions, which must undertake any remedial efforts in accordance with the dictates of that section. However, the Court of Appeals erred to the extent that it followed by rote the *Wygant* plurality's ruling that the Equal Protection Clause requires a showing of prior discrimination by the governmental unit involved, since that ruling was made in the context of a race-based policy that affected the particular public employer's own work force, whereas this case involves a state entity which has specific state-law authority to address discriminatory practices within local commerce under its jurisdiction. Pp. 486-493.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE KENNEDY, concluded in Parts III-A and V that:

1. Since the Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely on their race, Wygant's strict scrutiny standard of review must be applied, which requires a firm evidentiary basis for concluding that the underrepresentation of minorities is a product of past discrimination. Application of that standard, which is not dependent on the race of those burdened or benefited by the racial classification, assures that the city is pursuing a remedial goal important enough to warrant use of a highly suspect tool and that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. The relaxed standard of review proposed by JUSTICE MARSHALL's dissent does not provide a means for determining that a racial classification is in fact "designed to further remedial goals," since it accepts the remedial nature of the classification before examination of the factual basis for the classification's enactment and the nexus between its scope and that factual basis. Even if the level of equal protection scrutiny could be said to vary according to the ability of different groups to defend their interests in the representative process, heightened scrutiny would still be appropriate in the circumstances of this case, since blacks constitute approximately 50% of the city's population and hold five of nine seats on the City Council, thereby raising the concern that the political majority may have acted to disadvantage a minority based on unwarranted assumptions or incomplete facts. Pp. 493-498.

2. Even in the absence of evidence of discrimination in the local construction industry, the city has at its disposal an array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races who have suffered the effects of past societal discrimination, including simplification of bidding procedures, relaxation of

bonding requirements, training, financial aid, elimination or modification of formal barriers caused by bureaucratic inertia, and the prohibition of discrimination in the provision of credit or bonding by local suppliers and banks. Pp. 509-511.

JUSTICE STEVENS, although agreeing that the Plan cannot be justified as a remedy for past discrimination, concluded that the Fourteenth Amendment does not limit permissible racial classifications to those that remedy past wrongs, but requires that race-based governmental decisions be evaluated primarily by studying their probable impact on the future. Pp. 511-518.

(a) Disregarding the past history of racial injustice, there is not even an arguable basis for suggesting that the race of a subcontractor or contractor on city projects should have any relevance to his or her access to the market. Although race is not always irrelevant to sound governmental decisionmaking, the city makes no claim that the public interest in the efficient performance of its construction contracts will be served by granting a preference to minority-business enterprises. Pp. 512-513.

(b) Legislative bodies such as the city council, which are primarily policymaking entities that promulgate rules to govern future conduct, raise valid constitutional concerns when they use the political process to punish or characterize past conduct of private citizens. Courts, on the other hand, are well equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed, and should have the same broad discretion in racial discrimination cases that chancellors enjoy in other areas of the law to fashion remedies against persons who have been proved guilty of violations of law. Pp. 513-514.

(c) Rather than engaging in debate over the proper standard of review to apply in affirmative-action litigation, it is more constructive to try to identify the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment. Here, instead of carefully identifying those characteristics, the city has merely engaged in the type of stereotypical analysis that is the hallmark of Equal Protection Clause violations. The class of persons benefited by the Plan is not limited to victims of past discrimination by white contractors in the city, but encompasses persons who have never been in business in the city, minority contractors who may have themselves been guilty of discrimination against other minority group members, and firms that have prospered notwithstanding discriminatory treatment. Similarly, although the Plan unquestionably disadvantages some white contractors who are guilty of past discrimination against blacks, it also punishes some who discriminated only before it was forbidden by law and some who have never discriminated against anyone. Pp. 514-517.

JUSTICE KENNEDY concluded that the Fourteenth Amendment ought not to be interpreted to reduce a State's power to eradicate racial discrimination and its effects in both the public and private sectors, or its absolute duty to do so where those wrongs were caused intentionally by the State itself, except where there is a conflict with federal law or where, as here, a state remedy itself violates equal protection. Although a rule striking down all racial preferences which are not necessary remedies to victims of unlawful discrimination would serve important structural goals by eliminating the necessity for courts to pass on each such preference that is enacted, that rule would be a significant break with this Court's precedents that require a case-by-case test, and need not be adopted. Rather, it may be assumed that the principle of race neutrality found in the Equal Protection Clause will be vindicated by the less absolute strict scrutiny standard, the application of which demonstrates that the city's Plan is not a remedy but is itself an unconstitutional preference. Pp. 518-520.

JUSTICE SCALIA, agreeing that strict scrutiny must be applied to all governmental racial classifications, concluded that:

1. The Fourteenth Amendment prohibits state and local governments from discriminating on the basis of race in order to undo the effects of past discrimination, except in one circumstance: where that is necessary to eliminate their own maintenance of a system of unlawful racial classification. Moreover, the State's remedial power in that instance extends no further than the scope of the constitutional violation, and does not encompass the continuing effects of a discriminatory system once the system itself has been eliminated. Pp. 520-525.

2. The State remains free to undo the effects of past discrimination in permissible ways that do not involve classification by race -- for example, by according a contracting preference to small or new businesses or to actual victims of discrimination who can be identified. In the latter instance, the classification would not be based on race but on the fact that the victims were wronged. Pp. 526-528.

COUNSEL: John Payton argued the cause for appellant. With him on the briefs were Mark S. Hersh, Drew St. J. Carneal, Michael L. Sarahan, Michael K. Jackson, and John H. Pickering.

Walter H. Ryland argued the cause and filed a brief for appellee. *

* Briefs of amici curiae urging reversal were filed for the State of Maryland by J. Joseph Curran, Jr., Attorney General, and Charles O. Monk II, Deputy Attorney General; for the State of Michigan by Frank J. Kelley, Attorney General, Louis J. Caruso, Solicitor General, and Brent E. Simmons, Assistant Attorney General; for the State of New York et al. by Robert Abrams, Attorney General of New York, O. Peter Sherwood, Solicitor General, and Suzanne M. Lynn, Marjorie Fujiki, and Marla Tepper, Assistant Attorneys General, John K. Van de Kamp, Attorney General of California, Joseph I. Lieberman, Attorney General of Connecticut, Frederick D. Cooke, Corporation Counsel of the District of Columbia, Neil F. Hartigan, Attorney General of Illinois, James M. Shannon, Attorney General of Massachusetts, Hubert H. Humphrey III, Attorney General of Minnesota, W. Cary Edwards, Attorney General of New Jersey, Anthony J. Celebrezze, Jr., Attorney General of Ohio, Dave Frohnmayer, Attorney General of Oregon, James E. O'Neil, Attorney General of Rhode Island, T. Travis Medlock, Attorney General of South Carolina, Kenneth O. Eikenberry, Attorney General of Washington, Charles G. Brown, Attorney General of West Virginia, Donald Hanaway, Attorney General of Wisconsin, and Joseph B. Meyer, Attorney General of Wyoming; for the Alpha Kappa Alpha Sorority et al. by Eva Jefferson Paterson, Robert L. Harris, Judith Kurtz, William C. McNeill III, and Nathaniel Colley; for the American Civil Liberties Union et al. by Edward M. Chen, Steven R. Shapiro, John A. Powell, and John Hart Ely; for the city of San Francisco, California, et al. by Louise H. Renne and Burk E. Delventhal; for the Lawyer's Committee for Civil Rights under Law et al. by Stephen J. Pollak, James R. Bird, Paula A. Sweeney, Grover Hankins, Judith L. Lichtman, Conrad K. Harper, Stuart J. Land, Norman Redlich, William L. Robinson, Judith A. Winston, and Antonia Hernandez; for the Maryland Legislative Black Caucus by Koteles Alexander and Bernadette Gartrell; for the Minority Business Enterprise Legal Defense and Education Fund, Inc., et al. by Anthony W. Robinson, H. Russell Frisby, Jr., and Andrew L. Sandler; for the NAACP Legal Defense and Educational Fund, Inc., by Julius L. Chambers, Charles Stephen Ralston, Ronald L. Ellis, Eric Schnapper, Napoleon B. Williams, Jr., and Clyde E. Murphy; and for the National League of Cities et al. by Benna Ruth Solomon and David A. Strauss.

Briefs of amici curiae urging affirmance were filed for the United States by Solicitor General Fried, Assistant Attorney General Reynolds, Deputy Solicitor General Ayer, Deputy Assistant Attorney General Clegg, Glen G. Nager, and David K. Flynn; for the Anti-Defamation League of B'nai B'rith by Robert A. Helman, Michele Odorizzi, Daniel M. Harris, Justin J. Finger, Jeffrey P. Sinensky, and Jill L. Kahn; for Associated Specialty Contractors, Inc., by John A. McGuinn and Gary L. Lieber; for the Equal Employment Advisory Council by Robert E. Williams and Douglas S. McDowell; for the Mountain States Legal Foundation by Constance E. Brooks; for the Pacific Legal Foundation by Ronald A. Zumbrun and John H. Findley; for the

Southeastern Legal Foundation, Inc., by G. Stephen Parker; and for the Washington Legal Foundation et al. by Daniel J. Popeo and Paul D. Kamenar.

JUDGES: O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III-B, and IV, in which REHNQUIST, C. J., and WHITE, STEVENS, and KENNEDY, JJ., joined, an opinion with respect to Part II, in which REHNQUIST, C. J., and WHITE, J., joined, and an opinion with respect to Parts III-A and V, in which REHNQUIST, C. J., and WHITE and KENNEDY, JJ., joined. STEVENS, J., post, p. 511, and KENNEDY, J., post, p. 518, filed opinions concurring in part and concurring in the judgment. SCALIA, J., filed an opinion concurring in the judgment, post, p. 520. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, post, p. 528. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, J., joined, post, p. 561.

OPINIONBY: O'CONNOR

OPINION: [*476] [*871] [**713]** JUSTICE O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III-B, and IV, an opinion with respect to Part II, in which THE CHIEF JUSTICE and JUSTICE WHITE join, and an opinion with respect to Parts III-A and V, in which THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE KENNEDY join.

[*HR1A]** [1A]
In this case, we confront once again the tension between the Fourteenth Amendment's guarantee of equal treatment to all citizens, and the use of race-based measures to ameliorate **[*477]** the effects of past discrimination on the opportunities enjoyed by members of minority groups in our society. In *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), we held that a congressional program requiring that 10% of certain federal construction grants be awarded to minority contractors did not violate the equal protection principles embodied in the Due Process Clause of the Fifth Amendment. Relying largely on our decision in *Fullilove*, some lower federal courts have applied a similar standard of review in assessing the constitutionality of state and local minority set-aside provisions under the Equal Protection Clause of the Fourteenth Amendment. See, *e. g., South Florida Chapter, Associated General Contractors of America, Inc.* v. *Metropolitan Dade County*, 723 F. 2d 846 (CA11), cert. denied, 469 U.S. 871 (1984); *Ohio Contractors Assn.* v. *Keip*, 713 F. 2d 167 (CA6 1983). Since our decision two Terms ago in *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986), the lower federal courts have attempted to apply its standards in evaluating the constitutionality of state and local programs which allocate a portion of public contracting opportunities exclusively to minority-owned businesses. See, *e. g., Michigan Road Builders Assn., Inc.* v. *Milliken*, 834 F. 2d 583 (CA6 1987), appeal docketed, No. 87-1860; *Associated General Contractors of Cal.* v. *City and Cty. of San Francisco*, 813 F. 2d 922 (CA9 1987). We noted probable jurisdiction in this case to consider the applicability of our decision in *Wygant* to a minority set-aside program adopted by the city of Richmond, Virginia.

I

On April 11, 1983, the Richmond City Council adopted the Minority Business Utilization Plan (the Plan). The Plan required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises (MBE's). Ordinance No. 83-69-59, codified in Richmond, Va., City Code, § 12-156(a) (1985). The 30% set-aside **[*478]** did not apply to city contracts awarded to minority-owned prime contractors. *Ibid.*

[*HR2A]** [2A]
The Plan defined an MBE as "[a] business at least fifty-one (51) percent of which is owned and controlled . . . by minority group members." § 12-23, p. 941. "Minority group members" were defined as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals,

Indians, Eskimos, or Aleuts." *Ibid.* There was no geographic limit to the Plan; an otherwise qualified MBE from anywhere in the United **[***872]** States could avail itself of the 30% set-aside. The Plan declared that it was "remedial" in nature, and enacted "for the purpose of promoting wider participation by minority business enterprises in the construction of public projects." § 12-158(a). The Plan expired on June 30, 1988, and was in effect for approximately five years. *Ibid.* n1

[*HR2B]** [2B]

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - n1 The expiration of the ordinance has not rendered the controversy between the city and appellee moot. There remains a live controversy between the parties over whether Richmond's refusal to award appellee a contract pursuant to the ordinance was unlawful and thus entitles appellee to damages. See *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 8-9 (1978).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[714]** The Plan authorized the Director of the Department of General Services to promulgate rules which "shall allow waivers in those individual situations where a contractor can prove to the satisfaction of the director that the requirements herein cannot be achieved." § 12-157. To this end, the Director promulgated Contract Clauses, Minority Business Utilization Plan (Contract Clauses). Paragraph D of these rules provided:

> "No partial or complete waiver of the foregoing [30% set-aside] requirement shall be granted by the city other than in exceptional circumstances. To justify a waiver, it must be shown that every feasible attempt has been made to comply, and it must be demonstrated that sufficient, relevant, qualified Minority Business Enterprises . . . are unavailable or unwilling to participate in the **[*479]** contract to enable meeting the 30% MBE goal." para. D, Record, Exh. 24, p. 1; see *J. A. Croson Co.* v. *Richmond*, 779 F. 2d 181, 197 (CA4 1985) (*Croson I*).

The Director also promulgated "purchasing procedures" to be followed in the letting of city contracts in accordance with the Plan. *Id.*, at 194. Bidders on city construction contracts were provided with a "Minority Business Utilization Plan Commitment Form." Record, Exh. 24, p. 3. Within 10 days of the opening of the bids, the lowest otherwise responsive bidder was required to submit a commitment form naming the MBE's to be used on the contract and the percentage of the total contract price awarded to the minority firm or firms. The prime contractor's commitment form or request for a waiver of the 30% set-aside was then referred to the city Human Relations Commission (HRC). The HRC verified that the MBE's named in the commitment form were in fact minority owned, and then either approved the commitment form or made a recommendation regarding the prime contractor's request for a partial or complete waiver of the 30% set-aside. *Croson I*, 779 F. 2d, at 196. The Director of General Services made the final determination on compliance with the set-aside provisions or the propriety of granting a waiver. *Ibid.* His discretion in this regard appears to have been plenary. There was no direct administrative appeal from the Director's denial of a waiver. Once a contract had been awarded to another firm a bidder denied an award for failure to comply with the MBE requirements had a general right of protest under Richmond procurement policies. Richmond, Va., City Code, § 12-126(a) (1985).

The Plan was adopted by the Richmond **[***873]** City Council after a public hearing. App. 9-50. Seven members of the public spoke to the merits of the ordinance: five were in opposition, two in favor. Proponents of the set-aside provision relied on a study which

indicated that, while the general population of Richmond was 50% black, only 0.67% of the city's prime construction **[*480]** contracts had been awarded to minority businesses in the 5-year period from 1978 to 1983. It was also established that a variety of contractors' associations, whose representatives appeared in opposition to the ordinance, had virtually no minority businesses within their membership. See Brief for Appellant 22 (chart listing minority membership of six local construction industry associations). The city's legal counsel indicated his view that the ordinance was constitutional under this Court's decision in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980). App. 24. Councilperson Marsh, a proponent of the ordinance, made the following statement:

> "There is some information, however, that I want to make sure that we put in the record. I have been practicing law in this community since 1961, and I am familiar with the practices in the construction industry in this area, in the State, and around the nation. And I can say without equivocation, that the general conduct of the construction industry in **[**715]** this area, and the State, and around the nation, is one in which race discrimination and exclusion on the basis of race is widespread." *Id.*, at 41.

There was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors. See *id.*, at 42 (statement of Council-person Kemp) ("[The public witnesses] indicated that the minority contractors were just not available. There wasn't a one that gave any indication that a minority contractor would not have an opportunity, if he were available").

Opponents of the ordinance questioned both its wisdom and its legality. They argued that a disparity between minorities in the population of Richmond and the number of prime contracts awarded to MBE's had little probative value in establishing discrimination in the construction industry. *Id.*, at 30 (statement of Councilperson Wake). Representatives of various contractors' associations questioned whether there **[*481]** were enough MBE's in the Richmond area to satisfy the 30% set-aside requirement. *Id.*, at 32 (statement of Mr. Beck); *id.*, at 33 (statement of Mr. Singer); *id.*, at 35-36 (statement of Mr. Murphy). Mr. Murphy noted that only 4.7% of all construction firms in the United States were minority owned and that 41% of these were located in California, New York, Illinois, Florida, and Hawaii. He predicted that the ordinance would thus lead to a windfall for the few minority firms in Richmond. *Ibid.* Councilperson Gillespie indicated his concern that many local labor jobs, held by both blacks and whites, would be lost because the ordinance put no geographic limit on the MBE's eligible for the 30% set-aside. *Id.*, at 44. Some of the representatives of the local contractors' organizations indicated that they did not discriminate **[***874]** on the basis of race and were in fact actively seeking out minority members. *Id.*, at 38 (statement of Mr. Shuman) ("The company I work for belonged to all these [contractors'] organizations. Nobody that I know of, black, Puerto Rican or any minority, has ever been turned down. They're actually sought after to join, to become part of us"); see also *id.*, at 20 (statement of Mr. Watts). Councilperson Gillespie expressed his concern about the legality of the Plan, and asked that a vote be delayed pending consultation with outside counsel. His suggestion was rejected, and the ordinance was enacted by a vote of six to two, with Councilperson Gillespie abstaining. *Id.*, at 49.

On September 6, 1983, the city of Richmond issued an invitation to bid on a project for the provision and installation of certain plumbing fixtures at the city jail. On September 30, 1983, Eugene Bonn, the regional manager of J. A. Croson Company (Croson), a mechanical plumbing and heating contractor, received the bid forms. The project involved the installation of stainless steel urinals and water closets in the city jail. Products of either of two

manufacturers were specified, Acorn Engineering Company (Acorn) or Bradley Manufacturing Company (Bradley). Bonn determined that **[*482]** to meet the 30% set-aside requirement, a minority contractor would have to supply the fixtures. The provision of the fixtures amounted to 75% of the total contract price.

On September 30, Bonn contacted five or six MBE's that were potential suppliers of the fixtures, after contacting three local and state agencies that maintained lists of MBE's. No MBE expressed interest in the project or tendered a quote. On October 12, 1983, the day the bids were due, Bonn again telephoned a group of MBE's. This time, Melvin Brown, president of Continental Metal Hose (Continental), a local MBE, indicated that he wished to participate in the project. Brown subsequently contacted two sources of the specified fixtures in order to obtain a price quotation. One supplier, Ferguson Plumbing Supply, which is not an MBE, had already made a quotation directly to Croson, and refused to quote the same fixtures to Continental. **[**716]** Brown also contacted an agent of Bradley, one of the two manufacturers of the specified fixtures. The agent was not familiar with Brown or Continental, and indicated that a credit check was required which would take at least 30 days to complete.

On October 13, 1983, the sealed bids were opened. Croson turned out to be the only bidder, with a bid of $ 126,530. Brown and Bonn met personally at the bid opening, and Brown informed Bonn that his difficulty in obtaining credit approval had hindered his submission of a bid.

By October 19, 1983, Croson had still not received a bid from Continental. On that date it submitted a request for a waiver of the 30% set-aside. Croson's waiver request indicated that Continental was "unqualified" and that the other MBE's contacted had been unresponsive or unable to quote. Upon learning of Croson's waiver request, Brown contacted an agent of Acorn, the other fixture manufacturer specified by the city. Based upon his discussions with Acorn, Brown subsequently **[***875]** submitted a bid on the fixtures to Croson. Continental's bid was $ 6,183.29 higher than the price Croson had included for the fixtures in its bid to the city. This **[*483]** constituted a 7% increase over the market price for the fixtures. With added bonding and insurance, using Continental would have raised the cost of the project by $ 7,663.16. On the same day that Brown contacted Acorn, he also called city procurement officials and told them that Continental, an MBE, could supply the fixtures specified in the city jail contract. On November 2, 1983, the city denied Croson's waiver request, indicating that Croson had 10 days to submit an MBE Utilization Commitment Form, and warned that failure to do so could result in its bid being considered unresponsive.

Croson wrote the city on November 8, 1983. In the letter, Bonn indicated that Continental was not an authorized supplier for either Acorn or Bradley fixtures. He also noted that Acorn's quotation to Brown was subject to credit approval and in any case was substantially higher than any other quotation Croson had received. Finally, Bonn noted that Continental's bid had been submitted some 21 days after the prime bids were due. In a second letter, Croson laid out the additional costs that using Continental to supply the fixtures would entail, and asked that it be allowed to raise the overall contract price accordingly. The city denied both Croson's request for a waiver and its suggestion that the contract price be raised. The city informed Croson that it had decided to rebid the project. On December 9, 1983, counsel for Croson wrote the city asking for a review of the waiver denial. The city's attorney responded that the city had elected to rebid the project, and that there is no appeal of such a decision. Shortly thereafter Croson brought this action under 42 U. S. C. § 1983 in the Federal District Court for the Eastern District of Virginia, arguing that the Richmond ordinance was unconstitutional on its face and as applied in this case.

The District Court upheld the Plan in all respects. See Supplemental App. to Juris. Statement 112-232 (Supp. App.). In its original opinion, a divided panel of the Fourth Circuit **[*484]** Court of Appeals affirmed. *Croson I*, 779 F. 2d. 181 (1985). Both courts applied a test

derived from "the common concerns articulated by the various Supreme Court opinions" in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), and *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978). See *Croson I, supra*, at 188. Relying on the great deference which this Court accorded Congress' findings of past discrimination in *Fullilove*, the panel majority indicated its view that the same standard should be applied to the Richmond City Council, stating:

> "Unlike the review we make of a lower court decision, our task is not to determine if there was sufficient evidence to sustain the council majority's position in any traditional sense of weighing the evidence. Rather, it is to determine whether **[**717]** 'the legislative history . . . demonstrates that [the council] reasonably concluded that . . . private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors.'" 779 F. 2d, at 190 (quoting *Fullilove, supra*, at 503 **[***876]** (Powell, J., concurring)).

The majority found that national findings of discrimination in the construction industry, when considered in conjunction with the statistical study concerning the awarding of prime contracts in Richmond, rendered the city council's conclusion that low minority participation in city contracts was due to past discrimination "reasonable." *Croson I*, 779 F. 2d, at 190, and n. 12. The panel opinion then turned to the second part of its "synthesized *Fullilove*" test, examining whether the racial quota was "narrowly tailored to the legislative goals of the Plan." *Id.*, at 190. First, the court upheld the 30% set-aside figure, by comparing it not to the number of MBE's in Richmond, but rather to the percentage of minority persons in the city's population. *Id.*, at 191. The panel held that to remedy the effects of past discrimination, "a set-aside program for a period of five years obviously must require more than a 0.67% set-aside to encourage minorities to enter **[*485]** the contracting industry and to allow existing minority contractors to grow." *Ibid.* Thus, in the court's view the 30% figure was "reasonable in light of the undisputed fact that minorities constitute 50% of the population of Richmond." *Ibid.*

Croson sought certiorari from this Court. We granted the writ, vacated the opinion of the Court of Appeals, and remanded the case for further consideration in light of our intervening decision in *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986). See 478 U.S. 1016 (1986).

On remand, a divided panel of the Court of Appeals struck down the Richmond set-aside program as violating both prongs of strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *J. A. Croson Co.* v. *Richmond*, 822 F. 2d 1355 (CA4 1987) (*Croson II*). The majority found that the "core" of this Court's holding in *Wygant* was that, "[t]o show that a plan is justified by a compelling governmental interest, a municipality that wishes to employ a racial preference cannot rest on broad-brush assumptions of historical discrimination." 822 F. 2d, at 1357. As the court read this requirement, "[f]indings of *societal* discrimination will not suffice; the findings must concern 'prior discrimination *by the government unit involved.*'" *Id.*, at 1358 (quoting *Wygant, supra*, at 274) (emphasis in original).

In this case, the debate at the city council meeting "revealed no record of prior discrimination by the city in awarding public contracts . . . ." *Croson II, supra*, at 1358. Moreover, the statistics comparing the minority population of Richmond to the percentage of *prime* contracts awarded to minority firms had little or no probative value in establishing prior discrimination in the relevant market, and actually suggested "more of a political than a remedial basis for the racial preference." 822 F. 2d, at 1359. The court concluded that, "[i]f

this plan is supported by a compelling governmental interest, so is every other plan that has been enacted in the past or that will be enacted in the future." *Id.*, at 1360.

[*486] The Court of Appeals went on to hold that even if the city had demonstrated a compelling interest in the use of a racebased quota, the 30% set-aside was not narrowly tailored **[***877]** to accomplish a remedial purpose. The court found that the 30% figure was "chosen arbitrarily" and was not tied to the number of minority subcontractors in Richmond or to any other relevant number. *Ibid.* The dissenting judge argued that the majority had "misconstrue[d] and misapplie[d]" our decision in *Wygant*. 822 F. 2d, at 1362. We noted probable jurisdiction of the city's appeal, 484 U.S. 1058 **[**718]** (1988), and we now affirm the judgment.

II

The parties and their supporting *amici* fight an initial battle over the scope of the city's power to adopt legislation designed to address the effects of past discrimination. Relying on our decision in *Wygant*, appellee argues that the city must limit any race-based remedial efforts to eradicating the effects of its own prior discrimination. This is essentially the position taken by the Court of Appeals below. Appellant argues that our decision in *Fullilove* is controlling, and that as a result the city of Richmond enjoys sweeping legislative power to define and attack the effects of prior discrimination in its local construction industry. We find that neither of these two rather stark alternatives can withstand analysis.

In *Fullilove*, we upheld the minority set-aside contained in § 103(f)(2) of the Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116, 42 U. S. C. § 6701 *et seq.* (Act) against a challenge based on the equal protection component of the Due Process Clause. The Act authorized a $ 4 billion appropriation for federal grants to state and local governments for use in public works projects. The primary purpose of the Act was to give the national economy a quick boost in a recessionary period; funds had to be committed to state or local grantees by September 30, 1977. The Act also contained the following requirement: "'Except to the extent the Secretary **[*487]** determines otherwise, no grant shall be made under this Act . . . unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises.'" *Fullilove*, 448 U.S., at 454 (quoting 91 Stat. 116, 42 U. S. C. § 6705(f)(2)). MBE's were defined as businesses effectively controlled by "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." *Ibid.*

The principal opinion in *Fullilove*, written by Chief Justice Burger, did not employ "strict scrutiny" or any other traditional standard of equal protection review. The Chief Justice noted at the outset that although racial classifications call for close examination, the Court was at the same time "bound to approach [its] task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment." 448 U.S., at 472. The principal opinion asked two questions: first, were the objectives of the legislation within the power of Congress? Second, was the limited use of racial and ethnic criteria a permissible means for Congress **[***878]** to carry out its objectives within the constraints of the Due Process Clause? *Id.*, at 473.

On the issue of congressional power, the Chief Justice found that Congress' commerce power was sufficiently broad to allow it to reach the practices of prime contractors on federally funded local construction projects. *Id.*, at 475-476. Congress could mandate state and local government compliance with the set-aside program under its § 5 power to enforce the Fourteenth Amendment. *Id.*, at 476 (citing *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966)).

The Chief Justice next turned to the constraints on Congress' power to employ race-conscious remedial relief. His opinion stressed two factors in upholding the MBE set-aside. **[*488]** First was the unique remedial powers of Congress under § 5 of the Fourteenth Amendment:

> "Here we deal . . . not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. HN1 It is fundamental that *in no organ of government, state* **[**719]** *or federal, does there repose a more comprehensive remedial power than in the Congress*, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." 448 U.S., at 483 (principal opinion) (emphasis added).

Because of these unique powers, the Chief Justice concluded that HN2 "Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to *declare certain conduct unlawful*, it may, as here, authorize and induce state action to avoid such conduct." *Id.*, at 483-484 (emphasis added).

In reviewing the legislative history behind the Act, the principal opinion focused on the evidence before Congress that a nationwide history of past discrimination had reduced minority participation in federal construction grants. *Id.*, at 458-467. The Chief Justice also noted that Congress drew on its experience under § 8(a) of the Small Business Act of 1953, which had extended aid to minority businesses. *Id.*, at 463-467. The Chief Justice concluded that "Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination." *Id.*, at 478.

The second factor emphasized by the principal opinion in *Fullilove* was the flexible nature of the 10% set-aside. Two "congressional assumptions" underlay the MBE program: first, that the effects of past discrimination had impaired the competitive position of minority businesses, and second, that "adjustment for the effects of past discrimination" would assure **[*489]** that at least 10% of the funds from the federal grant program would flow to minority businesses. The Chief Justice noted that both of these "assumptions" could be "rebutted" by a **[***879]** grantee seeking a waiver of the 10% requirement. *Id.*, at 487-488. Thus a waiver could be sought where minority businesses were not available to fill the 10% requirement or, more importantly, where an MBE attempted "to exploit the remedial aspects of the program by charging an unreasonable price, *i. e.*, a price not attributable to the present effects of prior discrimination." *Id.*, at 488. The Chief Justice indicated that without this fine tuning to remedial purpose, the statute would not have "pass[ed] muster." *Id.*, at 487.

In his concurring opinion, Justice Powell relied on the legislative history adduced by the principal opinion in finding that "Congress reasonably concluded that private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors." *Id.*, at 503. Justice Powell also found that the means chosen by Congress, particularly in light of the flexible waiver provisions, were "reasonably necessary" to address the problem identified. *Id.*, at 514-515. Justice Powell made it clear that other governmental entities might have to show more than Congress before undertaking race-conscious measures: HN3 "The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body." *Id.*, at 515-516, n. 14.

Appellant and its supporting *amici* rely heavily on *Fullilove* for the proposition that a city council, like Congress, need not make specific findings of discrimination to engage in race-

conscious relief. Thus, appellant argues "[i]t would be a perversion of federalism to hold that the federal government has a compelling interest in remedying the effects of racial discrimination in its own public works program, but a city government does not." Brief for Appellant 32 (footnote omitted).

[*490] **[**720]** What appellant ignores is HN4 that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to "enforce" may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. See HN5 *Katzenbach* v. *Morgan*, 384 U.S., at 651 ("Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment"). See also *South Carolina* v. *Katzenbach*, 383 U.S. 301, 326 (1966) (similar interpretation of congressional power under § 2 of the Fifteenth Amendment). The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race. Speaking of the Thirteenth and Fourteenth Amendments in *Ex parte Virginia*, 100 U.S. 339, 345 (1880), the Court stated: "They were intended to be, what they really are, limitations of the powers of the States and enlargements of the power of Congress."

[*880]** HN6 That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit *constraint* on state power, and the States must undertake any remedial efforts in accordance with that provision. To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions. The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress under § 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under § 1. We believe that such a result would be contrary to the intentions of **[*491]** the Framers of the Fourteenth Amendment, who desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations. See *Associated General Contractors of Cal.* v. *City and Cty. of San Francisco*, 813 F. 2d, at 929 (Kozinski, J.) ("The city is not just like the federal government with regard to the findings it must make to justify raceconscious remedial action"); see also Days, Fullilove, 96 Yale L. J. 453, 474 (1987) (hereinafter Days) ("*Fullilove* clearly focused on the constitutionality of a *congressionally* mandated set-aside program") (emphasis in original); Bohrer, *Bakke, Weber*, and *Fullilove*: Benign Discrimination and Congressional Power to Enforce the Fourteenth Amendment, 56 Ind. L. J. 473, 512-513 (1981) ("Congress may authorize, pursuant to section 5, state action that would be foreclosed to the states acting alone").

We do not, as JUSTICE MARSHALL's dissent suggests, see *post*, at 557-560, find in § 5 of the Fourteenth Amendment some form of federal pre-emption in matters of race. We simply note what should be apparent to all -- § 1 of the Fourteenth Amendment stemmed from a distrust of state legislative enactments based on race; § 5 is, as the dissent notes, "'a *positive* grant of legislative power'" to Congress. *Post*, at 557, quoting *Katzenbach* v. *Morgan, supra*, at 651 (emphasis in dissent). Thus, our treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here. In the *Slaughter-House Cases*, 16 Wall. 36 (1873), cited by the dissent, *post*, at 560, the Court noted that the Civil War Amendments granted "additional powers to the Federal government," and laid "additional restraints upon those of the States." 16 Wall., at 68.

It would seem equally clear, however, that HN7 a state or local subdivision (if delegated the authority from the State) has the authority to eradicate the effects of private **[**721]**

discrimination **[*492]** within its own legislative jurisdiction. n2 This authority must, of course, be exercised within the constraints **[***881]** of § 1 of the Fourteenth Amendment. Our decision in *Wygant* is not to the contrary. *Wygant* addressed the constitutionality of the use of racial quotas by local school authorities pursuant to an agreement reached with the local teachers' union. It was in the context of addressing the school board's power to adopt a race-based layoff program affecting its own work force that the *Wygant* plurality indicated that the Equal Protection Clause required "some showing of prior discrimination by the governmental unit involved." *Wygant*, 476 U.S., at 274. As a matter of state law, the city of Richmond has legislative authority over its procurement policies, and can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment. To this extent, on the question of the city's competence, the Court of Appeals erred in following *Wygant* by rote in a case involving a state entity which has state-law authority to address discriminatory practices within local commerce under its jurisdiction.

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n2 In its original panel opinion, the Court of Appeals held that under Virginia law the city had the legal authority to enact the set-aside program. *Croson I*, 779 F. 2d 181, 184-186 (CA4 1985). That determination was not disturbed by the court's subsequent holding that the Plan violated the Equal Protection Clause.

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Thus, if the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice. Cf. *Norwood* v. *Harrison*, 413 U.S. 455, 465 (1973) ("Racial discrimination in state-operated schools is barred by the Constitution and [i]t is also axiomatic that a state may not induce, **[*493]** encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish") (citation and internal quotations omitted).

III

A

HN8 The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to *any person* within its jurisdiction the equal protection of the laws." (Emphasis added.) As this Court has noted in the past, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948). The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their "personal rights" to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.

[*HR3A]** [3A]

HN9 Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant **[***882]** use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the

classification was illegitimate racial prejudice or stereotype.

[722]** Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility. See *University of* **[*494]** *California Regents* v. *Bakke*, 438 U.S., at 298 (opinion of Powell, J.) ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth"). We thus reaffirm the view expressed by the plurality in *Wygant* that HN10 the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification. *Wygant*, 476 U.S., at 279-280; *id.*, at 285-286 (O'CONNOR, J., concurring in part and concurring in judgment). See also *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1, 105 (1973) (MARSHALL, J., dissenting) ("The highly suspect nature of classifications based on race, nationality, or alienage is well established") (footnotes omitted).

Our continued adherence to the standard of review employed in *Wygant* does not, as JUSTICE MARSHALL's dissent suggests, see *post*, at 552, indicate that we view "racial discrimination as largely a phenomenon of the past" or that "government bodies need no longer preoccupy themselves with rectifying racial injustice." As we indicate, see *infra*, at 509-510, States and their local subdivisions have many legislative weapons at their disposal both to punish and prevent present discrimination and to remove arbitrary barriers to minority advancement. Rather, our interpretation of § 1 stems from our agreement with the view expressed by Justice Powell in *Bakke* that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Bakke, supra*, at 289-290.

Under the standard proposed by JUSTICE MARSHALL's dissent, "race-conscious classifications designed to further remedial goals," *post*, at 535, are forthwith subject to a relaxed standard of review. How the dissent arrives at the legal conclusion that a racial classification is "designed to further remedial goals," without first engaging in an examination of **[*495]** the factual basis for its enactment and the nexus between its scope and that factual basis, we are not told. However, once the "remedial" conclusion is reached, the dissent's standard is singularly deferential, and bears little resemblance to the close examination of legislative purpose we have engaged in when reviewing classifications based either on race or gender. See *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 (1975) ("[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme"). The dissent's **[***883]** watered-down version of equal protection review effectively assures that race will always be relevant in American life, and that the "ultimate goal" of "eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being's race," *Wygant, supra*, at 320 (STEVENS, J., dissenting) (footnote omitted), will never be achieved.

Even were we to accept a reading of the guarantee of equal protection under which the level of scrutiny varies according to the ability of different groups to defend their interests in the representative process, heightened scrutiny would still be appropriate in the circumstances of this case. One of the central arguments for applying a less exacting standard to "benign" racial classifications is that such measures essentially involve a choice made by dominant racial groups to disadvantage themselves. If one aspect of the judiciary's role under the Equal Protection Clause is to protect **[**723]** "discrete and insular minorities" from majoritarian prejudice or indifference, see *United States* v. *Carolene Products Co.*, 304 U.S. 144, 153, n. 4 (1938), some maintain that these concerns are not implicated when the "white majority" places burdens upon itself. See J. Ely, Democracy and Distrust 170 (1980).

In this case, blacks constitute approximately 50% of the population of the city of Richmond. Five of the nine seats on the city council are held by blacks. The concern that a political

majority will more easily act to the disadvantage of a minority **[*496]** based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case. See Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723, 739, n. 58 (1974) ("Of course it works both ways: a law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature").

In *Bakke, supra*, the Court confronted a racial quota employed by the University of California at Davis Medical School. Under the plan, 16 out of 100 seats in each entering class at the school were reserved exclusively for certain minority groups. *Id.*, at 288-289. Among the justifications offered in support of the plan were the desire to "reduc[e] the historic deficit of traditionally disfavored minorities in medical school and the medical profession" and the need to "counte[r] the effects of societal discrimination." *Id.*, at 306 (citations omitted). Five Members of the Court determined that none of these interests could justify a plan that completely eliminated nonminorities from consideration for a specified percentage of opportunities. *Id.*, at 271-272 (Powell, J.) (addressing constitutionality of Davis plan); *id.*, at 408 (STEVENS, J., joined by Burger, C. J. and Stewart and REHNQUIST, JJ. concurring in judgment in part and dissenting in part) (addressing only legality of Davis admissions plan under Title VI of the Civil Rights Act of 1964).

Justice Powell's opinion applied heightened scrutiny under the Equal Protection Clause to the racial classification at issue. His opinion decisively rejected the first justification for the racially segregated admissions **[***884]** plan. The desire to have more black medical students or doctors, standing alone, was not merely insufficiently compelling to justify a racial classification, it was "discrimination for its own sake," forbidden by the Constitution. *Id.*, at 307. Nor could the second concern, the history of discrimination in society at large, justify a racial quota in medical school admissions. Justice Powell contrasted the "focused" goal of remedying "wrongs **[*497]** worked by specific instances of racial discrimination" with "the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past." *Ibid.* He indicated that for the governmental interest in remedying past discrimination to be triggered "judicial, legislative, or administrative findings of constitutional or statutory violations" must be made. *Ibid.* Only then does the government have a compelling interest in favoring one race over another. *Id.*, at 308-309.

In *Wygant*, 476 U.S. 267 (1986), four Members of the Court applied heightened scrutiny to a race-based system of employee layoffs. Justice Powell, writing for the plurality, again drew the distinction between "societal discrimination" which is an inadequate basis for race-conscious classifications, and the type of identified discrimination that can support and define the scope of race-based relief. The challenged classification in that case tied the layoff of minority teachers to the percentage of minority students enrolled in the school district. The lower courts had upheld the scheme, based on the theory that minority students were in need of "role models" to alleviate the effects of prior discrimination in society. **[**724]** This Court reversed, with a plurality of four Justices reiterating the view expressed by Justice Powell in *Bakke* that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Wygant, supra*, at 276.

The role model theory employed by the lower courts failed for two reasons. First, the statistical disparity between students and teachers had no probative value in demonstrating the kind of prior discrimination in hiring or promotion that would justify race-based relief. 476 U.S., at 276; see also *id.*, at 294 (O'CONNOR, J., concurring in part and concurring in judgment) ("The disparity between the percentage of minorities on the teaching staff and the percentage of minorities in the student body is not probative of employment discrimination"). Second, because the role model theory had no **[*498]** relation to some basis for believing a constitutional or statutory violation had occurred, it could be used to "justify" racebased decisionmaking essentially limitless in scope and duration. *Id.*, at 276 (plurality opinion) ("In

the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future").

B

[*HR1B]** [1B]
[*HR4A]** [4A]
We think it clear that the factual predicate offered in support of the Richmond Plan suffers from **[***885]** the same two defects identified as fatal in *Wygant*. The District Court found the city council's "findings sufficient to ensure that, in adopting the Plan, it was remedying the present effects of past discrimination in the *construction industry*." Supp. App. 163 (emphasis added). Like the "role model" theory employed in *Wygant*, a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It "has no logical stopping point." *Wygant, supra*, at 275 (plurality opinion). "Relief" for such an ill-defined wrong could extend until the percentage of public contracts awarded to MBE's in Richmond mirrored the percentage of minorities in the population as a whole.

Appellant argues that it is attempting to remedy various forms of past discrimination that are alleged to be responsible for the small number of minority businesses in the local contracting industry. Among these the city cites the exclusion of blacks from skilled construction trade unions and training programs. This past discrimination has prevented them "from following the traditional path from laborer to entrepreneur." Brief for Appellant 23-24. The city also lists a host of nonracial factors which would seem to face a member of any racial group attempting to establish a new business enterprise, such as deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures, **[*499]** and disability caused by an inadequate track record. *Id.*, at 25-26, and n. 41.

[*HR4B]** [4B]
While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia. Like the claim that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.

It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination, just as it was sheer speculation how many minority medical students would have been admitted to the medical school at Davis absent past discrimination in educational opportunities. Defining these sorts of injuries as "identified discrimination" would give local **[**725]** governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor.

[*HR5A]** [5A]
[*HR6A]** [6A]
[*HR7A]** [7A]
[*HR8A]** [8A]
[*HR9A]** [9A]
These defects are readily apparent in this case. The 30% quota cannot in any realistic sense be tied to any injury suffered by anyone. The District Court relied upon five predicate "facts" in reaching its conclusion that there was an adequate basis for the 30% quota: (1) the ordinance declares itself to be remedial; (2) several proponents of the measure stated their views that there had been past discrimination in the construction industry; (3) minority businesses received 0.67% of prime contracts from the city while minorities constituted 50% of the **[***886]** city's population; (4) there were very few minority contractors in local and

state contractors' associations; and (5) in 1977, Congress made a determination that the effects of past discrimination had stifled minority participation in the construction industry nationally. Supp. App. 163-167.

[*500]

[*HR1C]** [1C]
[*HR5B]** [5B]
[*HR6B]** [6B]
[*HR7B]** [7B]
[*HR8B]** [8B]
[*HR9B]** [9B]
None of these "findings," singly or together, provide the city of Richmond with a "strong basis in evidence for its conclusion that remedial action was necessary." *Wygant*, 476 U.S., at 277 (plurality opinion). There is nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry. *Id.*, at 274-275; see also *id.*, at 293 (O'CONNOR, J., concurring).

[*HR5C]** [5C]
The District Court accorded great weight to the fact that the city council designated the Plan as "remedial." But the mere recitation of a "benign" or legitimate purpose for a racial classification is entitled to little or no weight. See *Weinberger* v. *Wiesenfeld*, 420 U.S., at 648, n. 16 ("This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation"). Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice.

[*HR6C]** [6C]
[*HR10]** [10]
[*HR11]** [11]
The District Court also relied on the highly conclusionary statement of a proponent of the Plan that there was racial discrimination in the construction industry "in this area, and the State, and around the nation." App. 41 (statement of Councilperson Marsh). It also noted that the city manager had related his view that racial discrimination still plagued the construction industry in his home city of Pittsburgh. *Id.*, at 42 (statement of Mr. Deese). These statements are of little probative value in establishing identified discrimination in the Richmond construction industry. HN11 The factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary. See *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488-489 (1955). But when a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals. See HN12 *McLaughlin* v. *Florida*, 379 U.S. 184, 190-192 (1964). A **[*501]** governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists. See *id.*, at 193; *Wygant, supra*, at 277. The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis. See *Korematsu* v. *United States*, 323 U.S. 214, 235-240 (1944) (Murphy, J., dissenting).

[*HR7C]** [7C]
[*HR12A]** [12A]
Reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the city of Richmond is similarly misplaced. **[***887]** There is no doubt that HN13 "[w]here gross statistical disparities can be shown, **[**726]** they alone in a proper case may constitute prima facie proof of a pattern or practice of

discrimination" under Title VII. *Hazelwood School Dist.* v. *United States*, 433 U.S. 299, 307-308 (1977). But it is equally clear that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.*, at 308, n. 13. See also *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, 620 (1974) ("[T]his is not a case in which it can be assumed that all citizens are fungible for purposes of determining whether members of a particular class have been unlawfully excluded").

[*HR12B]** [12B]

HN14 In the employment context, we have recognized that for certain entry level positions or positions requiring minimal training, statistical comparisons of the racial composition of an employer's work force to the racial composition of the relevant population may be probative of a pattern of discrimination. See *Teamsters* v. *United States*, 431 U.S. 324, 337-338 (1977) (statistical comparison between minority truck-drivers and relevant population probative of discriminatory exclusion). But where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating **[*502]** discriminatory exclusion must be the number of minorities qualified to undertake the particular task. See *Hazelwood, supra*, at 308; *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U.S. 616, 651-652 (1987) (O'CONNOR, J., concurring in judgment).

[*HR7D]** [7D]

In this case, the city does not even know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction projects. Cf. *Ohio Contractors Assn.* v. *Keip*, 713 F. 2d, at 171 (relying on percentage of minority *businesses* in the State compared to percentage of state purchasing contracts awarded to minority firms in upholding set-aside). Nor does the city know what percentage of total city construction dollars minority firms now receive as subcontractors on prime contracts let by the city.

[*HR7E]** [7E]

To a large extent, the set-aside of subcontracting dollars seems to rest on the unsupported assumption that white prime contractors simply will not hire minority firms. See *Associated General Contractors of Cal.* v. *City and Cty. of San Francisco*, 813 F. 2d, at 933 ("There is no finding -- and we decline to assume -- that male caucasian contractors will award contracts only to other male caucasians"). n3 Indeed, there is evidence **[***888]** in this record that overall minority participation in city contracts in Richmond is 7 to 8%, and that minority contractor participation in Community Block Development Grant *construction* projects is 17 to 22%. App. 16 (statement of Mr. Deese, City Manager). Without any information **[*503]** on minority participation in subcontracting, it is quite simply impossible to evaluate overall minority representation in the city's construction expenditures.

[*HR7F]** [7F]

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n3 Since 1975 the city of Richmond has had an ordinance on the books prohibiting both discrimination in the award of public contracts and employment discrimination by public contractors. See Reply Brief for Appellant 18, n. 42 (citing Richmond, Va., City Code, § 17.2 *et seq.* (1985)). The city points to no evidence that its prime contractors have been violating the ordinance in either their employment or subcontracting practices. The complete silence of the record concerning enforcement of the city's own antidiscrimination ordinance flies in the face of the dissent's vision of a "tight-knit industry" which has prevented blacks from obtaining the experience necessary to participate in construction contracting. See *post*, at 542-543.

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[*HR8C]** [8C]
The city and the District Court also relied on evidence that MBE membership in local contractors' associations was extremely low. Again, standing alone this evidence is not probative of any discrimination in the local construction industry. There are numerous **[**727]** explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction. See The State of Small Business: A Report of the President 201 (1986) ("Relative to the distribution of all businesses, black-owned businesses are more than proportionally represented in the transportation industry, but considerably less than proportionally represented in the wholesale trade, manufacturing, and finance industries"). The mere fact that black membership in these trade organizations is low, standing alone, cannot establish a prima facie case of discrimination. Cf. *Bazemore* v. *Friday*, 478 U.S. 385, 407-408 (1986) (mere existence of single race clubs in absence of evidence of exclusion by race cannot create a duty to integrate).

[*HR8D]** [8D]
[*HR13]** [13]
For low minority membership in these associations to be relevant, the city would have to link it to the number of local MBE's eligible for membership. If the statistical disparity between eligible MBE's and MBE membership were great enough, an inference of discriminatory exclusion could arise. In such a case, the city would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market. See *Norwood*, 413 U.S., at 465; *Ohio Contractors, supra*, at 171 (upholding minority set-aside based in part on earlier District Court finding that "the state had become 'a joint participant' with private industry and certain craft unions in **[*504]** a pattern of racially discriminatory conduct which excluded black laborers from work on public construction contracts").

[*HR9C]** [9C]
Finally, the city and the District Court relied on Congress' finding in connection with the set-aside approved in *Fullilove* that there had been nationwide discrimination in the construction industry. The probative value of these findings for demonstrating the existence of discrimination in Richmond is extremely limited. By its inclusion of a waiver procedure in the national program addressed in *Fullilove*, Congress explicitly recognized that the scope of the problem would vary from market area to market area. See *Fullilove*, 448 U.S., at 487 (noting that the presumption that minority firms are disadvantaged by past discrimination may be rebutted by grantees in individual situations).

[*889]**

[*HR9D]** [9D]
[*HR14]** [14]
Moreover, as noted above, Congress was exercising its powers under § 5 of the Fourteenth Amendment in making a finding that past discrimination would cause federal funds to be distributed in a manner which reinforced prior patterns of discrimination. While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use raceconscious relief. Congress has made national findings that there has been societal discrimination in a host of fields. If all a state or local government need do is find a congressional report on the subject to enact a set-aside program, the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity. See Days 480-481 ("[I]t is essential that state and local agencies also establish the presence of discrimination in their own bailiwicks, based either upon their own fact-finding processes or upon determinations made by other competent institutions").

JUSTICE MARSHALL apparently views the requirement that Richmond identify the discrimination it seeks to remedy in its own jurisdiction as a mere administrative headache, an **[*505]** "onerous documentary obligatio[n]." *Post*, at 548. We cannot agree. In this regard, we are in accord with JUSTICE STEVENS' observation in *Fullilove*, that HN15 "[b]ecause racial characteristics so seldom provide a relevant basis for disparate **[**728]** treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate." *Fullilove, supra*, at 533-535 (dissenting opinion) (footnotes omitted). The "evidence" relied upon by the dissent, the history of school desegregation in Richmond and numerous congressional reports, does little to define the scope of any injury to minority contractors in Richmond or the necessary remedy. The factors relied upon by the dissent could justify a preference of any size or duration.

Moreover, JUSTICE MARSHALL's suggestion that findings of discrimination may be "shared" from jurisdiction to jurisdiction in the same manner as information concerning zoning and property values is unprecedented. See *post*, at 547, quoting *Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986). We have never approved the extrapolation of discrimination in one jurisdiction from the experience of another. See *Milliken* v. *Bradley*, 418 U.S. 717, 746 (1974) ("Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system").

[*HR1D]** [1D]
In sum, none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry. We, therefore, hold that the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race. To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid **[***890]** racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity **[*506]** and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs. "Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications . . . ." *Bakke*, 438 U.S., at 296-297 (Powell, J.). We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.

[*HR1E]** [1E]
[*HR5D]** [5D]
[*HR6D]** [6D]
[*HR7G]** [7G]
[*HR8E]** [8E]
[*HR9E]** [9E]
The foregoing analysis applies only to the inclusion of blacks within the Richmond set-aside program. There is *absolutely no evidence* of past discrimination against Spanishspeaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry. The District Court took judicial notice of the fact that the vast majority of "minority" persons in Richmond were black. Supp. App. 207. It may well be that Richmond has never had an Aleut or Eskimo citizen. The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination.

[*HR1F]** [1F]
If a 30% set-aside was "narrowly tailored" to compensate black contractors for past

discrimination, one may legitimately ask why they are forced to share this "remedial relief" with an Aleut citizen who moves to Richmond tomorrow? The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation. See *Wygant*, 476 U.S., at 284, n. 13 (haphazard inclusion of racial groups "further illustrates the undifferentiated nature of the plan"); see also Days 482 ("Such programs leave one with the sense that the racial and ethnic groups favored by the set-aside were added without attention to whether their inclusion was justified by evidence of past discrimination").

[*507] **[**729]** IV

[*HR15A]** [15A]
As noted by the court below, it is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way. We limit ourselves to two observations in this regard.

First, there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting. See *United States* v. *Paradise*, 480 U.S. 149, 171 (1987) ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies"). Many of the barriers to minority participation in the construction industry relied upon by the city to justify a racial classification appear to be race neutral. If MBE's disproportionately **[***891]** lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, *a fortiori*, lead to greater minority participation. The principal opinion in *Fullilove* found that Congress had carefully examined and rejected race-neutral alternatives before enacting the MBE set-aside. See *Fullilove*, 448 U.S., at 463-467; see also *id.*, at 511 (Powell, J., concurring) ("[B]y the time Congress enacted [the MBE set-aside] in 1977, it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry"). There is no evidence in this record that the Richmond City Council has considered any alternatives to a race-based quota.

Second, the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the "completely unrealistic" assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population. See *Sheet Metal Workers* v. *EEOC*, 478 U.S. 421, 494 (1986) (O'CONNOR, J., concurring in part and dissenting in part) ("[I]t is completely unrealistic to assume that individuals of **[*508]** one race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination").

Since the city must already consider bids and waivers on a case-by-case basis, it is difficult to see the need for a rigid numerical quota. As noted above, the congressional scheme upheld in *Fullilove* allowed for a waiver of the set-aside provision where an MBE's higher price was not attributable to the effects of past discrimination. Based upon proper findings, such programs are less problematic from an equal protection standpoint because they treat all candidates individually, rather than making the color of an applicant's skin the sole relevant consideration. Unlike the program upheld in *Fullilove*, the Richmond Plan's waiver system focuses solely on the availability of MBE's; there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors.

[*HR1G]** [1G]
[*HR15B]** [15B]
[*HR16]** [16]
Given the existence of an individualized procedure, the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simple administrative convenience. HN16 But the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the

effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification. See *Frontiero* v. *Richardson*, 411 U.S. 677, 690 (1973) (plurality opinion) ("[W]hen we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality"). Under Richmond's scheme, a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a **[**730]** program is not narrowly tailored to remedy the effects of prior discrimination.

[*509] [*892]** V

Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the city of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. HN17 Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise. See *Bazemore* v. *Friday*, 478 U.S., at 398; *Teamsters* v. *United States*, 431 U.S., at 337-339. Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria. See, *e. g., New York State Club Assn.* v. *New York City*, 487 U.S. 1, 10-11, 13-14 (1988). In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.

HN18 Nor is local government powerless to deal with individual instances of racially motivated refusals to employ minority contractors. Where such discrimination occurs, a city would be justified in penalizing the discriminator and providing appropriate relief to the victim of such discrimination. See generally *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-803 (1973). Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified. See *Teamsters, supra*, at 338.

Even in the absence of evidence of discrimination, the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding **[*510]** procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect. Many of the formal barriers to new entrants may be the product of bureaucratic inertia more than actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms. Their elimination or modification would have little detrimental effect on the city's interests and would serve to increase the opportunities available to minority business without classifying individuals on the basis of race. The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks. Business as usual should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards.

In the case at hand, the city has not ascertained how many minority enterprises are present in the local construction market nor the level of **[***893]** their participation in city construction projects. The city points to no evidence that qualified minority contractors have been passed over for city contracts or subcontracts, either as a group or in any individual case. Under such circumstances, it is simply impossible to say that the city has demonstrated "a strong basis in evidence for its conclusion that remedial action was necessary." *Wygant*, 476 U.S., at 277.

Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve **[**731]** to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself. Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics. "[I]f there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery **[*511]** within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate 'a piece of the action' for its members." *Fullilove*, 448 U.S., at 539 (STEVENS, J., dissenting). Because the city of Richmond has failed to identify the need for remedial action in the awarding of its public construction contracts, its treatment of its citizens on a racial basis violates the dictates of the Equal Protection Clause. Accordingly, the judgment of the Court of Appeals for the Fourth Circuit is

Affirmed.

CONCURBY: STEVENS (In Part); KENNEDY (In Part); SCALIA

CONCUR: JUSTICE STEVENS, concurring in part and concurring in the judgment.

A central purpose of the Fourteenth Amendment is to further the national goal of equal opportunity for all our citizens. In order to achieve that goal we must learn from our past mistakes, but I believe the Constitution requires us to evaluate our policy decisions -- including those that govern the relationships among different racial and ethnic groups -- primarily by studying their probable impact on the future. I therefore do not agree with the premise that seems to underlie today's decision, as well as the decision in *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986), that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong. See *ante*, at 493-494. n1 I do, however, agree **[***894]** with the Court's explanation **[*512]** of why the Richmond ordinance cannot be justified as a remedy for past discrimination, and therefore join Parts I, III-B, and IV of its opinion. I write separately to emphasize three aspects of the case that are of special importance to me.

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n1 In my view the Court's approach to this case gives unwarranted deference to race-based legislative action that purports to serve a purely remedial goal, and overlooks the potential value of race-based determinations that may serve other valid purposes. With regard to the former point -- as I explained at some length in *Fullilove* v. *Klutznick*, 448 U.S. 448, 532-554 (1980) (dissenting opinion) -- I am not prepared to assume that even a more narrowly tailored set-aside program supported by stronger findings would be constitutionally justified. Unless the legislature can identify both the particular victims and the particular perpetrators of past discrimination, which is precisely what a court does when it makes findings of fact and conclusions of law, a *remedial* justification for race-based legislation will almost certainly sweep too broadly. With regard to the latter point: I think it unfortunate that the Court in neither *Wygant* nor this case seems prepared to acknowledge that some race-based policy decisions may serve a legitimate public purpose. I agree, of course, that race is so seldom relevant to legislative decisions on how best to foster the public good that legitimate justifications for race-based legislation will usually not be available. But unlike the Court, I would not totally discount the legitimacy of race-based decisions that may produce tangible and fully justified future benefits. See n. 2, *infra*; see also Justice Powell's discussion in *University of California Regents* v. *Bakke*, 438 U.S. 265, 311-319 (1978).

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First, the city makes no claim that the public interest in the efficient performance of its construction contracts will be served by granting a preference to minority-business enterprises. This case is therefore completely unlike *Wygant*, in which I thought it quite obvious that the school board had reasonably concluded that an integrated faculty could provide educational benefits to the entire student body that could not be provided by an all-white, or nearly all-white, faculty. As I pointed out in my dissent in that case, even if we completely disregard our history of racial **[**732]** injustice, race is not always irrelevant to sound governmental decisionmaking. n2 In the **[*513]** case of public contracting, however, if we disregard the past, there is not even an arguable basis for suggesting that the race of a subcontractor or general contractor should have any relevance to his or her access to the market.

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n2 "Rather than analyzing a case of this kind by asking whether minority teachers have some sort of special entitlement to jobs as a remedy for sins that were committed in the past, I believe that we should first ask whether the Board's action advances the public interest in educating children for the future.
"[I]n our present society, race is not always irrelevant to sound governmental decisionmaking. To take the most obvious example, in law enforcement, if an undercover agent is needed to infiltrate a group suspected of ongoing criminal behavior -- and if the members of the group are all of the same race -- it would seem perfectly rational to employ an agent of that race rather than a member of a different racial class. Similarly, in a city with a recent history of racial unrest, the superintendent of police might reasonably conclude that an integrated police force could develop a better relationship with the community and thereby do a more effective job of maintaining law and order than a force composed only of white officers.

"In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty. For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous 'melting pot' do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only 'skin deep'; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process." *Wygant* v. *Jackson Board of Education*, 476 U.S., at 313-315 (footnotes omitted).

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Second, this litigation involves an attempt by a legislative body, rather than a court, to fashion a remedy for a past wrong. Legislatures are primarily policymaking bodies that promulgate rules to govern future conduct. **[***895]** The constitutional prohibitions against the enactment of *ex post facto* laws and bills of attainder reflect a valid concern about the use of the political process to punish or characterize past conduct of private citizens. n3 It is the judicial system, rather than the legislative process, that is best equipped to identify **[*514]** past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed. Thus, in cases involving the review of judicial remedies imposed against persons who have been proved guilty of violations of law, I would allow the courts in racial discrimination cases the same broad discretion that chancellors enjoy in other areas of the law. See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16 (1971). n4

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n3 See U.S. Const., Art. I, § 9, cl. 3, § 10, cl. 1. Of course, legislatures frequently appropriate funds to compensate victims of past governmental misconduct for which there is no judicial remedy. See, *e. g.*, Pub. L. 100-383, 102 Stat. 903 (provision of restitution to interned Japanese-Americans during World War II). Thus, it would have been consistent with normal practice for the city of Richmond to provide direct monetary compensation to any minority-business enterprise that the city might have injured in the past. Such a voluntary decision by a public body is, however, quite different from a decision to require one private party to compensate another for an unproven injury.

n4 As I pointed out in my separate opinion concurring in the judgment in *United States* v. *Paradise*, 480 U.S. 149, 193-194 (1987):

"A party who has been found guilty of repeated and persistent violations of the law bears the burden of demonstrating that the chancellor's efforts to fashion effective relief exceed the bounds of 'reasonableness.' The burden of proof in a case like this is precisely the opposite of that in cases such as *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986), and *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), which did not involve any proven violations of law. In such cases the governmental decisionmaker who would make race-conscious decisions must overcome a strong presumption against them. No such burden rests on a federal district judge who has found that the governmental unit before him is guilty of racially discriminatory conduct that violates the Constitution."

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[733]** Third, instead of engaging in a debate over the proper standard of review to apply in affirmative-action litigation, n5 I believe it is more constructive to try to identify the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment. See *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 452-453 (1985) (STEVENS, J., concurring). n6 In this case **[***896]** that approach convinces **[*515]** me that, instead of carefully identifying the characteristics of the two classes of contractors that are respectively favored and disfavored by its ordinance, the Richmond City Council has merely engaged in the type of stereotypical analysis that is a hallmark of violations of the Equal Protection Clause. Whether we look at the class of persons benefited by the ordinance or at the disadvantaged class, the same conclusion emerges.

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n5 "There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases." *Craig* v. *Boren*, 429 U.S. 190, 211-212 (1976) (STEVENS, J., concurring).

n6 "I have always asked myself whether I could find a 'rational basis' for the classification at issue. The term 'rational,' of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word 'rational' -- for me at least -- includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.

"In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a 'tradition of disfavor' by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases the answer to these questions will tell us whether the statute has a 'rational basis.'" *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S., at 452-453 (STEVENS, J., concurring).

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The justification for the ordinance is the fact that in the past white contractors -- and presumably other white citizens in Richmond -- have discriminated against black contractors. The class of persons benefited by the ordinance is not, however, limited to victims of such discrimination -- it encompasses persons who have never been in business in Richmond as well as minority contractors who may have been guilty of discriminating against members of other minority groups. Indeed, for all the record shows, all of the minority-business enterprises that have benefited from the ordinance may be firms that have prospered notwithstanding the discriminatory conduct that may have harmed other minority firms years ago. Ironically, minority firms that have survived in the competitive struggle, rather than those that have perished, are most likely to benefit from an ordinance of this kind.

The ordinance is equally vulnerable because of its failure to identify the characteristics of the disadvantaged class of **[*516]** white contractors that justify the disparate treatment. That class unquestionably includes some white contractors who are guilty of past discrimination against blacks, but it is only habit, rather than evidence or analysis, that makes it seem acceptable to assume that every white contractor covered by the ordinance shares in that guilt. Indeed, even among those who have discriminated in the past, it must be assumed that at least some of them have complied with the city ordinance that has made such discrimination unlawful since 1975. n7 Thus, the composition of the disadvantaged class of white contractors presumably includes some who have been guilty of unlawful discrimination, some who practiced discrimination before it was forbidden by law, n8 and **[**734]** some who have never discriminated against anyone on the basis of race. Imposing a common burden on such a disparate class merely because each member of the class is of the same race stems from reliance on a stereotype rather than fact or reason. n9

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n7 See *ante*, at 502, n. 3.

n8 There is surely some question about the power of a legislature to impose a statutory burden on private citizens for engaging in discriminatory practices at a time when such practices were not unlawful. Cf. *Teamsters* v. *United States*, 431 U.S. 324, 356-357, 360 (1977).

n9 There is, of course, another possibility that should not be overlooked. The ordinance might be nothing more than a form of patronage. But racial patronage, like a racial gerrymander, is no more defensible than political patronage or a political gerrymander. Cf. *Karcher* v. *Daggett*, 462 U.S. 725, 744-765 (1983) (STEVENS, J., concurring); *Rogers* v. *Lodge*, 458 U.S. 613, 631-653 (1982) (STEVENS, J., dissenting); *Mobile* v. *Bolden*, 446 U.S. 55, 83-94 (1980) (STEVENS, J., concurring in judgment); *Cousins* v. *City Council of Chicago*, 466 F. 2d 830, 848-853 (CA7) (Stevens, J., dissenting), cert. denied, 409 U.S. 893 (1972). A southern State with a long history of discrimination against Republicans in the awarding of public contracts could not rely on such past discrimination as a basis for granting a legislative preference to Republican contractors in the future.

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[*897]** There is a special irony in the stereotypical thinking that prompts legislation of this kind. Although it stigmatizes the disadvantaged class with the unproven charge of past racial discrimination, it actually imposes a greater stigma on its **[*517]** supposed beneficiaries. For, as I explained in my opinion in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980):

"[E]ven though it is not the actual predicate for this legislation, a statute of this

kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race." *Id.*, at 545.
"The risk that habitual attitudes toward classes of persons, rather than analysis of the relevant characteristics of the class, will serve as a basis for a legislative classification is present when benefits are distributed as well as when burdens are imposed. In the past, traditional attitudes too often provided the only explanation for discrimination against women, aliens, illegitimates, and black citizens. Today there is a danger that awareness of past injustice will lead to automatic acceptance of new classifications that are not in fact justified by attributes characteristic of the class as a whole.

"When [government] creates a special preference, or a special disability, for a class of persons, it should identify the characteristic that justifies the special treatment. When the classification is defined in racial terms, I believe that such particular identification is imperative.

"In this case, only two conceivable bases for differentiating the preferred classes from society as a whole have occurred to me: (1) that they were the victims of unfair treatment in the past and (2) that they are less able to compete in the future. Although the first of these factors would justify an appropriate remedy for past wrongs, for reasons that I have already stated, this statute is not such a remedial measure. The second factor is simply not true. Nothing in the record of this case, the legislative history of the Act, or experience that we may notice judicially provides any support for such a proposition." *Id.*, at 552-554 (footnote omitted).

[*518] Accordingly, I concur in Parts I, III-B, and IV of the Court's opinion, and in the judgment.

JUSTICE KENNEDY, concurring in part and concurring in the judgment.

I join all but Part II of JUSTICE O'CONNOR's opinion and give this further explanation.

Part II examines our case law upholding congressional power to grant preferences based on overt and explicit classification by race. See *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980). **[***898]** With the acknowledgment that the summary in Part II is both precise and fair, I must decline to join it. The process by which a law that is an equal protection **[**735]** violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition for me; but as it is not before us, any reconsideration of that issue must await some further case. For purposes of the ordinance challenged here, it suffices to say that the State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself. The Fourteenth Amendment ought not to be interpreted to reduce a State's authority in this regard, unless, of course, there is a conflict with federal law or a state remedy is itself a violation of equal protection. The latter is the case presented here.

The moral imperative of racial neutrality is the driving force of the Equal Protection Clause. JUSTICE SCALIA's opinion underscores that proposition, quite properly in my view. The rule suggested in his opinion, which would strike down all preferences which are not necessary remedies to victims of unlawful discrimination, would serve important structural goals, as it would eliminate the necessity for courts to pass upon each racial preference that is enacted. Structural protections may be necessities if moral imperatives are to be obeyed. His opinion

would make it crystal clear to the **[*519]** political branches, at least those of the States, that legislation must be based on criteria other than race.

Nevertheless, given that a rule of automatic invalidity for racial preferences in almost every case would be a significant break with our precedents that require a case-by-case test, I am not convinced we need adopt it at this point. On the assumption that it will vindicate the principle of race neutrality found in the Equal Protection Clause, I accept the less absolute rule contained in JUSTICE O'CONNOR's opinion, a rule based on the proposition that any racial preference must face the most rigorous scrutiny by the courts. My reasons for doing so are as follows. First, I am confident that, in application, the strict scrutiny standard will operate in a manner generally consistent with the imperative of race neutrality, because it forbids the use even of narrowly drawn racial classifications except as a last resort. Second, the rule against race-conscious remedies is already less than an absolute one, for that relief may be the only adequate remedy after a judicial determination that a State or its instrumentality has violated the Equal Protection Clause. I note, in this connection, that evidence which would support a judicial finding of intentional discrimination may suffice also to justify remedial legislative action, for it diminishes the constitutional responsibilities of the political branches to say they must wait to act until ordered to do so by a court. Third, the strict scrutiny rule is consistent with our precedents, as JUSTICE O'CONNOR's opinion demonstrates.

The ordinance before us falls far short of the standard we adopt. The nature and scope of the injury that existed; its historical or antecedent causes; the extent to which the city contributed to it, either by intentional acts or by passive complicity **[***899]** in acts of discrimination by the private sector; the necessity for the response adopted, its duration in relation to the wrong, and the precision with which it otherwise bore on whatever injury in fact was addressed, were all matters unmeasured, unexplored, and unexplained by the city council. We **[*520]** are left with an ordinance and a legislative record open to the fair charge that it is not a remedy but is itself a preference which will cause the same corrosive animosities that the Constitution forbids in the whole sphere of government and that our national policy condemns in the rest of society as well. This ordinance is invalid under the Fourteenth Amendment.

JUSTICE SCALIA, concurring in the judgment.

[*HR3B]** [3B]
I agree with much of the Court's opinion, and, in particular, with JUSTICE O'CONNOR's conclusion that strict scrutiny must be applied to all governmental classification **[**736]** by race, whether or not its asserted purpose is "remedial" or "benign." *Ante*, at 493, 495. I do not agree, however, with JUSTICE O'CONNOR's dictum suggesting that, despite the Fourteenth Amendment, state and local governments may in some circumstances discriminate on the basis of race in order (in a broad sense) "to ameliorate the effects of past discrimination." *Ante*, at 476-477. The benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can no more be pursued by the illegitimate means of racial discrimination than can other assertedly benign purposes we have repeatedly rejected. See, *e. g.*, *Wygant* v. *Jackson Board of Education*, 476 U.S. 267, 274-276 (1986) (plurality opinion) (discrimination in teacher assignments to provide "role models" for minority students); *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984) (awarding custody of child to father, after divorced mother entered an interracial remarriage, in order to spare child social "pressures and stresses"); *Lee* v. *Washington*, 390 U.S. 333 (1968) (*per curiam*) (permanent racial segregation of all prison inmates, presumably to reduce possibility of racial conflict). The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency -- fatal to a Nation such as ours -- to classify and judge men and women on the basis of their country of origin or the color of their skin. A solution **[*521]** to the first problem that aggravates the second is no solution

at all. I share the view expressed by Alexander Bickel that "[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society." A. Bickel, The Morality of Consent 133 (1975). At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb -- for example, a prison race riot, requiring temporary segregation of inmates, cf. *Lee* v. *Washington, supra* -- can justify an exception to the principle embodied in the Fourteenth Amendment that "[o]ur Constitution is colorblind, and neither knows nor tolerates classes **[***900]** among citizens," *Plessy* v. *Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting); accord, *Ex parte Virginia*, 100 U.S. 339, 345 (1880); 2 J. Story, Commentaries on the Constitution § 1961, p. 677 (T. Cooley ed. 1873); T. Cooley, Constitutional Limitations 439 (2d ed. 1871).

We have in some contexts approved the use of racial classifications by the Federal Government to remedy the effects of past discrimination. I do not believe that we must or should extend those holdings to the States. In *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), we upheld legislative action by Congress similar in its asserted purpose to that at issue here. And we have permitted federal courts to prescribe quite severe, race-conscious remedies when confronted with egregious and persistent unlawful discrimination, see, *e. g., United States* v. *Paradise*, 480 U.S. 149 (1987); *Sheet Metal Workers* v. *EEOC*, 478 U.S. 421 (1986). As JUSTICE O'CONNOR acknowledges, however, *ante*, at 486-491, it is one thing to permit racially based conduct by the Federal Government -- whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment, see U.S. Const., Amdt. 14, § 5 -- and quite another to permit it by the precise entities against whose conduct in **[*522]** matters of race that Amendment was specifically directed, see Amdt. 14, § 1. As we said in *Ex parte Virginia, supra*, at 345, the Civil War Amendments were designed to "take away all possibility of oppression by law because of race or color" and "to be . . . limitations on the power of the States and enlargements of **[**737]** the power of Congress." Thus, without revisiting what we held in *Fullilove* (or trying to derive a rationale from the three separate opinions supporting the judgment, none of which commanded more than three votes, compare 448 U.S., at 453-495 (opinion of Burger, C. J., joined by WHITE and Powell, JJ.), with *id.*, at 495-517 (opinion of Powell, J.), and *id.*, at 517-522 (opinion of MARSHALL, J., joined by BRENNAN and BLACKMUN, JJ.)), I Do not believe our decision in that case controls the one before us here.

A sound distinction between federal and state (or local) action based on race rests not only upon the substance of the Civil War Amendments, but upon social reality and governmental theory. It is a simple fact that what Justice Stewart described in *Fullilove* as "the dispassionate objectivity [and] the flexibility that are needed to mold a race-conscious remedy around the single objective of eliminating the effects of past or present discrimination" -- political qualities already to be doubted in a national legislature, *Fullilove, supra*, at 527 (Stewart, J., with whom REHNQUIST, J., joined, dissenting) -- are substantially less likely to exist at the state or local level. The struggle for racial justice has historically been a struggle by the national society against oppression in the individual States. See, *e. g., Ex parte Virginia, supra* (denying writ of habeas corpus to a state judge in custody under federal indictment for excluding jurors on the basis of race); H. Hyman & W. Wiecek, **[***901]** Equal Justice Under Law, 1835-1875, pp. 312-334 (1982); Logan, Judicial Federalism in the Court of History, 66 Ore. L. Rev. 454, 494-515 (1988). And the struggle retains that character in modern times. See, *e. g., Brown* v. *Board of Education*, 349 U.S. 294 (1955) (*Brown II); United States* v. *Montgomery Board of Education*, **[*523]** 395 U.S. 225 (1969); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Griffin* v. *Prince Edward County School Board*, 377 U.S. 218 (1964); *Cooper* v. *Aaron*, 358 U.S. 1 (1958). Not all of that struggle has involved discrimination against blacks, see, *e. g., Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886) (Chinese); *Hernandez* v. *Texas*, 347 U.S. 475 (1954) (Hispanics), and not all of it has been in the Old South, see, *e. g., Columbus Board of Education* v. *Penick*, 443 U.S. 449 (1979); *Keyes* v. *School Dist. No. 1, Denver, Colorado*,

413 U.S. 189 (1973). What the record shows, in other words, is that racial discrimination against any group finds a more ready expression at the state and local than at the federal level. To the children of the Founding Fathers, this should come as no surprise. An acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history. See G. Wood, The Creation of the American Republic, 1776-1787, pp. 499-506 (1969). As James Madison observed in support of the proposed Constitution's enhancement of national powers:

> "The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plan of oppression. Extend the sphere and you take in a greater variety of parties and interests; you 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." The Federalist No. 10, pp. 82-84 (C. Rossiter ed. 1961).

[*524] The prophesy of these words came to fruition in Richmond in the enactment of a set-aside clearly and directly beneficial to the dominant political group, which happens **[**738]** also to be the dominant racial group. The same thing has no doubt happened before in other cities (though the racial basis of the preference has rarely been made textually explicit) -- and blacks have often been on the receiving end of the injustice. Where injustice is the game, however, turnabout is not fair play.

In my view there is only one circumstance in which the States may act *by race* to "undo the effects of past discrimination": where that is necessary to eliminate their own maintenance of a system of unlawful racial classification. If, for example, **[***902]** a state agency has a discriminatory pay scale compensating black employees in all positions at 20% less than their nonblack counterparts, it may assuredly promulgate an order raising the salaries of "all black employees" to eliminate the differential. Cf. *Bazemore* v. *Friday*, 478 U.S. 385, 395-396 (1986). This distinction explains our school desegregation cases, in which we have made plain that States and localities sometimes have an obligation to adopt raceconscious remedies. While there is no doubt that those cases have taken into account the continuing "effects" of previously mandated racial school assignment, we have held those effects to justify a race-conscious remedy only because we have concluded, in that context, that they perpetuate a "dual school system." We have stressed each school district's constitutional "duty to *dismantle* its dual system," and have found that "[e]ach instance of a failure or refusal to fulfill this affirmative duty *continues the violation* of the Fourteenth Amendment." *Columbus Board of Education* v. *Penick, supra*, at 458-459 (emphasis added). Concluding in this context that race-neutral efforts at "dismantling the state-imposed dual system" were so ineffective that they might "indicate a lack of good faith," *Green* v. *New Kent County School Board*, 391 U.S. 430, 439 (1968); see also **[*525]** *Raney* v. *Board of Education of Gould School Dist.*, 391 U.S. 443 (1968), we have permitted, as part of the local authorities' "affirmative duty to disestablish the dual school system[s]," such voluntary (that is, noncourt-ordered) measures as attendance zones drawn to achieve greater racial balance, and out-of-zone assignment by race for the same purpose. *McDaniel* v. *Barresi*, 402 U.S. 39, 40-41 (1971). While thus permitting the use of race to declassify racially classified students, teachers, and educational resources, however, we have also made it clear that the remedial power extends no further than the scope of the continuing constitutional violation. See, *e. g.*,

Columbus Board of Education v. *Penick, supra*, at 465; *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420 (1977); *Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974); *Keyes* v. *School Dist. No. 1, Denver, Colorado, supra*, at 213. And it is implicit in our cases that after the dual school system has been completely disestablished, the States may no longer assign students by race. Cf. *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976) (federal court may not require racial assignment in such circumstances).

Our analysis in *Bazemore* v. *Friday, supra*, reflected our unwillingness to conclude, outside the context of school assignment, that the continuing effects of prior discrimination can be equated with state maintenance of a discriminatory system. There we found both that the government's adoption of "wholly neutral admissions" policies for 4-H and Homemaker Clubs sufficed to remedy its prior constitutional violation of maintaining segregated admissions, and that there was no further obligation to use racial reassignments to eliminate continuing effects -- that is, any remaining all-black and all-white clubs. 478 U.S., at 407-408. " **[***903]** [H]owever sound *Green* [v. *New Kent County School Board, supra*] may have been in the context of the public schools," we said, "it has no application to this wholly **[**739]** different milieu." *Id.*, at 408. The same is so here.

[*526] A State can, of course, act "to undo the effects of past discrimination" in many permissible ways that do not involve classification by race. In the particular field of state contracting, for example, it may adopt a preference for small businesses, or even for new businesses -- which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have racially disproportionate impact, but they are not based on race. And, of course, a State may "undo the effects of past discrimination" in the sense of giving the identified victim of state discrimination that which it wrongfully denied him -- for example, giving to a previously rejected black applicant the job that, by reason of discrimination, had been awarded to a white applicant, even if this means terminating the latter's employment. In such a context, the white jobholder is not being selected for disadvantageous treatment because of his race, but because he was wrongfully awarded a job to which another is entitled. That is worlds apart from the system here, in which those to be disadvantaged are identified solely by race.

I agree with the Court's dictum that a fundamental distinction must be drawn between the effects of "societal" discrimination and the effects of "identified" discrimination, and that the situation would be different if Richmond's plan were "tailored" to identify those particular bidders who "suffered from the effects of past discrimination by the city or prime contractors." *Ante*, at 507-508. In my view, however, the reason that would make a difference is not, as the Court states, that it would justify race-conscious action -- see, *e. g.*, *ante*, at 504-506, 507-508 -- but rather that it would enable race-neutral remediation. Nothing prevents Richmond from according a contracting preference to identified victims of discrimination. While most of the beneficiaries might be black, neither the beneficiaries nor those disadvantaged by the preference would be identified *on the basis of their race*. In other words, far from justifying racial classification, identification **[*527]** of actual victims of discrimination makes it less supportable than ever, because more obviously unneeded.

In his final book, Professor Bickel wrote:

> "[A] racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name, but in its effects: a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant." Bickel, The Morality of Consent, at 133.

Those statements are true and increasingly prophetic. Apart from their societal effects, however, which are "in the aggregate disastrous," **[***904]** *id.*, at 134, it is important not to lose sight of the fact that even "benign" racial quotas have individual victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race. *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U.S. 616, 677 (1987) (SCALIA, J., dissenting). As Justice Douglas observed: "A DeFunis who is white is entitled to no advantage by virtue of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner." *DeFunis* v. *Odegaard*, 416 U.S. 312, 337 (1974) (dissenting opinion). When we depart from this American principle we play with fire, and much more than an occasional DeFunis, Johnson, or Croson burns.

It is plainly true that in our society blacks have suffered discrimination immeasurably greater than any directed at other racial groups. But those who believe that racial preferences can help to "even the **[**740]** score" display, and reinforce, a manner of thinking by race that was the source of the injustice and that will, if it endures within our society, be the **[*528]** source of more injustice still. The relevant proposition is not that it was blacks, or Jews, or Irish who were discriminated against, but that it was individual men and women, "created equal," who were discriminated against. And the relevant resolve is that that should never happen again. Racial preferences appear to "even the score" (in some small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white. Nothing is worth that embrace. Since blacks have been disproportionately disadvantaged by racial discrimination, any raceneutral remedial program aimed at the disadvantaged *as such* will have a disproportionately beneficial impact on blacks. Only such a program, and not one that operates on the basis of race, is in accord with the letter and the spirit of our Constitution.

Since I believe that the appellee here had a constitutional right to have its bid succeed or fail under a decisionmaking process uninfected with racial bias, I concur in the judgment of the Court.

DISSENTBY: MARSHALL; BLACKMUN

DISSENT: JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting.

It is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst. In my view, nothing in the Constitution can be construed to prevent Richmond, Virginia, from allocating a portion of its contracting dollars for businesses owned or controlled by members of minority groups. Indeed, Richmond's set-aside program is indistinguishable in all meaningful respects from -- and in fact was patterned upon -- the federal set-aside plan which this Court upheld in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980).

A majority of this Court holds today, however, that the Equal Protection Clause of the Fourteenth Amendment blocks Richmond's initiative. **[***905]** The essence of the majority's **[*529]** position n1 is that Richmond has failed to catalog adequate findings to prove that past discrimination has impeded minorities from joining or participating fully in Richmond's construction contracting industry. I find deep irony in secondguessing Richmond's judgment on this point. As much as any municipality in the United States, Richmond knows what racial discrimination is; a century of decisions by this and other federal courts has richly documented the city's disgraceful history of public and private racial discrimination. In any

event, the Richmond City Council *has* supported its determination that minorities have been wrongly excluded from local construction contracting. Its proof includes statistics showing that minority-owned businesses have received virtually no city contracting dollars and rarely if ever belonged to area trade associations; testimony by municipal officials that discrimination has been widespread in the local construction industry; and the same exhaustive and widely publicized federal studies relied on in *Fullilove*, studies which showed that pervasive discrimination in the Nation's tight-knit construction industry had operated to exclude minorities from public contracting. These are precisely the types of statistical and testimonial evidence which, until today, this Court had credited in cases approving of raceconscious measures designed to remedy past discrimination.

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n1 In the interest of convenience, I refer to the opinion in this case authored by JUSTICE O'CONNOR as "the majority," recognizing that certain portions of that opinion have been joined by only a plurality of the Court.

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More fundamentally, today's decision marks a deliberate and giant step backward in this Court's affirmative-action jurisprudence. Cynical of one municipality's attempt to redress the effects of past racial discrimination in a particular industry, the majority launches a grapeshot attack on race-conscious remedies in general. The **[**741]** majority's unnecessary pronouncements will inevitably discourage or prevent governmental entities, particularly States and localities, from acting to rectify the scourge of past discrimination. This is **[*530]** the harsh reality of the majority's decision, but it is not the Constitution's command.

I

As an initial matter, the majority takes an exceedingly myopic view of the factual predicate on which the Richmond City Council relied when it passed the Minority Business Utilization Plan. The majority analyzes Richmond's initiative as if it were based solely upon the facts about local construction and contracting practices adduced during the city council session at which the measure was enacted. *Ante*, at 479-481. In so doing, the majority downplays the fact that the city council had before it a rich trove of evidence that discrimination in the Nation's construction industry had seriously impaired the competitive position of businesses owned or controlled by members of minority groups. It is only against this backdrop of documented national discrimination, however, that the local evidence adduced by Richmond can be properly understood. The majority's refusal to recognize that Richmond has proved itself no exception **[***906]** to the dismaying pattern of national exclusion which Congress so painstakingly identified infects its entire analysis of this case.

Six years before Richmond acted, Congress passed, and the President signed, the Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116, 42 U. S. C. § 6701 *et seq.* (Act), a measure which appropriated $ 4 billion in federal grants to state and local governments for use in public works projects. Section 103(f)(2) of the Act was a minority business set-aside provision. It required state or local grantees to use 10% of their federal grants to procure services or supplies from businesses owned or controlled by members of statutorily identified minority groups, absent an administrative waiver. In 1980, in *Fullilove, supra*, this Court upheld the validity of this federal set-aside. Chief Justice Burger's principal opinion noted the importance of overcoming those "criteria, methods, or practices thought by Congress to have the effect of defeating, or substantially impairing, access **[*531]** by the minority business community to public funds made available by congressional appropriations." *Fullilove*, 448 U.S., at 480. Finding the set-aside provision properly tailored to this goal, the Chief Justice concluded that the program was valid under either strict or

intermediate scrutiny. *Id.*, at 492.

The congressional program upheld in *Fullilove* was based upon an array of congressional and agency studies which documented the powerful influence of racially exclusionary practices in the business world. A 1975 Report by the House Committee on Small Business concluded:

> "The effects of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system.
>
> "While minority persons comprise about 16 percent of the Nation's population, of the 13 million businesses in the United States, only 382,000, or approximately 3.0 percent, are owned by minority individuals. The most recent data from the Department of Commerce also indicates that the gross receipts of all businesses in this country totals about $ 2,540.8 billion, and of this amount only $ 16.6 billion, or about 0.65 percent was realized by minority business concerns.
>
> "These statistics are not the result of random chance. *The presumption must be made that past discriminatory systems have resulted in present economic inequities*." H. R. Rep. No. 94-468, pp. 1-2 (1975) (quoted in *Fullilove, supra*, at 465) (opinion of Burger, C. J.) (emphasis deleted and added).

A 1977 Report by the same Committee concluded:

> "[O]ver the years, there has developed a business system which has traditionally excluded measurable minority participation. **[**742]** In the past more than the present, **[*532]** this system of conducting business transactions overtly precluded minority input. Currently, we more often end counter a business system which is racially neutral on its face, but because of past overt social and economic discrimination **[***907]** is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently have not participated to any measurable extent, in our total business system generally, or in the construction industry in particular." H. R. Rep. No. 94-1791, p. 182 (1977), summarizing H. R. Rep. No. 94-468, p. 17 (1976) (quoted in *Fullilove, supra*, at 466, n. 48).

Congress further found that minorities seeking initial public contracting assignments often faced immense entry barriers which did not confront experienced nonminority contractors. A report submitted to Congress in 1975 by the United States Commission on Civil Rights, for example, described the way in which fledgling minority-owned businesses were hampered by "deficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses." *Fullilove, supra*, at 467 (summarizing United States Comm'n on Civil Rights, Minorities and Women as Government Contractors (May 1975)).

Thus, as of 1977, there was "abundant evidence" in the public domain "that minority

businesses ha[d] been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." *Fullilove, supra*, at 477-478. n2 Significantly, **[*533]** this evidence demonstrated that discrimination had prevented existing or nascent minority-owned businesses from obtaining not only federal contracting assignments, but state and local ones as well. See *Fullilove, supra*, at 478. n3

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n2 Other Reports indicating the dearth of minority-owned businesses include H. R. Rep. No. 92-1615, p. 3 (1972) (Report of the Subcommittee on Minority Small Business Enterprise, finding that the "long history of racial bias" has created "major problems" for minority businessmen); H. R. Doc. No. 92-194, p. 1 (1972) (text of message from President Nixon to Congress, describing federal efforts "to press open new doors of opportunity for millions of Americans to whom those doors had previously been barred, or only half-open"); H. R. Doc. No. 92-169, p. 1 (1971) (text of message from President Nixon to Congress, describing paucity of minority business ownership and federal efforts to give "every man an equal chance at the starting line").

n3 Numerous congressional studies undertaken after 1977 and issued before the Richmond City Council convened in April 1983 found that the exclusion of minorities had continued virtually unabated -- and that, because of this legacy of discrimination, minority businesses across the Nation had still failed, as of 1983, to gain a real toehold in the business world. See, *e. g.*, H. R. Rep. No. 95-949, pp. 2, 8 (1978) (Report of House Committee on Small Business, finding that minority businesses "are severely undercapitalized" and that many minorities are disadvantaged "because they are identified as members of certain racial categories"); S. Rep. No. 95-1070, pp. 14-15 (1978); (Report of Senate Select Committee on Small Business, finding that the federal effort "has fallen far short of its goal to develop strong and growing disadvantaged small businesses," and "recogniz[ing] the pattern of social and economic discrimination that continues to deprive racial and ethnic minorities, and others, of the opportunity to participate fully in the free enterprise system"); S. Rep. No. 96-31, pp. IX, 107 (1979) (Report of Senate Select Committee on Small Business, finding that many minorities have "suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control"); S. Rep. No. 96-974, p. 3 (1980) (Report of Senate Select Committee on Small Business, finding that government aid must be "significantly increased" if minority-owned businesses are to "have the maximum practical opportunity to develop into viable small businesses"); H. R. Rep. No. 97-956, p. 35 (1982) (Report of House Committee on Small Business, finding that federal programs to aid minority businesses have had "limited success" to date, but concluding that success could be "greatly expanded" with "appropriate corrective actions"); H. R. Rep. No. 98-3, p. 1 (1983) (Report of House Committee on Small Business, finding that "the small business share of Federal contracts continues to be inadequate").

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[*908]** **[**743]** The members of the Richmond City Council were well aware of these exhaustive congressional findings, a point the **[*534]** majority, tellingly, elides. The transcript of the session at which the council enacted the local set-aside initiative contains numerous references to the 6-year-old congressional set-aside program, to the evidence of nationwide discrimination barriers described above, and to the *Fullilove* decision itself. See, *e. g.*, App. 14-16, 24 (remarks of City Attorney William H. Hefty); *id.*, at 14-15 (remarks of Councilmember William J. Leidinger); *id.*, at 18 (remarks of minority community task force president Freddie Ray); *id.*, at 25, 41 (remarks of Councilmember Henry L. Marsh III); *id.*, at 42 (remarks of City Manager Manuel Deese).

The city council's members also heard testimony that, although minority groups made up half of the city's population, only 0.67% of the $ 24.6 million which Richmond had dispensed in

construction contracts during the five years ending in March 1983 had gone to minority-owned prime contractors. *Id.*, at 43 (remarks of Councilmember Henry W. Richardson). They heard testimony that the major Richmond area construction trade associations had virtually no minorities among their hundreds of members. n4 Finally, they heard testimony from city officials as to the exclusionary history of the local construction industry. n5 As the District Court noted, not a **[*535]** single person who testified before the city council denied that discrimination in Richmond's construction industry had been widespread. Civ. Action No. 84-0021 (ED Va., Dec. 3, 1984) (reprinted in Supp. App. to Juris. Statement **[***909]** 164-165). n6 So long as one views Richmond's local evidence of discrimination against the backdrop of systematic nationwide racial discrimination which Congress had so painstakingly identified in this very industry, this case is readily resolved.

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n4 According to testimony by trade association representatives, the Associated General Contractors of Virginia had no blacks among its 130 Richmond-area members, App. 27-28 (remarks of Stephen Watts); the American Subcontractors Association had no blacks among its 80 Richmond members, *id.*, at 36 (remarks of Patrick Murphy); the Professional Contractors Estimators Association had 1 black member among its 60 Richmond members, *id.*, at 39 (remarks of Al Shuman); the Central Virginia Electrical Contractors Association had 1 black member among its 45 members, *id.*, at 40 (remarks of Al Shuman); and the National Electrical Contractors Association had 2 black members among its 81 Virginia members. *Id.*, at 34 (remarks of Mark Singer).

n5 Among those testifying to the discriminatory practices of Richmond's construction industry was Councilmember Henry Marsh, who had served as mayor of Richmond from 1977 to 1982. Marsh stated:

"I have been practicing law in this community since 1961, and I am familiar with the practices in the construction industry in this area, in the State, and around the nation. And I can say without equivocation, that the general conduct in the construction industry in this area, and the State and around the nation, is one in which race discrimination and exclusion on the basis of race is widespread.

"I think the situation involved in the City of Richmond is the same . . . . I think the question of whether or not remedial action is required is not open to question." *Id.*, at 41.

Manuel Deese, who in his capacity as City Manager had oversight responsibility for city procurement matters, stated that he fully agreed with Marsh's analysis. *Id.*, at 42.

n6 The representatives of several trade associations did, however, deny that their particular organizations engaged in discrimination. See, *e. g., id.*, at 38 (remarks of Al Shuman, on behalf of the Central Virginia Electrical Contractors Association).

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II

"Agreement upon a means for applying the Equal Protection Clause to an affirmative-action program has eluded this Court every time the issue has come before us." *Wygant* v. *Jackson Bd. of Education*, 476 U.S. 267, 301 (1986) (MARSHALL, J., dissenting). My view has long been that raceconscious classifications designed to further remedial goals "must serve important governmental objectives and must be substantially related to achievement of those **[**744]** objectives" in order to withstand constitutional scrutiny. *University of California Regents* v. *Bakke*, 438 U.S. 265, 359 (1978) (joint opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.) (citations omitted); see also *Wygant, supra*, at 301-302 (MARSHALL, J.,

dissenting); *Fullilove*, 448 U.S., at 517-519 **[*536]** (MARSHALL, J., concurring in judgment). Analyzed in terms of this two-pronged standard, Richmond's set-aside, like the federal program on which it was modeled, is "plainly constitutional." *Fullilove, supra*, at 519 (MARSHALL, J., concurring in judgment).

A

1

Turning first to the governmental interest inquiry, Richmond has two powerful interests in setting aside a portion of public contracting funds for minority-owned enterprises. The first is the city's interest in eradicating the effects of past racial discrimination. It is far too late in the day to doubt that remedying such discrimination is a compelling, let alone an important, interest. In *Fullilove*, six Members of this Court deemed this interest sufficient to support a raceconscious set-aside program governing federal contract procurement. The decision, in holding that the federal set-aside provision satisfied the equal protection principles under any level of scrutiny, recognized that the measure sought to remove "barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or unlawful conduct." 448 U.S., at 478; see also *id.*, at 502-506 (Powell, J., concurring); *id.*, at 520 (MARSHALL, J., concurring in judgment). Indeed, we have repeatedly reaffirmed the government's interest in breaking down barriers erected by past racial discrimination in cases involving access to public education, *McDaniel* v. *Barresi*, 402 U.S. 39, 41 (1971); *University of California Regents* v. *Bakke*, 438 U.S., at 320 (opinion of Powell, J.); *id.*, at 362-364 (joint opinion of BRENNAN, WHITE, **[***910]** MARSHALL, and BLACKMUN, JJ.), employment, *United States* v. *Paradise*, 480 U.S. 149, 167 (1987) (plurality opinion); *id.*, at 186-189 (Powell, J., concurring), and valuable government contracts, *Fullilove*, 448 U.S., at 481-484 (opinion of Burger, C. J.); *id.*, at 496-497 (Powell, **[*537]** J., concurring); *id.*, at 521 (MARSHALL, J., concurring in judgment).

Richmond has a second compelling interest in setting aside, where possible, a portion of its contracting dollars. That interest is the prospective one of preventing the city's own spending decisions from reinforcing and perpetuating the exclusionary effects of past discrimination. See *Fullilove*, 448 U.S., at 475 (noting Congress' conclusion that "the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities"); *id.*, at 503 (Powell, J., concurring).

The majority pays only lipservice to this additional governmental interest. See *ante*, at 491-493, 503-504. But our decisions have often emphasized the danger of the government tacitly adopting, encouraging, or furthering racial discrimination even by its own routine operations. In *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), this Court recognized this interest as a constitutional command, holding unanimously that the Equal Protection Clause forbids courts to enforce racially restrictive covenants even where such covenants satisfied all requirements of state law and where the State harbored no discriminatory intent. Similarly, in *Norwood* v. *Harrison*, 413 U.S. 455 (1973), we invalidated a program in which a State purchased textbooks **[**745]** and loaned them to students in public and private schools, including private schools with racially discriminatory policies. We stated that the Constitution requires a State "to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination." *Id.*, at 467; see also *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974) (upholding federalcourt order forbidding city to allow private segregated schools which allegedly discriminated on the basis of race to use public parks).

[*538] The majority is wrong to trivialize the continuing impact of government acceptance or use of private institutions or structures once wrought by discrimination. When government channels all its contracting funds to a white-dominated community of established contractors whose racial homogeneity is the product of private discrimination, it does more than place its

imprimatur on the practices which forged and which continue to define that community. It also provides a measurable boost to those economic entities that have thrived within it, while denying important economic benefits to those entities which, but for prior discrimination, might well be better qualified to receive valuable government contracts. In my view, the interest in ensuring that the government **[***911]** does not reflect and reinforce prior private discrimination in dispensing public contracts is every bit as strong as the interest in eliminating private discrimination -- an interest which this Court has repeatedly deemed compelling. See, *e. g., New York State Club Assn.* v. *New York City*, 487 U.S. 1, 14, n. 5 (1988); *Board of Directors of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623 (1984); *Bob Jones University* v. *United States*, 461 U.S. 574, 604 (1983); *Runyon* v. *McCrary*, 427 U.S. 160, 179 (1976). The more government bestows its rewards on those persons or businesses that were positioned to thrive during a period of private racial discrimination, the tighter the deadhand grip of prior discrimination becomes on the present and future. Cities like Richmond may not be constitutionally required to adopt setaside plans. But see *North Carolina Bd. of Education* v. *Swann*, 402 U.S. 43, 46 (1971) (Constitution may require consideration of race in remedying state-sponsored school segregation); *McDaniel, supra*, at 41 (same, and stating that "[a]ny other approach would freeze the status quo that is the very target of all desegregation processes"). But there can be no doubt that when Richmond acted affirmatively to stem the perpetuation of patterns of discrimination through **[*539]** its own decisionmaking, it served an interest of the highest order.

2

The remaining question with respect to the "governmental interest" prong of equal protection analysis is whether Richmond has proffered satisfactory proof of past racial discrimination to support its twin interests in remediation and in governmental nonperpetuation. Although the Members of this Court have differed on the appropriate standard of review for race-conscious remedial measures, see *United States* v. *Paradise*, 480 U.S., at 166, and 166-167, n. 17 (plurality opinion); *Sheet Metal Workers* v. *EEOC*, 478 U.S. 421, 480 (1986) (plurality opinion), we have always regarded this factual inquiry as a practical one. Thus, the Court has eschewed rigid tests which require the provision of particular species of evidence, statistical or otherwise. At the same time we have required that government adduce evidence that, taken as a whole, is sufficient to support its claimed interest and to dispel the natural concern that it acted out of mere "paternalistic stereotyping, not on a careful consideration of modern social conditions." *Fullilove* v. *Klutznick, supra*, **[**746]** at 519 (MARSHALL, J., concurring in judgment).

The separate opinions issued in *Wygant* v. *Jackson Bd. of Education*, a case involving a school board's race-conscious layoff provision, reflect this shared understanding. Justice Powell's opinion for a plurality of four Justices stated that "the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary." 476 U.S., at 277. JUSTICE O'CONNOR's **[***912]** separate concurrence required "a firm basis for concluding that remedial action was appropriate." *Id.*, at 293. The dissenting opinion I authored, joined by JUSTICES BRENNAN and BLACKMUN, required a government body to present a "legitimate factual predicate" and a reviewing court to "genuinely consider the circumstances of the provision at issue." *Id.*, at 297, 303. Finally, JUSTICE **[*540]** STEVENS' separate dissent sought and found "a rational and unquestionably legitimate basis" for the school board's action. *Id.*, at 315-316. Our unwillingness to go beyond these generalized standards to require specific types of proof in all circumstances reflects, in my view, an understanding that discrimination takes a myriad of "ingenious and pervasive forms." *University of California Regents* v. *Bakke*, 438 U.S., at 387 (separate opinion of MARSHALL, J.).

The varied body of evidence on which Richmond relied provides a "strong," "firm," and "unquestionably legitimate" basis upon which the city council could determine that the effects

of past racial discrimination warranted a remedial and prophylactic governmental response. As I have noted, *supra*, at 530-534, Richmond acted against a backdrop of congressional and Executive Branch studies which demonstrated with such force the nationwide pervasiveness of prior discrimination that Congress presumed that "'present economic inequities'" in construction contracting resulted from "'past discriminatory systems.'" *Supra*, at 531 (quoting H. R. Rep. No. 94-468, pp. 1-2 (1975)). The city's local evidence confirmed that Richmond's construction industry did not deviate from this pernicious national pattern. The fact that just 0.67% of public construction expenditures over the previous five years had gone to minority-owned prime contractors, despite the city's racially mixed population, strongly suggests that construction contracting in the area was rife with "present economic inequities." To the extent this enormous disparity did not itself demonstrate that discrimination had occurred, the descriptive testimony of Richmond's elected and appointed leaders drew the necessary link between the pitifully small presence of minorities in construction contracting and past exclusionary practices. That *no one* who testified challenged this depiction of widespread racial discrimination in area construction contracting lent significant weight to these accounts. The fact that area trade associations had virtually no minority members dramatized the extent of present **[*541]** inequities and suggested the lasting power of past discriminatory systems. In sum, to suggest that the facts on which Richmond has relied do not provide a sound basis for its finding of past racial discrimination simply blinks credibility.

Richmond's reliance on localized, industry-specific findins is a far cry from the reliance on generalized "societal discrimination" which the majority decries as a basis for remedial action. *Ante*, at 496, 499, 505. But characterizing the plight of Richmond's minority contractors as mere "societal discrimination" is not the only respect in which the majority's critique **[***913]** shows an unwillingness to come to grips with why construction-contracting in Richmond is essentially a whites-only enterprise. The majority also takes the disingenuous approach of disaggregating Richmond's local evidence, attacking it piecemeal, and thereby concluding that no *single* piece of evidence adduced by the city, "standing alone," see, *e. g., ante*, at 503, suffices to prove past discrimination. But items of evidence do not, of course, **[**747]** "stan[d] alone" or exist in alien juxtaposition; they necessarily work together, reinforcing or contradicting each other.

In any event, the majority's criticisms of individual items of Richmond's evidence rest on flimsy foundations. The majority states, for example, that reliance on the disparity between the share of city contracts awarded to minority firms (0.67%) and the minority population of Richmond (approximately 50%) is "misplaced." *Ante*, at 501. It is true that, when the factual predicate needed to be proved is one of *present* discrimination, we have generally credited statistical contrasts between the racial composition of a work force and the general population as proving discrimination only where this contrast revealed "gross statistical disparities." *Hazelwood School Dist.* v. *United States*, 433 U.S. 299, 307-308 (1977) (Title VII case); see also *Teamsters* v. *United States*, 431 U.S. 324, 339 (1977) (same). But this principle does not impugn Richmond's statistical contrast, for two reasons. First, considering how minuscule the share of Richmond public **[*542]** construction contracting dollars received by minority-owned businesses is, it is hardly unreasonable to conclude that this case involves a "gross statistical disparit[y]." *Hazelwood School Dist., supra*, at 307. There are roughly equal numbers of minorities and nonminorities in Richmond -- yet minority-owned businesses receive *one-seventy-fifth* of the public contracting funds that other businesses receive. See *Teamsters, supra*, at 342, n. 23 ("[F]ine tuning of the statistics could not have obscured the glaring absence of minority [bus] drivers. . . . [T]he company's inability to rebut the inference of discrimination came not from a misuse of statistics but from 'the inexorable zero'") (citation omitted) (quoted in *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U.S. 616, 656-657 (1987) (O'CONNOR, J., concurring in judgment)).

Second, and more fundamentally, where the issue is not present discrimination but rather whether *past* discrimination has resulted in the *continuing exclusion* of minorities from a

historically tight-knit industry, a contrast between population and work force is entirely appropriate to help gauge the degree of the exclusion. In *Johnson* v. *Transportation Agency, Santa Clara County, supra*, JUSTICE O'CONNOR specifically observed that, when it is alleged that discrimination has prevented blacks from "obtaining th[e] experience" needed to qualify for a position, the "relevant comparison" is not to the percentage of blacks in the pool of qualified candidates, but to "the total percentage of blacks in the labor force." *Id.*, at 651; see also *Steelworkers* v. *Weber*, 443 U.S. 193, 198-199, and n. 1 (1979); *Teamsters, supra*, **[***914]** at 339, n. 20. This contrast is especially illuminating in cases like this, where a main avenue of introduction into the work force -- here, membership in the trade associations whose members presumably train apprentices and help them procure subcontracting assignments -- is itself grossly dominated by nonminorities. The majority's assertion that the city "does not even know how many MBE's in the relevant market are qualified," *ante*, at 502, is thus entirely beside the **[*543]** point. If Richmond indeed has a monochromatic contracting community -- a conclusion reached by the District Court, see Civ. Action No. 84-0021 (ED Va. 1984) (reprinted in Supp. App. to Juris. Statement 164) -- this most likely reflects the lingering power of past exclusionary practices. Certainly this is the explanation Congress has found persuasive at the national level. See *Fullilove*, 448 U.S., at 465. The city's requirement that prime public contractors set aside 30% of their subcontracting assignments for minority-owned enterprises, subject to the ordinance's provision for waivers where minority-owned enterprises are unavailable or unwilling to participate, is designed precisely **[**748]** to ease minority contractors into the industry.

The majority's perfunctory dismissal of the testimony of Richmond's appointed and elected leaders is also deeply disturbing. These officials -- including councilmembers, a former mayor, and the present city manager -- asserted that race discrimination in area contracting had been widespread, and that the set-aside ordinance was a sincere and necessary attempt to eradicate the effects of this discrimination. The majority, however, states that where racial classifications are concerned, "simple legislative assurances of good intention cannot suffice." *Ante*, at 500. It similarly discounts as minimally probative the city council's designation of its setaside plan as remedial. "[B]lind judicial deference to legislative or executive pronouncements," the majority explains, "has no place in equal protection analysis." *Ante*, at 501.

No one, of course, advocates "blind judicial deference" to the findings of the city council or the testimony of city leaders. The majority's suggestion that wholesale deference is what Richmond seeks is a classic straw-man argument. But the majority's trivialization of the testimony of Richmond's leaders is dismaying in a far more serious respect. By disregarding the testimony of local leaders and the judgment of local government, the majority does violence to the very principles of comity within our federal system which this **[*544]** Court has long championed. Local officials, by virtue of their proximity to, and their expertise with, local affairs, are exceptionally well qualified to make determinations of public good "within their respective spheres of authority." *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 244 (1984); see also *FERC* v. *Mississippi*, 456 U.S. 742, 777-778 (1982) (O'CONNOR, J., concurring in judgment in part and dissenting in part). The majority, however, leaves any traces of comity behind in its headlong rush to strike down Richmond's raceconscious measure.

Had the majority paused for a **[***915]** moment on the facts of the Richmond experience, it would have discovered that the city's leadership is deeply familiar with what racial discrimination is. The members of the Richmond City Council have spent long years witnessing multifarious acts of discrimination, including, but not limited to, the deliberate diminution of black residents' voting rights, resistance to school desegregation, and publicly sanctioned housing discrimination. Numerous decisions of federal courts chronicle this disgraceful recent history. In *Richmond* v. *United States*, 422 U.S. 358 (1975), for example, this Court denounced Richmond's decision to annex part of an adjacent county at a time when the city's black population was nearing 50% because it was "infected by the

impermissible purpose of denying the right to vote based on race through perpetuating white majority power to exclude Negroes from office." *Id.*, at 373; see also *id.*, at 382 (BRENNAN, J., dissenting) (describing Richmond's "flagrantly discriminatory purpose . . . to avert a transfer of political control to what was fast becoming a black-population majority") (citation omitted). n7

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n7 For a disturbing description of the lengths to which some Richmond white officials went during recent decades to hold in check growing black political power, see J. Moeser & R. Dennis, The Politics of Annexation -- Oligarchic Power in a Southern City 50-188 (1982).

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In *Bradley* v. *School Bd. of Richmond*, 462 F. 2d 1058, 1060, n. 1 (CA4 1972), aff'd by an equally divided Court, 412 U.S. 92 **[*545]** (1973), the Court of Appeals for the Fourth Circuit, sitting en banc, reviewed in the context of a school desegregation case Richmond's long history of inadequate compliance with *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and the cases implementing its holding. The dissenting judge elaborated:

> "The sordid history of Virginia's, and Richmond's attempts to circumvent, defeat, and nullify the holding of *Brown I* has been recorded in the opinions of this and other courts, and need not be repeated in detail here. It suffices to say **[**749]** that there was massive resistance and every state resource, including the services of the legal officers of the state, the services of private counsel (costing the State hundreds of thousands of dollars), the State police, and the power and prestige of the Governor, was employed to defeat *Brown I*. In Richmond, as has been mentioned, not even freedom of choice became actually effective until 1966, *Twelve years after the decision of Brown I*." 462 F. 2d, at 1075 (Winter, J.) (emphasis in original) (footnotes and citations omitted).

The Court of Appeals majority in *Bradley* used equally pungent words in describing public and private housing discrimination in Richmond. Though rejecting the black plaintiffs' request that it consolidate Richmond's school district with those of two neighboring counties, the majority nonetheless agreed with the plaintiffs' assertion that "within the City of Richmond there has been state (also federal) action tending to perpetuate apartheid of the races in ghetto patterns throughout the city." *Id.*, at 1065 (citing numerous **[***916]** public and private acts of discrimination). n8

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n8 Again the dissenting judge -- who would have consolidated the school districts -- elaborated:
"[M]any other instances of state and private action contribut[ed] to the concentration of black citizens within Richmond and white citizens without. These were principally in the area of residential development. Racially restrictive convenants were freely employed. Racially discriminatory practices in the prospective purchase of county property by black purchasers were followed. Urban renewal, subsidized public housing and government-sponsored home mortgage insurance had been undertaken on a racially discriminatory basis. [The neighboring counties] provided schools, roads, zoning and development approval for the rapid growth of the white population in each county at the expense of the city, without making any attempt to assure that the development that they made possible was integrated. Superimposed on the pattern of government-aided residential segregation . . . had been a discriminatory policy of school construction, i. e., the selection of school construction sites in the center of racially

identifiable neighborhoods manifestly to serve the educational needs of students of a single race.

"The majority does not question the accuracy of these facts." 462 F. 2d, at 1075-1076 (Winter, J.) (emphasis in original) (footnote omitted).

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[*546] When the legislatures and leaders of cities with histories of pervasive discrimination testify that past discrimination has infected one of their industries, armchair cynicism like that exercised by the majority has no place. It may well be that "the autonomy of a State is an essential component of federalism," *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 588 (1985) (O'CONNOR, J., dissenting), and that "each State is sovereign within its own domain, governing its citizens and providing for their general welfare," *FERC* v. *Mississippi, supra*, at 777 (O'CONNOR, J., dissenting), but apparently this is not the case when federal judges, with nothing but their impressions to go on, choose to disbelieve the explanations of these local governments and officials. Disbelief is particularly inappropriate here in light of the fact that appellee Croson, which had the burden of proving unconstitutionality at trial, *Wygant*, 476 U.S., at 277-278 (plurality opinion), has *at no point* come forward with *any* direct evidence that the city council's motives were anything other than sincere. n9

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n9 Cf. *Fullilove* v. *Klutznick*, 448 U.S. 448, 541 (1980) (STEVENS, J., dissenting) (noting statements of sponsors of federal set-aside that measure was designed to give their constituents "a piece of the action").

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Finally, I vehemently disagree with the majority's dismissal of the congressional and Executive Branch findings **[*547]** noted in *Fullilove* as having "extremely limited" probative value in this case. *Ante*, at 504. The majority concedes that Congress established nothing less than a "presumption" that minority contracting firms have been disadvantaged by prior discrimination. *Ibid.* The majority, inexplicably, would forbid Richmond to "share" in this information, and permit only Congress to take note of these ample findings. *Ante*, at 504-505. In thus requiring that Richmond's local evidence be severed from the context in which it was prepared, the majority would require **[**750]** cities seeking to eradicate the effects of past discrimination within their borders to reinvent the evidentiary wheel and engage in unnecessarily duplicative, costly, and time-consuming factfinding.

No principle of federalism or of **[***917]** federal power, however, forbids a state or local government to draw upon a nationally relevant historical record prepared by the Federal Government. See *Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986) (city is "entitled to rely on the experiences of Seattle and other cities" in enacting an adult theater ordinance, as the First Amendment "does not require a city . . . to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the cities relies upon is reasonably believed to be relevant to the problem that the city addresses"); see also *Steelworkers* v. *Weber*, 443 U.S., at 198, n. 1 ("Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice"); cf. *Wygant, supra*, at 296 (MARSHALL, J., dissenting) ("No race-conscious provision that purports to serve a remedial purpose can be fairly assessed in a vacuum"). n10 Of course, Richmond could have built an even more **[*548]** compendious record of past discrimination, one including additional stark statistics and additional individual accounts of past discrimination. But nothing in the Fourteenth Amendment imposes such onerous documentary obligations upon States and localities once the reality of past

discrimination is apparent. See *infra*, at 555-561.

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n10 Although the majority sharply criticizes Richmond for using data which it did not itself develop, it is noteworthy that the federal set-aside program upheld in *Fullilove* was adopted as a floor amendment "without any congressional hearings or investigation whatsoever." L. Tribe, American Constitutional Law 345 (2d ed. 1988). The principal opinion in *Fullilove* justified the set-aside by relying heavily on the aforementioned studies by agencies like the Small Business Administration and on legislative reports prepared in connection with prior, failed legislation. See *Fullilove* v. *Klutznick*, 448 U.S., at 478 (opinion of Burger, C. J.) ("Although the Act recites no preambulary 'findings' on the subject, we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination"); see also *id.*, at 549-550, and n. 25 (STEVENS, J., dissenting) (noting "perfunctory" consideration accorded the set-aside provision); Days, Fullilove, 96 Yale L. J. 453, 465 (1987) ("One can only marvel at the fact that the minority set-aside provision was enacted into law without hearings or committee reports, and with only token opposition") (citation and footnote omitted).

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B

In my judgment, Richmond's set-aside plan also comports with the second prong of the equal protection inquiry, for it is substantially related to the interests it seeks to serve in remedying past discrimination and in ensuring that municipal contract procurement does not perpetuate that discrimination. The most striking aspect of the city's ordinance is the similarity it bears to the "appropriately limited" federal setaside provision upheld in *Fullilove*. 448 U.S., at 489. Like the federal provision, Richmond's is limited to five years in duration, *ibid.*, and was not renewed when it came up for reconsideration in 1988. Like the federal provision, Richmond's contains a waiver provision freeing from its subcontracting requirements those nonminority firms that demonstrate that they cannot comply **[***918]** with its provisions. *Id.*, at 483-484. Like the federal provision, Richmond's has a minimal impact on innocent third parties. While the measure affects 30% of *public* contracting dollars, that translates to only **[*549]** 3% of overall Richmond area contracting. Brief for Appellant 44, n. 73 (recounting federal census figures on construction in Richmond); see *Fullilove, supra*, at 484 (burden shouldered by nonminority firms is "relatively light" compared to "overall construction contracting opportunities").

Finally, like the federal provision, Richmond's does not interfere with any vested **[**751]** right of a contractor to a particular contract; instead it operates entirely prospectively. 448 U.S., at 484. Richmond's initiative affects only future economic arrangements and imposes only a diffuse burden on nonminority competitors -- here, businesses owned or controlled by nonminorities which seek subcontracting work on public construction projects. The plurality in *Wygant* emphasized the importance of not disrupting the settled and legitimate expectations of innocent parties. "While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive." *Wygant*, 476 U.S., at 283; see *Steelworkers* v. *Weber, supra*, at 208.

These factors, far from "justify[ing] a preference of any size or duration," *ante*, at 505, are precisely the factors to which this Court looked in *Fullilove*. The majority takes issue, however, with two aspects of Richmond's tailoring: the city's refusal to explore the use of race-neutral measures to increase minority business participation in contracting, *ante*, at 507, and the selection of a 30% set-aside figure. *Ante*, at 507-508. The majority's first

criticism is flawed in two respects. First, the majority overlooks the fact that since 1975, Richmond has barred both discrimination by the city in awarding public contracts and discrimination by public contractors. See Richmond, Va., City Code § 17.1 *et seq.* (1985). The virtual absence of minority businesses from the city's contracting rolls, indicated by the fact that such businesses have received less than 1% of public contracting dollars, **[*550]** strongly suggests that this ban has not succeeded in redressing the impact of past discrimination or in preventing city contract procurement from reinforcing racial homogeneity. Second, the majority's suggestion that Richmond should have first undertaken such race-neutral measures as a program of city financing for small firms, *ante*, at 507, ignores the fact that such measures, while theoretically appealing, have been discredited by Congress as ineffectual in eradicating the effects of past discrimination in this very industry. For this reason, this Court in *Fullilove* refused to fault Congress for not undertaking race-neutral measures as precursors to its race-conscious set-aside. See *Fullilove*, 448 U.S., at 463-467 (noting inadequacy of previous measures designed to give experience to minority businesses); see also **[***919]** *id.*, at 511 (Powell, J., concurring) ("By the time Congress enacted [the federal set-aside] in 1977, it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry"). The Equal Protection Clause does not require Richmond to retrace Congress' steps when Congress has found that those steps lead nowhere. Given the well-exposed limitations of race-neutral measures, it was thus appropriate for a municipality like Richmond to conclude that, in the words of JUSTICE BLACKMUN, "[i]n order to get beyond racism, we must first take account of race. There is no other way." *University of California Regents* v. *Bakke*, 438 U.S., at 407 (separate opinion). n11

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n11 The majority also faults Richmond's ordinance for including within its definition of "minority group members" not only black citizens, but also citizens who are "Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons." *Ante*, at 506. This is, of course, precisely the same definition Congress adopted in its set-aside legislation. *Fullilove, supra*, at 454. Even accepting the majority's view that Richmond's ordinance is overbroad because it includes groups, such as Eskimos or Aleuts, about whom no evidence of local discrimination has been proffered, it does not necessarily follow that the balance of Richmond's ordinance should be invalidated.

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[*551] As for Richmond's 30% target, the majority states that this figure "cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." *Ante*, at 507. The majority ignores two important facts. First, the set-aside measure affects only 3% of overall city contracting; thus, any imprecision in tailoring **[**752]** has far less impact than the majority suggests. But more important, the majority ignores the fact that Richmond's 30% figure was patterned directly on the *Fullilove* precedent. Congress' 10% figure fell "roughly halfway between the present percentage of minority contractors and the percentage of minority group members in the Nation." *Fullilove, supra*, at 513-514 (Powell, J., concurring). The Richmond City Council's 30% figure similarly falls roughly halfway between the present percentage of Richmond-based minority contractors (almost zero) and the percentage of minorities in Richmond (50%). In faulting Richmond for not presenting a different explanation for its choice of a set-aside figure, the majority honors *Fullilove* only in the breach.

III

I would ordinarily end my analysis at this point and conclude that Richmond's ordinance satisfies both the governmental interest and substantial relationship prongs of our Equal Protection Clause analysis. However, I am compelled to add more, for the majority has gone

beyond the facts of this case to announce a set of principles which unnecessarily restricts the power of governmental entities to take race-conscious measures to redress the effects of prior discrimination.

A

Today, for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures. *Ante*, at 493-494; *ante*, at 520 (SCALIA, J., concurring in judgment). **[***920]** This is an unwelcome development. A profound difference separates governmental actions that themselves are racist, **[*552]** and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism. See, *e. g.*, *Wygant* v. *Jackson Bd. of Education*, 476 U.S., at 301-302 (MARSHALL, J., dissenting); *Fullilove, supra*, at 517-519 (MARSHALL, J., concurring in judgment); *University of California Regents* v. *Bakke*, 438 U.S., at 355-362 (joint opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.).

Racial classifications "drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism" warrant the strictest judicial scrutiny because of the very irrelevance of these rationales. *Id.*, at 357-358. By contrast, racial classifications drawn for the purpose of remedying the effects of discrimination that itself was race based have a highly pertinent basis: the tragic and indelible fact that discrimination against blacks and other racial minorities in this Nation has pervaded our Nation's history and continues to scar our society. As I stated in *Fullilove*: "Because the consideration of race is relevant to remedying the continuing effects of past racial discrimination, and because governmental programs employing racial classifications for remedial purposes can be crafted to avoid stigmatization, . . . such programs should not be subjected to conventional 'strict scrutiny' -- scrutiny that is strict in theory, but fatal in fact." *Fullilove, supra*, at 518-519 (citation omitted).

In concluding that remedial classifications warrant no different standard of review under the Constitution than the most brutal and repugnant forms of state-sponsored racism, a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice. I, however, do not believe this Nation is anywhere close to eradicating racial discrimination or its vestiges. In constitutionalizing its wishful thinking, **[*553]** the majority today does a grave disservice not only to those victims of past and present racial discrimination in this Nation whom government has sought to assist, but also to this Court's long tradition of approaching issues of race with the utmost sensitivity.

[753]** B

I am also troubled by the majority's assertion that, even if it did not believe generally in strict scrutiny of race-based remedial measures, "the circumstances of this case" require this Court to look upon the Richmond City Council's measure with the strictest scrutiny. *Ante*, at 495. The sole such circumstance which the majority cites, however, is the fact that blacks in Richmond are a "dominant racial grou[p]" in the city. *Ibid.* In support of this characterization of dominance, the majority observes that "blacks constitute approximately 50% of the population of the city of Richmond" and that "[f]ive of the nine **[***921]** seats on the City Council are held by blacks." *Ibid.*

While I agree that the numerical and political supremacy of a given racial group is a factor bearing upon the level of scrutiny to be applied, this Court has never held that numerical inferiority, standing alone, makes a racial group "suspect" and thus entitled to strict scrutiny review. Rather, we have identified *other* "traditional indicia of suspectness": whether a group has been "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." *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1, 28 (1973).

It cannot seriously be suggested that nonminorities in Richmond have any "history of purposeful unequal treatment." *Ibid.* Nor is there any indication that they have any of the disabilities that have characteristically afflicted those groups this Court has deemed suspect. Indeed, the numerical and political dominance of nonminorities within **[*554]** the State of Virginia and the Nation as a whole provides an enormous political check against the "simple racial politics" at the municipal level which the majority fears. *Ante*, at 493. If the majority really believes that groups like Richmond's nonminorities, which constitute approximately half the population but which are outnumbered even marginally in political fora, are deserving of suspect class status for these reasons alone, this Court's decisions denying suspect status to women, see *Craig* v. *Boren*, 429 U.S. 190, 197 (1976), and to persons with below-average incomes, see *San Antonio Independent School Dist., supra*, at 28, stand on extremely shaky ground. See *Castaneda* v. *Partida*, 430 U.S. 482, 504 (1977) (MARSHALL, J., concurring).

In my view, the "circumstances of this case," *ante*, at 495, underscore the importance of *not* subjecting to a strict scrutiny straitjacket the increasing number of cities which have recently come under minority leadership and are eager to rectify, or at least prevent the perpetuation of, past racial discrimination. In many cases, these cities will be the ones with the most in the way of prior discrimination to rectify. Richmond's leaders had just witnessed decades of publicly sanctioned racial discrimination in virtually all walks of life -- discrimination amply documented in the decisions of the federal judiciary. See *supra*, at 544-546. This history of "purposefully unequal treatment" forced upon minorities, not imposed by them, should raise an inference that minorities in Richmond had much to remedy -- and that the 1983 set-aside was undertaken with sincere remedial goals in mind, not "simple racial politics." *Ante*, at 493.

Richmond's own recent political history underscores the facile nature of the majority's assumption that elected officials' voting decisions are based on the color of their skins. In recent years, white and black councilmembers in Richmond have increasingly joined hands on controversial matters. When the Richmond **[***922]** City Council elected a black man mayor in 1982, for example, his victory was won with the **[*555]** support of the city council's four white members. Richmond Times-Dispatch, July 2, 1982, p. 1, col. 1. The vote on the set-aside plan a year later also was not purely **[**754]** along racial lines. Of the four white councilmembers, one voted for the measure and another abstained. App. 49. The majority's view that remedial measures undertaken by municipalities with black leadership must face a stiffer test of Equal Protection Clause scrutiny than remedial measures undertaken by municipalities with white leadership implies a lack of political maturity on the part of this Nation's elected minority officials that is totally unwarranted. Such insulting judgments have no place in constitutional jurisprudence.

C

Today's decision, finally, is particularly noteworthy for the daunting standard it imposes upon States and localities contemplating the use of race-conscious measures to eradicate the present effects of prior discrimination and prevent its perpetuation. The majority restricts the use of such measures to situations in which a State or locality can put forth "a prima facie case of a constitutional or statutory violation." *Ante*, at 500. In so doing, the majority calls into question the validity of the business set-asides which dozens of municipalities across this Nation have adopted on the authority of *Fullilove*.

Nothing in the Constitution or in the prior decisions of this Court supports limiting state authority to confront the effects of past discrimination to those situations in which a prima facie case of a constitutional or statutory violation can be made out. By its very terms, the

majority's standard effectively cedes control of a large component of the content of that constitutional provision to Congress and to state legislatures. If an antecedent Virginia or Richmond law had defined as unlawful the award to nonminorities of an overwhelming share of a city's contracting dollars, for example, Richmond's subsequent set-aside initiative would then satisfy **[*556]** the majority's standard. But without such a law, the initiative might not withstand constitutional scrutiny. The meaning of "equal protection of the laws" thus turns on the happenstance of whether a state or local body has previously defined illegal discrimination. Indeed, given that racially discriminatory cities may be the ones least likely to have tough antidiscrimination laws on their books, the majority's constitutional incorporation of state and local statutes has the perverse effect of inhibiting those States or localities with the worst records of official racism from taking remedial action.

Similar flaws would inhere in the majority's standard even if it incorporated only federal antidiscrimination statutes. If Congress tomorrow dramatically expanded Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.* -- or alternatively, if it repealed that legislation altogether -- the meaning of equal protection would change precipitately along with it. Whatever the Framers of the Fourteenth Amendment had in mind in 1868, it certainly was not that the content of their Amendment would turn on the amendments to or the evolving interpretations **[***923]** of a federal statute passed nearly a century later. n12

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n12 Although the majority purports to "adher[e] to the standard of review employed in *Wygant," ante*, at 494, the "prima facie case" standard it adopts marks an implicit rejection of the more generally framed "strong basis in evidence" test endorsed by the *Wygant* v. *Jackson Bd. of Education*, 476 U.S. 267 (1986) plurality, and the similar "firm basis" test endorsed by JUSTICE O'CONNOR in her separate concurrence in that case. See *id.*, at 289; *id.*, at 286. Under those tests, proving a prima facie violation of Title VII would appear to have been but one means of adducing sufficient proof to satisfy Equal Protection Clause analysis. See *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U.S. 616, 632 (1987) (plurality opinion) (criticizing suggestion that race-conscious relief be conditioned on showing of a prima facie Title VII violation).

The rhetoric of today's majority opinion departs from *Wygant* in another significant respect. In *Wygant*, a majority of this Court rejected as unduly inhibiting and constitutionally unsupported a requirement that a municipality demonstrate that its remedial plan is designed only to benefit specific victims of discrimination. See 476 U.S., at 277-278; *id.*, at 286 (O'CONNOR, J., concurring in part and concurring in judgment); *id.*, at 305 (MARSHALL, J., dissenting). JUSTICE O'CONNOR noted the Court's general agreement that a "remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required. . . . [A] plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored,' or 'substantially related,' to the correction of prior discrimination by the state actor." *Id.*, at 286-287. The majority's opinion today, however, hints that a "specific victims" proof requirement might be appropriate in equal protection cases. See, *e. g., ante*, at 504 (States and localities "must identify that discrimination . . . with some specificity"). Given that just three Terms ago this Court rejected the "specific victims" idea as untenable, I believe these references -- and the majority's cryptic "identified discrimination" requirement -- cannot be read to require States and localities to make such highly particularized showings. Rather, I take the majority's standard of "identified discrimination" merely to require some quantum of proof of discrimination within a given jurisdiction that exceeds the proof which Richmond has put forth here.

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[*557] **[**755]** To the degree that this parsimonious standard is grounded on a view that either § 1 or § 5 of the Fourteenth Amendment substantially disempowered States and localities from remedying past racial discrimination, *ante*, at 490-491, 504, the majority is seriously mistaken. With respect, first, to § 5, our precedents have never suggested that this provision -- or, for that matter, its companion federal-empowerment provisions in the Thirteenth and Fifteenth Amendments -- was meant to pre-empt or limit state police power to undertake raceconscious remedial measures. To the contrary, in *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), we held that § 5 "is a *positive* grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Id.*, at 651 (emphasis added); see *id.*, at 653-656; *South Carolina* v. *Katzenbach*, 383 U.S. 301, 326-327 (1966) (interpreting similar provision of the Fifteenth Amendment to empower Congress to "implemen[t] the rights created" by its passage); see also *City of Rome* v. **[*558]** *United States*, 446 U.S. 156, 173 (1980) (same). Indeed, we have held that Congress has this authority **[***924]** even where no constitutional violation has been found. See *Katzenbach* v. *Morgan, supra* (upholding Voting Rights Act provision nullifying state English literacy requirement we had previously upheld against Equal Protection Clause challenge). Certainly *Fullilove* did not view § 5 either as limiting the traditionally broad police powers of the States to fight discrimination, or as mandating a zero-sum game in which state power wanes as federal power waxes. On the contrary, the *Fullilove* plurality invoked § 5 only because it provided specific and certain authorization for the Federal Government's attempt to impose a raceconscious condition on the dispensation of federal funds by state and local grantees. See *Fullilove*, 448 U.S., at 476 (basing decision on § 5 because "[i]n certain contexts, there are limitations on the reach of the Commerce Power").

As for § 1, it is too late in the day to assert seriously that the Equal Protection Clause prohibits States -- or for that matter, the Federal Government, to whom the equal protection guarantee has largely been applied, see *Bolling* v. *Sharpe*, 347 U.S. 497 (1954) -- from enacting race-conscious remedies. Our cases in the areas of school desegregation, voting rights, and affirmative action have demonstrated time and again that race is constitutionally germane, precisely because race remains dismayingly relevant in American life.

In adopting its prima facie standard for States and localities, the majority closes its eyes to this constitutional history and social reality. So, too, does JUSTICE SCALIA. He would further limit consideration of race to those cases in which States find it "necessary to eliminate their own maintenance of a system of unlawful racial classification" -- a "distinction" which, he states, "explains our school desegregation cases." *Ante*, at 524 (SCALIA, J., concurring in **[**756]** judgment). But this Court's remedy-stage school desegregation decisions cannot so conveniently be cordoned off. These decisions (like those involving voting rights and affirmative action) **[*559]** stand for the same broad principles of equal protection which Richmond seeks to vindicate in this case: all persons have equal worth, and it is permissible, given a sufficient factual predicate and appropriate tailoring, for government to take account of race to eradicate the present effects of race-based subjugation denying that basic equality. JUSTICE SCALIA's artful distinction allows him to avoid having to repudiate "our school desegregation cases," *ibid.*, but, like the arbitrary limitation on race-conscious relief adopted by the majority, his approach "would freeze the status quo that is the very target" of the remedial actions of States and localities. *McDaniel* v. *Barresi*, 402 U.S., at 41; see also *North Carolina Bd. of Education* v. *Swann*, 402 U.S., at 46 (striking down State's flat prohibition on assignment of pupils on basis of race as impeding an "effective remedy"); *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 159-162 (1977) (upholding New York's use of racial criteria in drawing district lines so as to comply with § 5 of the Voting Rights Act).

The fact is that Congress' concern in passing the Reconstruction **[***925]** Amendments, and particularly their congressional authorization provisions, was that States would *not* adequately respond to racial violence or discrimination against newly freed slaves. To

interpret any aspect of these Amendments as proscribing state remedial responses to these very problems turns the Amendments on their heads. As four Justices, of whom I was one, stated in *University of California Regents* v. *Bakke*:

> "[There is] no reason to conclude that the States cannot voluntarily accomplish under § 1 of the Fourteenth Amendment what Congress under § 5 of the Fourteenth Amendment validly may authorize or compel either the States or private persons to do. A contrary position would conflict with the traditional understanding recognizing the competence of the States to initiate measures consistent with federal policy in the absence of congressional pre-emption of the subject matter. *Nothing* **[*560]** *whatever in the legislative history of either the Fourteenth Amendment or the Civil Rights Acts even remotely suggests that the States are foreclosed from furthering the fundamental purpose of equal opportunity to which the Amendment and those Acts are addressed*. Indeed, voluntary initiatives by the States to achieve the national goal of equal opportunity have been recognized to be essential to its attainment. 'To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment.' *Railway Mail Assn.* v. *Corsi*, 326 U.S. 88, 98 (Frankfurter, J., concurring)." 438 U.S., at 368 (footnote omitted; emphasis added).

In short, there is simply no credible evidence that the Framers of the Fourteenth Amendment sought "to transfer the security and protection of all the civil rights . . . from the States to the Federal government." The *Slaughter-House Cases*, 16 Wall. 36, 77-78 (1873). n13 The three Reconstruction Amendments undeniably "worked a dramatic change in the balance between congressional and state power," *ante*, at 490: they forbade state-sanctioned slavery, forbade the statesanctioned denial of the right to vote, and (until the content of the Equal Protection Clause was substantially applied to the Federal Government through the Due Process Clause of the Fifth Amendment) uniquely forbade States to deny equal protection. **[**757]** The Amendments also specifically empowered the Federal Government to combat discrimination at a time when the breadth of federal power under the Constitution was less apparent than it is today. But nothing in the Amendments themselves, or in our long history of interpreting or applying those momentous charters, suggests that **[*561]** States, exercising their police power, are in any way constitutionally inhibited from working alongside the Federal Government in the fight against discrimination and its effects.

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n13 Tellingly, the sole support the majority offers for its view that the Framers of the Fourteenth Amendment intended such a result are two law review articles analyzing this Court's recent affirmative-action decisions, and a Court of Appeals decision which relies upon statements by James Madison. *Ante*, at 491. Madison, of course, had been dead for 32 years when the Fourteenth Amendment was enacted.

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[*926]** IV

The majority today sounds a full-scale retreat from the Court's longstanding solicitude to race-conscious remedial efforts "directed toward deliverance of the century-old promise of equality of economic opportunity." *Fullilove*, 448 U.S., at 463. The new and restrictive tests it applies scuttle one city's effort to surmount its discriminatory past, and imperil those of dozens more localities. I, however, profoundly disagree with the cramped vision of the Equal

Protection Clause which the majority offers today and with its application of that vision to Richmond, Virginia's, laudable set-aside plan. The battle against pernicious racial discrimination or its effects is nowhere near won. I must dissent.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins, dissenting.

I join JUSTICE MARSHALL's perceptive and incisive opinion revealing great sensitivity toward those who have suffered the pains of economic discrimination in the construction trades for so long.

I never thought that I would live to see the day when the city of Richmond, Virginia, the cradle of the Old Confederacy, sought on its own, within a narrow confine, to lessen the stark impact of persistent discrimination. But Richmond, to its great credit, acted. Yet this Court, the supposed bastion of equality, strikes down Richmond's efforts as though discrimination had never existed or was not demonstrated in this particular litigation. JUSTICE MARSHALL convincingly discloses the fallacy and the shallowness of that approach. History is irrefutable, even though one might sympathize with those who -- though possibly innocent in themselves -- benefit from the wrongs of past decades.

[*562] So the Court today regresses. I am confident, however, that, given time, it one day again will do its best to fulfill the great promises of the Constitution's Preamble and of the guarantees embodied in the Bill of Rights -- a fulfillment that would make this Nation very special.

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ARTICLE: Affirmative Action: Past, Present, and Future

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+ Simeon E. Baldwin Professor of Law, Yale University. This Article is a chapter from a forthcoming book, Peter H. Schuck, Diversity in America: Keeping Government at a Safe Distance (Harvard University Press, 2003). The Article reflects comments from many readers, including Edder Bennett, David Bernstein, Derek Bok, Jack Citrin, Nicole Stelle Garnett, Nathan Glazer, Samuel Issacharoff, Linda Krieger, Walter Lafeber, Evelyn Eskin Major, Rick Pildes, Jonathan Rauch, Terrance Sandalow, Marcy Schuck, John Skrentny, Peter Spiro, Stephen Sugarman, Jacob Sullivan, and a faculty workshop at Boalt Law School. Jacob Sullivan, Yale Law School class of 2003, provided superb research assistance. I am also grateful to the Rockefeller Foundation for a month-long residency at Bellagio, Italy during which I worked on this project. A very short version of the Article appears in Brookings Review (Winter 2002), under the title Affirmative Action: Don't End It or Mend It - Bend It.

SUMMARY:
... Affirmative action policy is even more divisive and unsettled today than at its inception more than thirty years ago. ... Because the programming diversity rationale for preferences is so poorly supported by the evidence, even some who defend affirmative action in general have excoriated the FCC's preferences in particular. ... The University of Michigan, whose affirmative action program is detailed in a pending lawsuit, weighs race even more heavily than the average school in the Bowen-Bok sample. ... By excluding them, more radical advocates say, the supposedly **race-neutral** merit standard in fact operates as a "white-people's affirmative action" program. ... For the diversity rationale to justify affirmative action in higher education, it must do so because of the genuine diversity benefits that flow to students and faculty, especially those in the favored groups. ... They then assume that all of these students have the common experience of growing up black in America and the special perspectives that go with that experience - what Yale Law School dean Anthony Kronman calls value-diversity. ... Whatever the content of Patterson's proposal, the political reality is that once affirmative action preferences are established, they are almost impossible to dismantle. ...

TEXT:
[*2]

I. Introduction

Affirmative action policy is even more divisive and unsettled today than at its inception more than thirty years ago. This is a remarkable socio-political fact. I know of no other public policy since the rise of the administrative state during the New Deal that has remained so intensely unpopular yet has survived so long. [1] Equally remarkable, its current unpopularity coincides with strong support for ethnic diversity in all areas of public and private life and with unprecedented social progress by blacks [2] and other minorities. [3] This Article analyzes the true nature of this conflict, how it arose, why it endures, and the role that law has played in fomenting and perpetuating it - often and increasingly in the name of diversity.

I set the stage by defining affirmative action, distinguishing it from non-discrimination, and identifying the most important forms and policy domains where it appears. I then discuss the importance of context to a normative assessment of affirmative action and emphasize several developments that create a new context: immigration and intermarriage patterns, more fluid notions of identity, greater socioeconomic convergence of minorities with whites, and recent studies revealing the actual magnitude of college and professional school **[*3]** admission preferences. In this new context, I argue, the ethno-racial categories on which affirmative action relies are losing whatever coherence and normative appeal they may once have had. Next, I develop the principal rationales and normative justifications offered by affirmative action's advocates, as well as the counter-arguments. I focus here on the diversity rationale, particularly in the domain of higher education, where it now assumes the central justificatory role. In an effort to understand how so unpopular a policy could have survived for so long, I describe the policy's political and regulatory past and how the public views it today. After reviewing what is known about the actual consequences of affirmative action, I consider two vital issues: what an America without it would look like, and whether attractive alternatives exist.

I conclude the analysis by explaining why race is a singularly and increasingly problematic principle of distributive justice in America. My own view, as will emerge, is that affirmative action, although well-intended, is hard to square with liberal ideals in general and the diversity ideal (properly understood) in particular. The benefits it confers are too small, too arbitrarily and narrowly targeted, and too widely resented to justify the costs that it imposes - its unfairness to other individuals, its propensity to corrupt and debase public discourse, its incoherent programmatic categories, and its reinforcement of the pernicious and increasingly meaningless use of race as a central principle of distributive justice rather than the other distributive principles, particularly merit, with which most Americans, whites and minorities alike, strongly identify. (Below, I analyze the highly contested ideal of merit as one of affirmative action's rationales.) [4]

My chief concern here is not with the constitutionality of ethno-racial affirmative action, but with its wisdom as public policy. In my view - much too briefly stated - the Constitution should be interpreted to permit Congress to adopt a law preferring blacks so long as it does not violate the heightened constitutional protection that other racial minorities enjoy. At the time of the Fourteenth Amendment, after all, Congress did just that. [5] Congress enacts laws every day that favor one group over another, laws that if rational are constitutional. That being so, Congress has the power to favor blacks at the expense of the white majority if it believes that this would be sound policy. Whether it can favor blacks over other disadvantaged ethno-racial minorities, as affirmative action sometimes does, is less clear.

Be that as it may, the question I address here is whether, assuming such a **[*4]** law would be constitutional, Congress (or a state legislature) should enact it. In explaining why my answer to this question is no, I pay special attention to the diversity rationale for affirmative action both because of my larger interest in how law manages diversity, [6] and because diversity is the only broad rationale that the Supreme Court has not yet rejected. This rationale, I find, is too flimsy and poorly tailored to the relevant social facts to satisfy the constitutional standard for affirmative action now applied by the Court. But my larger point is

that even if an ethno-racial preference could meet the Court's standard, it should not be adopted and that most proposals for reform would be impractical, ineffective, or make matters even worse.

Accordingly, I would bar government from using or mandating affirmative action, except perhaps [7] as a carefully-tailored, time-limited remedy for the continuing effects of past bias in the kinds of situations where the Supreme Court has long permitted it. [8] On the other hand, I believe that private institutions that want to use affirmative action for diversity or other purposes should be generally free to do so. In my vision of a diverse liberal polity, private entities organized primarily for purposes of fellowship or the promotion of group values should be able to implement those goals through membership or other policies so long as they do not violate the larger community's most fundamental normative commitments, including non-discrimination against racial minorities. Specifically, I would permit private affirmative action if the entity engaging in it publicly discloses the nature and magnitude of its preferences and does not discriminate against blacks and other minorities entitled to the highest level of protection under the Fourteenth Amendment.

No sensible person who carefully considers the evidence and arguments I marshal here can be wholly satisfied with either the status quo or the position I espouse. The cruel legacy of 250 years of slavery in America has proved more stubborn than even Frederick Douglass, a former slave and consummate realist, imagined. Affirmative action, for all its problems, promises to do something to repair this incalculable damage. This explains why thoughtful individuals like Orlando Patterson, Sanford Levinson, David Hollinger, Nathan Glazer, Derek Bok, and many others continue to support it even though, as I shall show, the empirical and normative premises of their own arguments have become harder and harder to sustain. Reasonable people can and obviously do differ about these premises and about the tradeoffs that any reformed policy would entail. My ambitions here are to dispel some of the misunderstandings that plague the debate, to clarify what is actually at stake, and to propose a better reconciliation **[*5]** of the conflicting social values.

II. Definitions, Designs, and Domains

A. Definitions

By affirmative action, I mean a program in which people who control access to important social resources offer preferential access to those resources for particular groups that they think need special treatment. [9] In this context, then, I use the terms "affirmative action" and "preferences" interchangeably. [10] By affirmative action, I also refer to its typical programmatic forms - more or less systematic, continuous, bureaucratized, rule-or routine-governed, and often outcome-determinative. [11] I also focus on ethno-racial preferences rather than those based on income, age, gender, or disability, although some of my arguments also apply to them. Unless the context indicates otherwise, I use race to include the ethnicities favored by affirmative action.

As the adjective "affirmative" suggests, I mean to distinguish affirmative action from a more passive practice, non-discrimination, in which the normative principle is simply to refrain from treating people differently on the basis of their race or other protected characteristics. [12] The distinction between affirmative action and non-discrimination is clear and important both in politics and in principle, though not always in practice. [13] In sharp contrast to affirmative action, non-discrimination is no longer a controversial norm in American society except among bigots and some extreme libertarians. [14] The punctilio of public discourse severely condemns any hint of anti-black or anti-minority attitudes. As Alan Wolfe observes, "No credible public figure - literally none - seeks to bind white Americans closer together by means of rhetoric that sets them against blacks." [15] The public associates non-discrimination with the universally-praised **[*6]** norm of equal opportunity, while it generally disparages preferences as a demand for equal outcomes or special treatment. Some strong egalitarians

favor affirmative action precisely because they think it will equalize results, but most affirmative action proponents make a more limited argument - that it is essential to achieve genuine equal opportunity.

Both proponents and opponents of affirmative action define non-discrimination in ways they hope will draw on its greater legitimacy. [16] Proponents claim that affirmative action, by leveling the playing field, is simply another form of non-discrimination. Opponents define non-discrimination to include greater outreach to minority communities in hopes of going beyond "old boy" networks and enlarging the pool of minority applicants who will then have an equal opportunity to compete for the prize on the basis of merit. Outreach, in this view, includes more minorities, vindicates the non-discrimination, equal opportunity, and merit principles, and leaves no one with a legitimate claim to the prize worse off - whereas preferences, quotas, and goals subject to sanctions violate all of these principles. This makes it easy, then, for affirmative action critics to support outreach. [17]

Not so fast. In fact, greater outreach is neither cost-free nor neutral. In order to reach out, one must expend additional resources, targeting them on some groups and not on others and, as with affirmative action, increasing the probability that members of the target group will win the prize. If we dismiss this problem as de minimis because only limited resources are involved, we should nonetheless recognize that we are now on a slippery slope that could move us toward preferences of a more robust sort. [18]

Evidentiary problems also propel us from non-discrimination toward preferences, especially when proof of intentional bias is required. Anti-discrimination enforcers need baselines or other indicia of bias to help them gauge its extent, the need for remedial measures, and the measures' effects. They naturally prefer numerical benchmarks - in employment, for example, a group's share of the working age population in the relevant labor pool - as a basis for inferring whether the employer discriminated against the group. In anti-discrimination programs, and also in voluntary affirmative action programs, these benchmarks may take the form and rhetoric of mere "goals" toward which firms should strive but that do not necessarily trigger sanctions if **[*7]** they are not met. The "not necessarily" is what pushes the anti-discrimination program down the slippery slope toward preferences. For legal and psychological reasons, soft, tentative goals tend to become harder, more rigid standards that raise a presumption of bias if not reached. The strength of the presumption, the kind of evidence that can rebut it, the effect of rebuttal on the burden of proof, and other technical issues are the province of an increasingly arcane anti-discrimination law. Goals that at their inception were merely precatory become more binding and consequential; they either mark "safe harbors" where firms meeting them can expect protection, or condemn those that do not meet them as at least prima facie illegal. [19]

Although the government does not impose specific goals on private universities but exhorts them to set their own, admissions officers nonetheless feel external pressure and internal compunction to use preferences to meet the goals they set. [20] Under these various pressures, three related distinctions - between non-discrimination and affirmative action, equality of opportunity and equality of result, and goals and preferences - blur at the edges. Some affirmative action advocates use this blurring to deny that the distinctions exist; others recognize the distinctions but define non-discrimination, equal opportunity, and goals in ways that imply greater normative and programmatic scope for affirmative action. [21] In contrast, I view these distinctions as foundational (though again, blurry at the borders) and believe that they condemn affirmative action. Americans overwhelmingly agree, and they have organized a philosophy around these three distinctions. [22] Public convictions, of course, may still be false; our history is replete with collective delusions - norms favoring racism and subordination of women, for example. All I claim here is that these distinctions matter to almost all of us.

Another principle, merit, is central to the foundational character of these distinctions. [23]

Although I discuss the merit principle at length below, I do not provide a categorical definition of it for one simple reason: decisionmakers who allocate a job, admission slot, or any other scarce resource on the basis of merit properly define it in their own ways. Merit's content is wholly contextual; it derives meaning only from one's particular conditions and purposes. [24] We may criticize particular conceptions of merit in context; these critiques sometimes **[*8]** persuade the decision-maker to change its conception. This is why some colleges decided to recruit women and why others are abandoning standardized tests. [25] Rather than dispute the prevailing definition of merit in a particular context, we may instead argue that the applicant satisfies it. To assess affirmative action, then, we must begin with the definition of merit on which it implicitly rests and proceed to analyze how well this definition serves the policy's purported rationales. This will be my approach.

B. Designs

Affirmative action programs are structured differently, depending on how they combine a number of distinct features. I note five of them here.

Favored groups. The standard favored groups, which David Hollinger calls the "ethno-racial pentagon," [26] track the major Census categories: blacks, Hispanics, Native Americans, Asian and Pacific Islanders, and women. Other groups (e.g., Arabs and others of Middle Eastern descent) have demanded inclusion, [27] and particular programs may include fewer or more groups. Some preferences cover the disabled and the economically disadvantaged; homosexuals, however, are seldom if ever covered even when non-discrimination laws protect them. [28] Which groups should be covered and how they should be defined are highly controversial issues. Blacks and to a lesser extent Native Americans are always covered but consensus ends there. Even some proponents of preferences doubt that immigrants should be included.

Kind of actions. The program may direct or permit decision-makers to report data on the composition of their populations; engage in outreach and dissemination of information to the general public and members of the favored groups in particular; set goals and timetables; impose numerical quotas - or other things in between.

Mandatory, voluntary, or prohibited. Compliance with affirmative action may be voluntary, legally mandated, or legally prohibited. I use the term "voluntary" loosely here to mean an absence of legal sanctions for non-compliance, such as ineligibility for participation in public programs or subsidies. Programs mandated by legislation or regulation raise the most difficult legal and policy issues, of course, [29] but voluntary programs like those in private higher education **[*9]** also raise some of them..

Kind and weight of preference. Preferences may affect individuals' eligibility for employment or housing, bids for contracts, college admission, or many other public and private advantages. Preferences may add weight to any beneficiary's claim or may instead function only as a tie-breaker when competing claimants are otherwise equally qualified.

Methodology, exemptions, and duration. Programs differ in how they measure membership in favored groups, rank claimants according to various eligibility or performance criteria, and so forth. Programs may exempt small businesses, permit religious institutions to employ only co-religionists, or include other special provisions. Most are open-ended, but some can be time-limited, becoming inapplicable once certain conditions are met (e.g., when a firm's minority employees reach a level equal to their share of the relevant population).

C. Domains

Federally-mandated affirmative action was first established in the employment area, and the scope of affirmative action in both public and private employment vastly expanded

thereafter, as detailed below. It now covers much of the nation's workforce in both public and private employment, protects not only the ethno-racial pentagon but women and the disabled as well, and extends beyond recruitment and hiring decisions to include promotions, terminations, in-service training, and other workplace practices. The U.S. military establishment is the work setting where affirmative action has been particularly pervasive and arguably most successful. [30] In public and private contracting, federal, state, and local law often imposes set-asides, quotas, and other preferences for minority contractors and sub-contractors. [31]

Affirmative action operates in all parts of the educational system, no other domain practices and supports it so enthusiastically. [32] Public education systems often mandate it to assign pupils to different schools and school districts and to **[*10]** structure their programs in order to achieve and then maintain some ideal of racial or ethnic balance in the face of enrollment changes that might "tip" this carefully-engineered balance and precipitate white flight. These assignment policies have generated bitter political and legal conflicts in Boston, San Francisco, and many other cities. [33] Colleges and universities with selective admissions criteria - a minority of institutions, but exercising disproportionate social influence - use affirmative action to select students, balance residential units, award financial aid, employ administrators, recruit and promote faculty, run athletic programs, staff student organizations, award contracts, and conduct other aspects of their institutional lives. A few states bar affirmative action in college admissions, as we shall see, and others mandate it only for public institutions. Nevertheless, selective private institutions, including their alumni, are among its most committed advocates. Affirmative action even extends to shaping how university scientists conduct their research; a 1993 law requires the National Institutes of Health to ensure that women and minorities are involved in clinical studies as researchers and as subjects of research. [34]

Banks and other lenders are required to use affirmative action in their programs, including mortgages, construction and auto loans, and the like. Under the Community Reinvestment Act, financial institutions must, on pain of losing their public charters, assure that their facilities and investments are located in minority and low-income communities. Public housing projects are subject to affirmative action requirements, and private developers receiving public credit, funds, or other public assistance must assure that members of favored groups enjoy equal access to their projects, sometimes including set-asides and quotas. [35] The law's efforts to diversify housing racially and economically is the subject of a chapter in a forthcoming book. [36]

Electoral districting is another affirmative action venue. [37] Federal courts have interpreted the Voting Rights Act of 1965 and its 1982 amendments to require the states to draw electoral lines for legislative districts and other decision-making **[*11]** bodies so as to maximize the number of "majority-minority" districts, those with a sufficient concentration of the favored minority group that one of its members is very likely to win. [38] Since 1993, however, Supreme Court decisions have cast doubt on the extent to which districting may take race into account. [39] The situation is complicated by the fact that the Court seems willing to permit the line drawers to use partisanship, which for blacks has been a strong predictor of race. Growing evidence, however, suggests that at least 20% of whites vote for black candidates even in some Deep South states (which weakens any justification for packing so many blacks into majority-minority districts) and that packing them in this way has undercut their interests. [40] In the redistricting cycle that began in 2001, the Court's mixed signals have sowed enormous uncertainty and confusion. [41]

The Federal Communications Commission (FCC) has affirmative action programs governing the agency's award of TV and radio broadcasting licenses. The agency extends its diversity requirements to programming content, the employment and investment practices of potential and existing licensees, and the financing of auction bids by potential licensees. Although the federal courts have sometimes invalidated FCC programs not authorized by Congress, [42] the

agency, citing the need for more diversity in broadcasting, has pressed ahead with them anyway - with little success. [43] Indeed, on the very day that the FCC suffered a major defeat in court, [44] the U.S. Department of Commerce reported that the number of TV stations owned by minorities had dipped to the lowest level in more than a decade, while minority ownership of radio stations had risen marginally in the preceding two years, with industry consolidation and deregulation making further minority ownership gains more difficult. [45] The FCC's programs, moreover, face rough sledding under the new agency leadership installed by President Bush. [46]

[*12] The magnitude of FCC preferences is huge. By awarding licenses for the spectrum it controls, it confers enormously valuable economic rights on a very small number of individuals and firms. In recent years, it has awarded much of the spectrum by auctioning off licenses to the highest qualified bidder, and it has created programs to subsidize minority groups so that they can compete in the auctions as "designated bidders." This status gives them bidding credits such that they need pay the government only a fraction of the winning bid and can pay in installments over a long period at favorable interest rates. Combining both of these advantages enables the designated bidder to pay the government only 50% of its winning bid. Given the economic value of the licenses, these advantages are worth scores of millions of dollars to those who can use them. [47]

Because the programming diversity rationale for preferences is so poorly supported by the evidence, [48] even some who defend affirmative action in general have excoriated the FCC's preferences in particular. For example, Michael Kinsley, editor of Slate magazine, an avowed liberal, and supporter of some affirmative action programs, views the FCC's as

especially farcical. Members of favored groups who get valuable licenses, for nothing or at a discount, are more or less free to resell them, at market rates, to white males or anyone else. The policy amounts to the simple anointment of black millionaires. And, because black-millionaire businessmen are such an obvious exception to the generalization that "black equals disadvantaged," these policies help to discredit affirmative action even in situations where the generalization makes more sense. [49]

These abuses, moreover, extend beyond race-based affirmative action to FCC programs that give extremely valuable preferences to small minority-owned firms. Many large companies have helped to organize small ones with token minority leadership to front for them in bidding at auctions of wireless frequencies for which the large ones are legally disadvantaged or ineligible. [50]

[*13] Finally, the law requires many private groups that receive government grants or contracts to engage in affirmative action. Much litigation has challenged the implementation of these programs. Courts, for example, have ordered labor unions to undertake affirmative action, sometimes even appointing special masters to supervise compliance. [51] Private groups often press for affirmative action even when the law does not require it. The American Bar Association, for example, seeks to increase the number of minority judicial law clerks - surely among the most privileged young people in America. [52]

III. The Importance of Context

Should all of these domains (and others not mentioned here) be governed by the same principles, or should those principles instead differ depending on the particular domain at issue? This "meta-question" relates closely to the question of merit, which I discuss below. In his well-known book Spheres of Justice, philosopher Michael Walzer persuasively argues that a liberal society should aspire to a "complex equality" in which different domains ("spheres" in his parlance) are governed by different principles of justice depending on the social

meanings and competing values implicated in each domain and the different balances that may be struck there among those values. [53] Few affirmative action advocates, for example, would suggest that morality requires us to practice it in our own families, homes, or friendships. Parents looking for babysitters or people seeking professional services are seldom equal opportunity employers. On the other side, few opponents of affirmative action object on moral grounds to the traditional practice of ethnic ticket-balancing by political parties or to special efforts by urban police departments to recruit minority and female officers. People who take these views are not necessarily moral hypocrites or even logically inconsistent. They recognize that different principles are appropriate in different public and private domains by virtue of the distinct values that are morally relevant there. [54]

Certain preferences engender little public controversy. Veterans' preferences for civil service jobs, for example, have been in place for many decades and remain politically and legally secure despite the fact that they greatly disadvantage women who could not serve in the armed forces in significant numbers until very recently, but who wish to compete for those jobs. [55] Many colleges **[*14]** and universities give admission preferences to athletes, alumni children, and those from remote areas. [56] However one views the merits of these practices (I am quite dubious about the first two), each is rationalized on the basis of particular contextual facts - veterans' sacrifices and interrupted careers, the capacity of college athletics and kinship to cement alumni loyalty, [57] and the supposed value of geographic diversity - that have some normative weight relevant to one's overall evaluation of the practices.

In assessing (and re-assessing) affirmative action, then, context matters. In reality, its policy context is being transformed in ways that greatly weaken its empirical, conceptual, and normative underpinnings. First, new patterns of immigration, intermarriage, and identity are completing the process that science long ago began - rendering affirmative action's ethno-racial categories ever more meaningless. Second, recent studies show that the preferences, at least in higher education admissions, have grown very large. Third, only a tenuous connection exists between being in a favored category and being socially disadvantaged enough to need preferential treatment at the expense of others with their own justice-based claims. Fourth, mounting evidence suggests that many of the policy's supposed benefits are exaggerated, imaginary, or even socially harmful, while its social costs are substantial. This section discusses the first of these changes; the others are considered subsequently.

Scientists have long discredited the notion of race that underlies affirmative action policy, and the latest DNA research provides further evidence, if any were needed, of its artificiality and incoherence. Science aside, centuries of immigration and miscegenation, and the recent rise in intermarriage rates by all groups, render the conventional racial categories ever more arbitrary. [58] Indeed, the number of Americans who now consider themselves multi-racial and who wish to be identified as such (if they must be racially identified at all) is already so large - seven million in the 2000 Census, including nearly two million blacks (5% of the black population) and 37% of all Native Americans [59] - that advocacy groups desperate to retain the demographic status quo mounted a **[*15]** fierce political campaign to pre-empt a multi-racial Census category. [60]

Although these mono-racial groups did not decisively win that battle - the Census allowed people to indicate more than one race but did not include a "multi-racial" category [61] - they seem to be winning the war. In a grimly ironic aspect of the new demographic dispensation, the government adopted something like the one-drop rule that helped enslave so many mulattos and self-identifying whites before Emancipation. (As Malcolm X quipped, "That must be mighty powerful blood." [62]) In March 2000, the Office of Management and Budget issued rules providing that for civil rights enforcement purposes, [63] any response combining one minority race and the white race must be allocated to the minority race. [64] This, despite evidence that 25% of those in the United States who describe themselves as both black and white consider themselves white. Indeed, 48% of Hispanic respondents to the Census self-

identified as white; another 42% said "some other race." In a survey by highly-trained Census enumerators of Hispanic households that had failed to respond to the mail questionnaire, 63% considered themselves white and 29% said "some other race." [65] Almost half of Asian-white people and more than 80% of Indian-white people self-identified as white. [66] This is the racial equivalent of an enduring sociological reality: almost 95% of Americans, including many who are poor by standard "objective" measures, consider themselves solidly working-or middle-class. [67] Just as class warriors prefer to brush by this fact, administrators of affirmative action programs, who desperately need to race-and ethnic-code in order to meet their targets or quotas, choose to ignore the "whitening" and "multi-racializing" of those whom we insist on treating as minorities. [68]

No allocation rule can be neutral, of course; OMB's rule effectively maximizes the size of minority groups and minimizes that of the white group. But where multi-racial individuals chose their own racial identities, the government's allocation rules now decide this matter for them in order to preserve racial preferences. The new rules introduce other changes that will further complicate **[*16]** future race-coding by the government and hence by the many others who rely on these racial data for affirmative action and other purposes. By recognizing no fewer than 126 group combinations under the Census 2000 system, these rules encourage many other eager groups (Arab-Americans, for example) to demand their own specific listing in the Census form. The government will now find it harder to resist these demands than when the ethno-racial pentagon was its exclusive taxonomy. [69]

The number of actual and self-designating multi-racial individuals will surely grow rapidly in the future due both to intermarriage and to younger respondents' greater propensity to intermarry and to self-identify as multi-racial. Sociologist Amitai Etzioni predicts that even if current trends do not accelerate, 14% of the population will identify as multi-racial by 2050. [70] Forcing them into the increasingly arbitrary categories to which traditional racial classifiers tenaciously cling will spur them to seek even more fundamental changes in the ethno-racial pentagon, including a separate multi-racial category or perhaps even eliminating racial categories altogether, as a proposed initiative in **California** hopes to do. The government's insistent pigeonholing, which clashes with the robust and, for Americans, compelling rhetoric and ideology of freedom of choice, will further erode the already weak public support for preferences. Some analysts wishfully think that the multi-racial phenomenon does not threaten the viability of the traditional civil rights programs that rely on racial data, both because the cohort of self-reporting multi-racials is relatively small and because OMB's allocation rules further reduce their numerical significance. [71] Although this may well be true for the immediate future, advocates of the ethno-racial pentagon have only a temporary reprieve. New demographics and identities mean that as time goes on, the government's use of the standard racial categories as a pivot of social policy will become ever harder to justify logically and sustain politically.

The effort to control racial profiling by the police through the gathering of race-coded identity information, while aimed at discrimination and not affirmative action, reveals an important irony about the latter as well. Just when the accuracy, coherence, and social value of racial information are rapidly declining, the law is demanding more of it and using it more intrusively. State and **[*17]** city police departments must now collect data on the race, ethnicity, or national origin of all drivers or other individuals whom they stop. In order to do so, the officer must decide what the motorists' race, ethnicity, or national origin are and then record the data for the profiling monitor - without asking them, much less allowing them, to self-identify. To a lament by the president of the Los Angeles Board of Police Commissioners (himself multi-racial) that "with all the racially mixed people in L.A., and Latinos coming in all shades, the data will be garbage in, garbage out," a Harvard law professor responds that "we're not trying to get at truth, we're trying to get at bias." [72] But the legitimacy of the search for bias has everything to do with what information the naturally confused police will record and how accurate it is. Of the other techniques that may be used to obtain the racial data, the least chilling is already in place: New Jersey taxpayers paid for all 2700 state

troopers to receive mandatory "instruction on how to classify a motorist's race by judging "skin color' and "facial characteristics.'" [73] In the name of racial justice, one supposes, every bad idea must be taken seriously and even subsidized, at least until the inevitable political backlash against this new policy erupts - perhaps in the form of a voter referendum that will ratchet up the political rhetoric, racial bitterness, and group alienation. In this way, we are told, America will somehow "get beyond racism" [74] and enhance racial equality.

IV. The Size of Affirmative Action Preferences

When competing claims for scarce resources - jobs, admission to higher education, financial aid, public and private contracts, broadcast or other spectrum licenses, credit, housing, and the like - are weighed, how heavy is the thumb that affirmative action actually places on the scales? This question is important for at least two reasons. First, the larger the preference, the greater is its tension with the merit principle - and this is so however one conceives of merit. Indeed, a preference may be large enough to flatly contradict certain conceptions of merit, in which case preference advocates must invoke other rationales such as diversity that either reject or redefine those conceptions. It is one thing to use a preference merely as a tie-breaker between two equally qualified candidates, another to use it to enable a relatively unqualified one to win. (The tie-breaking case is very rare, as candid advocates of preferences will concede. [75]) Some might oppose the preference in both of these situations, of course, but most will view the tie-breaker case more favorably just as most will **[*18]** support greater outreach and candidate pool-enlarging efforts more than they favor more demanding forms of affirmative action. [76]

A second reason why the size of a preference matters is that the larger it is, the harder it is to deny or disguise the competing interests and values being sacrificed. This can be a decisive factor in the highly politicized environment of affirmative action debates. [77] In fact, as we shall see, the preferences received by minority applicants in higher education are so large that their defenders have reached and passed a rhetorical tipping point. Rather than deny the preferences' size, they use this fact to argue that eliminating the preferences would re-segregate the institutions. [78] I closely examine later this important argument for preferences later in the Article. [79]

Measuring the size of a preference is more difficult in some domains than in others. I have already discussed the quantification of minority bidders' discounts in some FCC spectrum auctions, and I shall discuss later in the Article the efforts to determine what efficiency losses, if any, affirmative action imposes in particular work settings. The most extensive studies, however, have focused on higher education admissions where schools have traditionally used standardized tests to measure students' aptitude, preparation, and achievement. In 1998, William Bowen and Derek Bok, the former presidents of Princeton and Harvard, published a book-length study based on the academic records of more than 80,000 students who entered twenty-eight highly selective institutions (large public universities, private universities, co-ed liberal arts colleges, and women's colleges) in 1951, 1976, and 1989, augmented by some other data. [80] Affirmative action, Bowen and Bok say, has little or no relevance outside of such institutions because the vast majority of undergraduate institutions accept all qualified candidates and thus have no need to prefer any group of applicants. [81] On the other hand, a recent study suggests that the practice may be much more widespread, including some second and third-tier schools. [82]

A large literature reviewing the Bowen-Bok analysis now exists. There is **[*19]** little disagreement about the actual magnitude of the preferences enjoyed by black applicants (the authors did not break out other minorities): by any objective standard, the preference is very large - one might say immense - although its precise magnitude probably cannot be determined. [83] Bowen and Bok, who strongly support affirmative action, find a difference of almost 200 points in the average SAT total test scores of the black and white applicant groups in these schools. But the difference between the two applicant groups is even starker.

First, the deficit for black applicants with respect to high school grade point average (GPA), the other major admission criterion, is even larger than for SAT scores. Thomas Kane, a researcher in this field, finds that black applicants to selective schools "enjoy an advantage equivalent to an increase of two-thirds of a point in [GPA] - on a four-point scale - or [the equivalent of] 400 points on the SAT." [84] Second, at every SAT score level, the test, which has long been criticized as being culturally biased against blacks, in fact over-predicts their actual academic performance in college. The same is true of GPA scores. [85]

Another way to characterize the difference between the two groups is to compare their prospects for admission to the schools in the Bowen-Bok sample. Terrance Sandalow, a professor and former dean at the University of Michigan Law School, summarizes the Bowen-Bok data this way:

Thus, a black applicant with a score between 1400 and 1449 had nearly a 75% chance of admission, while a white with a comparable score had approximately a 40% chance. In the 1250-1299 range, the odds that a black applicant would be admitted remained at the 75% level, while the odds for white applicants dropped below 25%. The comparable percentages for applicants with scores between 1100 and 1149 were approximately 15% for whites and just under 50% for blacks. Viewing the same data from a slightly different perspective, the odds were approximately even that black applicants with scores between 1100 and 1199 would be admitted. The odds for whites did not reach that level until they had scores in the 1450-1499 range. [86]

Sandalow does not mention a further finding - that with a score of 1500 or above, more than a third of whites were rejected while every single black gained admission. [87] The University of Michigan, whose affirmative action program is detailed in a pending lawsuit, [88] weighs race even more heavily than the **[*20]** average school in the Bowen-Bok sample. At Michigan, the advantage of being black, Hispanic, or Native American is even larger than Kane's estimate; they receive the equivalent of a full point of GPA, and permits minority status to override any SAT score deficit [89]. A recent study of forty-seven public institutions, moreover, found that the odds of a black student being admitted compared to a white student with the same SAT and GPA were 173 to 1 at Michigan, and 177 to 1 at North Carolina State. [90]

These preferences continue, broadly speaking, at the graduate and professional school levels. Bowen and Bok document the encouraging fact that an identical percentage (56%) of black and white graduates of the institutions in their sample earned graduate degrees, and the percentage of blacks earning professional or doctoral degrees was actually slightly higher than for whites (40% vs. 37%). But because the black students' college grades and graduate-and professional-level admissions test scores are usually much lower, preferences strongly affect their admission to programs, especially at top-tier institutions. For similar methodological reasons, including the greater significance of financial aid factors, we cannot know the exact size of their preferences at this level with certainty, but it is surely very large. [91]

The leading study of law school admissions in the early 1990s found that only a few dozen of the 420 blacks admitted to the eighteen most selective law schools would have been admitted to those schools absent affirmative action. [92] And although a high percentage of blacks who graduate from these law schools eventually pass the bar examination, only 61% of black law graduates pass it the first time (compared to 92% of whites) and 78% pass it on the second or subsequent attempt (compared to 97% for whites). In short, over 20% of the blacks who take it never pass, almost seven times higher than the failure rate for whites. [93]

It is true, of course, that institutions, especially selective ones, take other factors into account besides race, that some whites who are admitted have academic credentials that are

no better or even worse than the blacks admitted under **[*21]** preferences, [94] and that if one compared the credentials of the blacks who were just barely admitted with those of the whites who were next in line for those slots, the credentials gap, while still significant, would be much smaller. [95] It is also true that minority graduates of the selective institutions whose alumni have been studied, like the University of Michigan Law School, achieve high professional status, income, civic participation and leadership, and career satisfaction. [96]

These studies, however, do not examine how these schools' preferences affect the institutions and students that are lower down the academic food chain. The less selective institutions must admit many minorities who will have academic difficulty, are likely to fail the bar examination (some of them repeatedly), and may be marginal professionally. Because there simply are not enough academically qualified minorities to go around, Richard Sander notes, "the success of affirmative action at Michigan comes at the cost of making integrated education more problematic at weaker law schools." [97] This also means that any school that opts out of the preferences competition - for any reason - ends up with few or no black students, which of course just reduces racial diversity at those schools.

These large disparities in high school and college academic records and professional entry rates are profoundly disturbing and tragic measures of the persisting social disadvantages of blacks in American society. They reveal the inferiority of their earlier schooling, their desperate need to be better matched with or better prepared for the academic programs in which they enroll, and the deceptiveness of preferences' ostensible inclusiveness. To many affirmative action supporters, these disparities, far from weakening the case for preferences, constitute the strongest argument in their favor by indicating how lily-white and Asian the student bodies at elite campuses would be without preferences. [98] This "re-segregation" argument is certainly troubling - indeed, there is no wholly satisfying rebuttal to it - and I discuss it below. [99]

My purpose at this point is not to make an overall assessment of affirmative action, but only to establish that the preferences it confers tend to be very large and thus are extremely valuable to the recipients and disadvantageous to their competitors. I discuss the magnitude of this disadvantage below when I consider how preferences affect those who do not receive them. [100] To say, as Stanley Fish does, that a preference simply allows a decision-maker to "take **[*22]** minority status into consideration" within a pool of "qualified applicants" [101] is to beg the key question: how far one can stretch the meaning of "qualified" and "consideration" before they lose their notional integrity.

V. Rationales and Counter-Rationales

Affirmative action's supporters have advanced many different rationales for preference programs in light of a changing mix of ideological, tactical, and legal considerations over the course of more than three decades of public debate. Perhaps the most candid, powerful, and comprehensive defense of affirmative action is that by sociologist Orlando Patterson, who advances almost all of the rationales in one form or another. [102] These rationales overlap to some extent, and any given advocate is likely to invoke more than one of them. Still, it is useful to distinguish among them according to their different claims. Because their opponents often counter these claims, I can consider both sets of arguments together. Some of the arguments against affirmative action, however, do not line up quite so neatly; they are more usefully discussed in Part VII on consequences. Because the case for affirmative action is strongest for blacks, [103] though by no means limited to them, I shall discuss the rationales for race-based programs, unless otherwise indicated.

A. Restitution

Affirmative action is often justified as a means of compensating groups that have been victimized in the past by persecution and discrimination inflicted by the dominant majority.

This rationale looks backward and is an argument for reparations. It is to be distinguished from another rationale, which I call "anti-caste" and discuss in Part V, Section C, that emphasizes the consequences today and in the future of past injustices. In this view, what connects past, present, and future is the bitter irony, if not arrant hypocrisy, of ruling out the use of race now when it is used to rectify egregious wrongs that were perpetrated in the past on that very basis. It is easy to understand why affirmative action advocates see opposition to this use of race as the cruelest kind of Catch-22. Their morally grounded skepticism deserves a serious answer, but it cannot be a simple one. It will take me the rest of this Article to provide it.

The restitution rationale applies with special force, of course, to blacks whose ancestors were brought to the United States in chains and suffered unspeakable degradation over many generations, including the era of Jim Crow that ended as recently as the 1950s and 1960s. [104] Although these monstrous **[*23]** wrongs can never be truly or precisely rectified, the argument runs, the simple but compelling imperative of compensatory or corrective justice requires society to do what it can to restore the victims' descendants to the positions they would have occupied had the wrongs not been committed. Although this remedy is not really feasible as a practical matter, a program of affirmative action is. Distributive justice considerations, moreover, also justify such a restitution-oriented program both because blacks as a group are especially needy [105] and because government has often been an active agent or a passive participant in their subordination. [106]

Opponents of the restitution rationale counter with several arguments. First, the history of human communities is replete with great wrongs. Were we to take the project of restitution seriously, we could not stop with slavery but must also rectify the violence and destruction inflicted on Native Americans, their lands, and their cultures; the harsh subordination of the Chinese, Japanese, Irish, Jews, and many other immigrant groups; and the discrimination against women that severely limited their opportunities outside the home and their freedom within it.

Second, affirmative action programs cannot rectify past wrongs because their beneficiaries are not the victims; indeed, preferences can only commit new wrongs because the cost-bearers are innocent. Some program advocates insist that the notion of "innocent victim" that underlies such concerns is itself problematic and that today's whites are the unwitting, continuing beneficiaries of the crimes committed by white slaveholders and their segregationist successors. [107] Opponents respond that it would be impossible to conduct the kind of complex causal analysis necessary to support any fair calculation of historical advantages and disadvantages, [108] that attributing them to broad racial groups would be egregiously crude, and that so gross an assessment could not satisfy even the most minimal demands of a very rough justice.

Third, even if these objections could somehow be met, some opponents say, the restitution rationale could at most justify affirmative action for the descendants of American slaves and perhaps Native Americans. It could never justify extending protection to immigrants, linguistic minorities like Hispanics, or **[*24]** geographic origin groups like Asians and Pacific Islanders. Yet tens of millions of immigrants become automatically eligible for preferences the moment they set foot in the United States, competing for preferences with blacks whose families have been in America since ante-bellum times. For example, a University of Michigan faculty study found that almost 20% of black faculty and more than half of Asian-Pacific Islander faculty were immigrants. [109]

The U.S. Supreme Court has accepted a limited version of the restitution rationale, permitting or mandating affirmative action as a constitutional matter where it is shown that the actor has specifically engaged in identifiable past discrimination against a favored group, this discrimination continues to affect individual victims, and the preference is carefully tailored to remedy this particular wrong. [110] In the context of elite professional schools that

draw from a national, indeed international, pool of candidates, the required nexus between discrimination and preference can become quite attenuated and far-fetched. [111]

B. Merit

Most affirmative action advocates challenge the fundamental assumption of its opponents that merit selection - as conventionally understood and as implemented - is a valid and compelling principle of distributive justice with respect to certain kinds of social goods. This challenge takes at least three forms; some advocates use all of them. [112] First, they contend that accepted understandings of merit are arbitrary, unduly narrow, and unjustly disadvantage minorities. "Merit," Nicholas Lemann writes, "is various, not unidimensional. Intelligence tests, and also education itself, can't be counted on to find every form of merit. They don't find wisdom, or originality, or humor, or toughness, or empathy, or common sense, or independence, or determination - let alone moral worth." [113] Stanley Fish adds that when disputes arise over merit, "the dispute is between different versions of merit and not between merit and something base and indefensible." [114]

[*25] Like Lemann and Fish, defenders of preferences particularly object to notions of merit that rely heavily or exclusively on certain kinds of mental and physical tests or that demand certain academic, experiential, and other traditional credentials. This argument for redefining merit may invoke efficiency as well as fairness values. The claim is that those who administer conventional merit standards ignore or reject many individuals who, were merit properly defined, would be found to possess it and thus would perform the task perfectly well. [115] By excluding them, more radical advocates say, the supposedly **race-neutral** merit standard in fact operates as a "white-people's affirmative action" program. [116]

Second, some argue that what we conventionally think of as merit is actually a composite of different ingredients, some of which have little or nothing to do with the kinds of virtues that society should reward with material or status advantage. Ronald Dworkin, for example, condemns the notion that what he calls "wealth-talents" (which would include scholastic aptitude or achievement) should be rewarded because they are praiseworthy attributes. "What counts as a wealth-talent," Dworkin writes, "is contingent in a hundred dimensions ... . Luck is, anyway, by far the most important wealth-talent in this catalogue - being in the right place is often more important than being anything else at all ... ." [117] Even apart from luck, he argues, it is hard to justify conferring such social advantages on those whom such contingencies happen to favor. In short, merit is not an appropriate principle of distributive justice for the social rewards that wealth-talent receives.

Third, advocates of racial preferences maintain that conventional merit standards are routinely violated by other preference practices that bear little or no relation to any defensible conception of merit and that exhibit few if any of affirmative action's virtues. I have already noted some examples in higher education - lower admissions standards for athletes, legacies, and geographic diversity - but exceptions to the merit principle also abound in other areas like employment, where governments and private firms often recruit, hire, and promote through veterans' preferences, old boy networks, nepotism, and favoritism. [118] And as journalist Michael Kinsley has noted (with barely-disguised glee), the Republicans endorse even race-based affirmative action when it suits **[*26]** their purposes. [119]

Finally, some defenders of preferences do not so much challenge traditional notions of merit as they argue pragmatically that the likely alternatives to preferences would be even worse. In Jeffrey Rosen's view, for example, state universities' programmatic responses to the ending of preferences coupled with continuing political pressures to keep minorities on flagship campuses threatens to "turn the leading state universities into remedial academies ... . Affirmative action represents a lesser compromise of meritocratic standards than the alternatives that are almost certain to follow its elimination ... ." [120] I discuss

alternatives below in Part IX.

A willingness to disregard or redefine the merit principle, then, knows no ideological and partisan boundaries. Does this bespeak a context-sensitive flexibility in the notion of merit, as Fish maintains, or is it just hypocrisy? The answer is - it depends. Universities, employers, and other decision-makers are in the best position to define and measure merit in whatever terms they deem most relevant to their own institutions because they must bear most if not all of any efficiency losses and other costs arising from any errors in definition or measurement. Thus, what outsiders may view as arbitrary and hypocritical exceptions to the merit principle presumably advance the institutions' broader interests. In this sense, these "exceptions" can be seen as part of a defensible, institution-specific conception of merit. A preference for legacies and athletes, for example, may maximize the alumni contributions and loyalty that in turn support the institution's academic mission. By the same token, a preference for racial minorities may reflect the institution's belief that their presence will somehow enrich campus life. If so, the merit principle remains inviolate, although its precise definition depends on the particular social context in which it is invoked and the mix of values that the institution seeks to promote.

This conception of merit is more than just window-dressing. A university president may well believe that admitting athletes, legacies, and minorities who do not meet the school's highest academic standards would nonetheless advance its overriding academic and social missions. Indeed, many university presidents do take this view. For myself, I could not reach this conclusion without strong evidence that admitting them was both necessary and sufficient to advance that mission without eroding those standards. My sense - based partly on the academic and fiscal success of elite schools that abandoned single-sex admissions over initial alumni opposition, and partly on the scandalously low academic standards for athletes on many campuses [121] - is that such evidence **[*27]** does not exist and that most of the special treatment for athletes and legacies bears no relation to a defensible conception of merit. Evidence of the contribution of minorities to campus life does exist, however, and I discuss it below in Section G of this Part.

In defining the academic mission, I personally place a very, very high weight on intellectual achievement. I say "very, very high," not exclusive; I might also give points to applicants who play in the school orchestra, come from rural backgrounds or foreign countries, or exhibit unusual leadership abilities. Doubtless others, mindful of their own institutions' distinctive goals and traditions, would strike these balances somewhat differently, and variations of this kind are to be encouraged. An institution's choice should only be considered hypocritical (as opposed to arguably misguided) when it violates the institution's proclaimed values or when the institution does not demand hard evidence to justify departures from those values, as may well be the case with some universities' athletic programs. The important point is not merely that, as Lemann and Fish rightly argue, different institutions (and the people within them) can plausibly define merit in different ways, but also that the integrity of those definitions depends partly on the underlying facts. In Part IX, Section G, I combine this point and my defense of diverse institutional identities to justify allowing private entities, but not public ones, to adopt ethno-racial preferences under certain defined conditions and in certain contexts.

Defenders of traditional merit make several dignity-based and consequentialist arguments against preferences. One of them counters Dworkin's contingency argument, contending that it assigns insufficient importance to the role that individual efforts play in academic and other success. Such efforts should be rewarded both on efficiency and fairness grounds; those rewards send socially desirable signals to others in the community. If society deems the rewards excessive, it can best reduce them by taxing the excess, not by disparaging a principle that helps motivate socially valuable activity. Once this merit principle is abandoned or discredited, it cannot readily be restored or replaced. No alternative principle, in this view, is as socially functional or morally attractive as merit.

Another argument against preferences holds that departures from traditional merit tend to demean and stigmatize the program's beneficiaries - including those who would have qualified under the traditional merit standard. [122] Since preferences' categorical nature prevents others from telling which members of the favored group were hired or admitted on the basis of merit and which on the **[*28]** basis of the preference, observers assume the worst. (This assumption, of course, might itself be considered discriminatory but it may instead reflect a non-discriminatory aversion to risk.) In a reverse twist on the economic theory explaining why "lemons" are hard to detect in the market, [123] a preference tends to reduce the returns to true merit. A similar argument of this kind notes that many who take advantage of preferences will perform poorly or fail, further stigmatizing the group and demoralizing the individuals. [124] Stanley Fish's riposte to the stigma argument is worth quoting:

Some beneficiaries of affirmative action will question their achievements; others will be quite secure in them; and many more will manage to have low self-esteem no matter what their history. Affirmative action is a weak predictor of low self-esteem, and even if there were a strong correlation, you might prefer the low self-esteem that comes along with wondering if your success is really earned to the low self-esteem that comes from never having been in a position to succeed in the first place. At any rate, low self-esteem is at least in part the product of speculation about it. [125]

I consider these and some other consequentialist arguments in more detail in Part VII.

C. Anti-Caste

Most advocates of affirmative action seek to justify it as a powerful tool for dismantling what they view as a racial caste system in which blacks continue to be subordinated not just by individual racist attitudes, but also and more importantly by intractable hierarchical and institutional structures that a more passive, slow-moving non-discrimination principle cannot effectively dislodge. [126] In contrast to the backward-looking restitution rationale, the emphasis on eliminating tenacious caste structures is more forward-looking and remedial. However labeled, this rationale aims at promoting integration with the goal of genuine democratic participation on the basis of equality. [127]

Indeed, even today when defenders of affirmative action use diversity rhetoric in order to avoid legal pitfalls, the heart of the case for affirmative action is unquestionably its capacity to remedy the current effects of past discrimination. One advocate, the former chancellor of the University of **California [*29]** at Berkeley, likens a university without affirmative action to a form of educational apartheid "almost as pervasive and insidious as the strictest segregation in South Africa." [128] Others, less hyperbolic, believe that affirmative action on campus "may well be ... the best long-term remedy for the private beliefs and behavior that perpetuate the effects of racial caste." [129]

Somewhat subtler is Orlando Patterson's argument for affirmative action, based on the small number of blacks in the workplace relative to whites. Since there are on average more than six white employees for every black one, Patterson contends, even non-racist employers will likely promote whites more often than blacks, especially if they think that whites will "fit in" better with a predominantly white work force. When one adds to this "the fact that Euro-American workers have a hard time taking orders from Afro-American supervisors," affirmative action is the only way to break the statistically-driven and sometimes vicious circle. [130]

Advocates who rely on the anti-caste rationale contend that the intractability of these social

structures - what Martin Duberman calls racism's "terrifying agility" [131] - demands special and energetic interventions to dismantle them. Perhaps conceding that affirmative action is problematic in certain respects, they nonetheless insist - in the spirit of Justice Harry Blackmun's claim that "in order to get beyond racism, we must first take account of race" [132] - that the imperative of true integration and the prospect of genuine equality are overriding ends and that affirmative action is the only practical way to achieve them. For constitutional support, they point to Reconstruction-era legislation, contemporaneous with the Fourteenth Amendment's adoption, that seemed to establish racial preferences for the freedmen. [133]

The political leaders of minority groups clearly view affirmative action as a rallying point, a basis for group solidarity, that can galvanize the ethnically-defined organization of minorities into an effective political force. [134] This tactic succeeded in extending the scope of affirmative action from public sector to private sector, from hiring to promotion, from college admissions to graduate and professional school admissions, and in other dimensions, [135] while institutionalizing it more firmly than its supporters could possibly have predicted at its **[*30]** inauspicious inception. [136] Indeed, some use these anti-caste arguments to justify giving preferences even to middle-class blacks. [137]

Opponents counter with several arguments. None of these counter-arguments denies America's dark history of racial caste. All of them, however, emphasize changes that cast doubt on the merits of affirmative action today. Some, for example, point to the stunning political, economic, and social advances by blacks both individually and as a group, concluding that special preferences are no longer warranted (if they ever were), especially in light of their social costs. [138] Some cite the historical experience of immigrant groups that also suffered harsh racial and other discrimination but still managed to advance without the benefit of these kinds of affirmative action programs. [139] Others argue that any caste effects today are based more on class or cultural practices than on race, [140] or more on spiritual than economic deprivation. [141] Still others, like Cass Sunstein, who strongly supports the struggle against caste, concede that racial preferences often fail and prefer "**race-neutral** alternatives." [142]

Affirmative action advocates do not concede these points. They note, correctly, that many substantive inequalities remain [143] and contend that affirmative action's social costs are minimal. Immigrants, they say, came to America voluntarily and optimistically, not in chains and in trauma, and they insist that slavery's acids continue to corrode the foundations of the black family and of black culture even six or seven generations after Emancipation. [144]

D. Leadership Cadre

A variant of the anti-caste rationale is the claim that affirmative action is effective in producing a cadre of black professionals who can form a nucleus of group leaders and serve as role models for other members of the group, especially the young who need to have high aspirations and confidence that others **[*31]** have succeeded despite their common legacy of group disadvantage. This rationale, which has its skeptics, [145] applies most strongly to the domain of higher education, which of course is an important training ground for leaders. Studies on how well such programs perform this function have been chewed over by proponents and opponents of affirmative action alike.

Proponents point to the Bowen-Bok data on the career achievements of blacks admitted to the selective schools in their sample during the affirmative-action era, graduates whom the authors characterize as "the backbone of the emergent black ... middle class." [146] The Bowen-Bok data clearly establish that the vast majority of the individuals who graduate from baccalaureate and post-baccalaureate programs to which they were admitted through affirmative action do enter the middle class, participate in community life, and presumably function as role models for young blacks. [147] A further argument in this vein is that the presence of minority group members in visible roles of leadership and influence is conducive,

if not essential, to the legitimacy of social and political institutions. For minorities to accept their outcomes as minimally just or at least acceptable, they must view these institutions as inclusive and procedurally fair. Being tried by minority judges, for example, may advance that goal. They must perceive that they are not merely invisible servants of the regime but are, along with their fellow citizens, its masters as well. A related, though slightly different, argument, which is particularly applicable to affirmative action in public universities and other public programs, is that minorities pay taxes for these mobility-enhancing public services, entitling them to fair representation in those programs. [148]

This, then, is the core of the leadership cadre rationale for affirmative action. There are at least three reasons, however, to doubt how much of this mobility and participation are due to affirmative action. First, the propensity to participate and lead in the civic sphere reflects factors that are usually evident in high school and that therefore presumably increase the chances that individuals will be admitted to the selective institutions in the first place, with or **[*32]** without the boost of affirmative action. [149] Second, the vast majority of the black students admitted to these institutions (86%) are already from middle-and upper-class families (although they are still poorer than their white peers), [150] a background that correlates with both participation and leadership. Third, absent affirmative action, these students would presumably have attended other institutions that graduate many more blacks than the ones in the Bowen-Bok sample do, blacks who succeed both professionally and civically. [151] Indeed, a striking fact is that historically black colleges, which account for only a sixth of total black college enrollment, produced 43% of the 1995 Congressional Black Caucus, 39% of black officers in the U.S. Army, and a quarter of black MacArthur "genius" grantees in the last two decades. [152] Although these successful graduates were educated some time ago, their alma maters are now more intensively recruiting and often enrolling the most outstanding black students, many of whom could gain admission to predominantly white institutions through affirmative action programs. [153] The same is true of the non-flagship campuses of public university systems, where most of the direct affirmative action beneficiaries would end up, absent affirmative action. [154] In short, the vast majority of those admitted to select institutions would probably have succeeded, participated, and been leaders anyway even without the preferences.

E. Market Failure

Some analysts of an economistic bent emphasize that affirmative action can be justified as a response to a defect in the markets for labor, college admissions, credit, and other goods. Their argument is that a decisionmaker who rationally relies on group stereotypes - because the savings in search and other **[*33]** information costs in doing so exceed the costs of missing some qualified members of the stereotyped group (false negatives, as it were) - is not internalizing the full social costs of her discrimination. Those costs include the demoralization of excluded, but qualified, group members, underinvestment by stereotyped group members in education and other qualifications that would disproportionately benefit them and society, and so forth. Affirmative action, in this view, is a way of obliging decisionmakers to bear the full costs of these externalities and thus to make economically efficient choices. [155] But even if some externality adjustment were desirable, the one effected by affirmative action is, as we shall see, far too crude, costly, and inefficient in its own right to rectify the problem.

F. Institutional Pragmatism

Some have defended affirmative action as a necessary, prudent resolution of the competing values to which certain institutions are committed. Focusing on elite universities, for example, law professor Samuel Issacharoff, echoing Nathan Glazer, argues that

affirmative action represents a point of compromise in the contradictory missions of the elite universities. They serve as both the guardians of a meritocratic vision of achievement and as the guarantors of opportunity so that the elites of the society may be replenished from the diverse groups that have built this country. Affirmative action grows out of the frustration with the apparent intractability of this country's inability to achieve these twin objectives with regard to black Americans. It is a pragmatic and oftentimes messy accommodation of two of the central values of higher education. [156]

Issacharoff's plea for granting institutions some discretion in deciding how to balance competing considerations that are peculiar to them is convincing, at least for private institutions. [157] And his description of the moral and political impulses motivating many proponents of affirmative action is surely correct. But as we shall see, it is not an accurate account of how most Americans and even most racial minorities view affirmative action; their opposition to it as a matter of principle thus discredits the compromise he defends. Furthermore, his pragmatic judgment rests on certain premises: that affirmative action is necessary to create black mobility, that the preferences are "modest," that they only "operate on the margin of established selection criteria," that they have "an end-point that will prevent affirmative action programs from becoming institutionalized as a racial spoils system," and that they do not have other negative consequences that might affect the prudential balance. [158] My analysis casts serious **[*34]** doubt on all of these premises.

G. Diversity

The institutional pragmatist will often seize on diversity as a more satisfying, more substantive rationale for affirmative action. Its appeal is readily apparent. Even more obvious, however, are its flaws - so obvious, in fact, that many of affirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds. [159]

Until the late 1990s, when federal courts began striking down affirmative action programs in public institutions of higher education as unconstitutional reverse discrimination, advocates had focused their arguments more on the restitution, anti-caste, merit, leadership cadre, market failure, and institutional pragmatism rationales for such programs than on diversity. These other rationales were more attractive to the advocates because they seemed morally compelling, remedial, and based on the demands of justice. Diversity, in contrast, was essentially a functional rationale whose force depended on a number of plausible but controvertible empirical propositions. Equally problematic, this functional account of diversity was geared less to how affirmative action benefited the victims of past discrimination than to how it benefited other institutions or people (e.g., students and faculty), including many who may have either participated in that discrimination or been advantaged by it. [160] Functional arguments for diversity suffer not only from this distasteful aspect, but also from the distinct possibility, which I develop below, that these arguments fail according to their own functional criteria. Arguments supporting preferences because of diversity's supposed effects may turn out to discredit them if and when those effects do not materialize. [161]

In fact, the diversity rationale should be seen as little more than a rhetorical Hail Mary pass, an argument made in desperation when all other arguments for preferences have failed. It is no secret that proponents turned to this rationale in earnest only when a series of adverse court rulings beginning in 1989 cast serious constitutional doubt on other legal arguments for preferences. By 1998, voters in **California and Washington** State had adopted laws barring affirmative action in state programs. [162] Casting about for a safe harbor, defenders of preferences **[*35]** seized upon the diversity justification offered by Justice Powell in 1978 in his plurality opinion for the Supreme Court in the Bakke case. [163] There he stated that "a diverse student body ... clearly is a constitutionally permissible goal for an institution of higher education" and observed that "the atmosphere of "speculation, experiment and creation' - so essential to the quality of higher education - is widely believed to be promoted

by a diverse student body." [164]

Today, Michael Selmi explains, "diversity has quite clearly become the most heralded of all justifications for affirmative action." [165] In large part, this is because

relying on diversity rather than discrimination places affirmative action programs on more solid legal and perhaps political grounds. It is the rare case in which a university will have engaged in systematic discrimination against a particular group recently enough and in other particulars that a court may accept as sufficient to justify a race-conscious measure. It is rarer still that a university defending a plan will be willing to assert its own past discrimination as justification for affirmative measures. [166]

The diversity rationale, in contrast, entails a fresher, more "future-oriented vision." [167] As law professor Eugene Volokh says, "it ascribes no guilt, calls for no arguments about compensation. It seems to ask simply for rational, unbigoted judgment ..." [168] Judge Alex Kozinski adds that "everyone likes diversity, so long as it falls within a fairly narrow ideological range." [169] And depending **[*36]** on how diversity is defined, preferences for middle-class minorities might fall within the rationale, possibly facilitating public acceptance of the policy. [170]

The diversity rationale attracts supporters, especially in higher education, for another reason. Whether or not professors agree with Kenneth Karst that the conventional affirmative action categories are good proxies for the kinds of diversity that enrich teaching, learning, and social interactions in and outside the classroom, [171] and whether or not they are persuaded by the non-diversity arguments for affirmative action, most of them are profoundly uncomfortable at the thought of teaching a class or being on a faculty containing only whites and Asians. (Whether this also troubled professors in the days before preferences helped put racial minorities in their classrooms is less clear.) As we shall see in Part VIII, this "re-segregation" nightmare might well occur at the more elite private institutions absent preferences. I am such a teacher at such an institution and experience the same anticipatory discomfort.

What is the source of this discomfort? Here, I enter the realm of speculation (or more precisely, introspection), although survey evidence does shed some light. College and university professors tend to be ideologically and politically far more liberal, Democratic, statist, and secular than other Americans. [172] More to the point, professors tend to be knowledgeable about and sensitive to the historical injustices inflicted on blacks by slavery, Jim Crow, and the legacy of racism in America, and to support affirmative action and other remedial and egalitarian policies. [173] It is not cynical, I think, to add that tenured professors have little or nothing to fear personally from affirmative action for students or faculty. Indeed, it benefits them by eliminating the discomfort they would feel in classes and faculty meetings without non-Asian minorities, and they bear few of the program's costs. [174] Many genuinely believe that the benefits of **[*37]** ethno-racial diversity justify preferential admissions. Their reactions are perfectly predictable and understandable, and I share some of them.

What independent weight should these professorial feelings carry in the affirmative action debate? Not much, in my view. For the diversity rationale to justify affirmative action in higher education, it must do so because of the genuine diversity benefits that flow to students and faculty, especially those in the favored groups. The diversity rationale means that the benefits relevant to a diversity assessment must be the educational and social advantages that interactions among diverse students and faculty supposedly produce. The benefits from allaying the anxieties of white faculty members who are already highly privileged in so many respects should not count heavily (or perhaps at all) because such

benefits bear only the most tenuous relation to the values that underlie the diversity rationale, properly understood.

What, then, are the benefits - from a diversity perspective - that should count in favor of preferences in higher education admissions? To answer this question, we must first address three other closely-related ones. What does diversity mean in this context? What is it about a group that accounts for its diversity-value? [175] (Groups, after all, are what diversity-based affirmative action programs are all about.) And what diversity-value do the groups favored by affirmative action create?

1. Diversity's Meaning

Diversity, like equality, is an idea that is at once complex and empty until it is given descriptive and normative content and context. [176] Unfortunately, most discussions of diversity and the diversity rationale for affirmative action do not explain what it actually means, much less which groups with what kinds of attributes create diversity-value. [177] Nevertheless, the ways that affirmative action programs are designed and defended leave little doubt that program advocates almost always mean racial diversity, with little regard to the many anomalies, evasions, and confusions that attend most race discourse in America. [178]

[*38] This preoccupation with race by proponents of the diversity rationale is also anomalous because other attributes are also predictive of one's experiences, outlooks, and ideas. According to a still-unpublished study by lawyer-sociologist James Lindgren of the demographic correlates of viewpoint differences, political affiliation accounts for the largest cleavages, with religion and race producing cleavages of similar magnitude. [179] The failure of diversity-based affirmative action programs to base preferences on religion is among the most revealing facts about them. [180] (Alas, this immense failing extends as well to most of the other debates over multi-culturalism. [181]) The programs' lack of interest in our rapidly-growing religious diversity [182] casts some doubt on the bona fides, or at least the coherence, of the diversity rationale as now implemented, [183] and may reflect the unusual religious composition of university faculties. [184] A priori (which is how programs select the groups to be preferred), doesn't the perspective of a Muslim or fundamentalist Christian applicant have at least as much diversity-value as that of a middle-class black or Hispanic? [185] Sanford Levinson, an affirmative action supporter, puts this point another way: "One sometimes gets the feeling that ostensible defenders of "diversity' and **[*39]** "multiculturalism' have no real idea of how truly diverse and multicultural the United States has become, fixated as they are on the "traditional' racial and ethnic cleavages within this country." Levinson's use of scare quotes around "traditional" reminds us how much more complex and numerous these cleavages are than those presupposed by diversity-based affirmative action programs. [186] This complexity also underlies David Hollinger's critique of the official ethno-racial pentagon. [187] And if we want to stick with simple but perspective-relevant cleavages, why not diversify the student body through preferences according to political party affiliation?

2. Diversity-Value in General

Just how many blacks or members of other favored groups must be present in order to establish the requisite diversity? Because the value of diversity surely depends on various factors, any sensible answer must be context-specific. [188] Unfortunately, law and practice offer a wholly reductionist answer to the question. They simply count the number of group members in the relevant community (or their percentage of the community total) and demand proportional representation, at least as a default but often, in effect, as the final answer. [189] Defining the relevant community - that which will be used in making the proportionality assessment on which the legal obligation will directly turn - almost always entails highly controversial judgments, if not arbitrary empirical and normative ones. The relevant baseline for judging proportionality, for example, can only be defined in terms of a

number of elusive, hard-to-measure, and internally competing parameters including group definition, geography, qualifications, attitudes, applicant pool, and others. Rhetoric aside, the task of actually administering affirmative action requires, ironically, that a program first combine many complex determinations that as a practical matter it can only make through almost comically arbitrary judgments, [190] and then come up with a bottom-line number that is certain to be breathtaking in its simplicity and abstraction from context.

This, emphatically, is not what Justice Powell had in mind in his Bakke opinion, although in other respects it is not altogether clear what he did have in mind [191] or how binding his opinion is as precedent. [192] In Bakke, he insisted that **[*40]** simple numerical quotas could not be used to achieve diversity; institutions must instead look at the individual as a whole and her potential to contribute effectively to educational diversity. [193] Institutions that invoke diversity, Powell added, must also pursue non-racial diversity. [194] Both factors led him to condemn the Davis system that precluded whites from competing for the set-aside slots and to praise Harvard's because race was only a tie-breaking factor. [195] More recently, the Supreme Court held, as Powell had argued in Bakke, [196] that all race-based preferences are subject to strict scrutiny, the most demanding constitutional test. [197]

The diversity that Powell seemed to have in mind was not the pure ethno-racial diversity that affirmative action programs now prize. [198] The fact that affirmative action programs have bureaucratized diversity does not mean that it is a hollow ideal unworthy of society's aspiration. It does mean, however, that these programs may in fact be pursuing a spurious or formalistic kind of diversity. Indeed, for institutions that must process thousands of applications for relatively few slots in a very limited period of time, it could hardly be otherwise. [199] As a practical matter, diversity admissions can mean little more than color-coding and color-counting in service of a pre-determined color-targeting. [200]

3. Diversity-Value in Particular

How, then, does a favored group in fact confer diversity-value on a community? A group can only create diversity-value if it possesses certain desired qualities qua group. It seems to follow that a group can only do this if those qualities inhere in all members of the group (else the group should be re- **[*41]** defined to exclude those who lack them). [201] To affirm that a quality inheres in a racial group, however, is to "essentialize" race in a way that is not true when one selects for, say, rural background, which is not a proxy for anything but itself. Racial essentialization utterly contradicts liberal, egalitarian, legal, scientific, and religious values (at least in the "Abrahamic" (i.e., Jewish, Christian, and Muslim) traditions). These religious values hold that all individuals are unique and formally equal regardless of genetic heritage, and that their race causally determines little or nothing about their character, intelligence, experience, or anything else that is relevant to their diversity-value. Indeed, for employers to use racial stereotypes in this way would be flatly illegal - even if the assumptions underlying the stereotypes were true. (As Eugene Volokh says, "It's hard enough to persuade people to give up their irrational prejudices; it's harder still to persuade them to give up their rational ones." [202]) The best that can be said of advocates' using diversity in this way is that they have "reproduced the most gross and invidious of popular images of what makes human beings different from one another" for a putatively benign purpose. [203] They are propagating a socially inflammatory stereotype that, even when fairly accurate, invites decision-makers to violate people's claims to be judged as individuals, not as members of ascribed groups. On a parity of reasoning, legitimating the use of this proxy might equally justify racial profiling by police if it were intended to fight crime and were tolerably accurate. [204]

This, then, brings us to the third question: what diversity-value does a favored group actually confer? Affirmative action programs attempt to finesse the essentialism difficulty by assuming certain facts that might make the use of race as a proxy more defensible. They assume, first, that black students bring to campus histories and viewpoints that are unique to

and universal among black students even though those histories and viewpoints are not racially or genetically hard-wired into them. They then assume that all of these students have the common experience of growing up black in America and the special perspectives that go with that experience - what Yale Law School dean Anthony Kronman calls value-diversity. [205] Educational institutions and their black members, they further assume, should help non-blacks to comprehend this experience, and campus diversity can strengthen the foundations of good citizenship **[*42]** in a pluralist democracy. [206] Finally, they assume that race can serve under these circumstances as a rough but serviceable proxy for both diversity-value and value-diversity. Although Sanford Levinson doubts that anyone "is so stupid as to believe that all (or even most) members of any given group necessarily have similar opinions on a variety of important issues," [207] most defenses of preferences based on viewpoint diversity seem to reflect precisely this belief. Levinson makes a more limited claim - that the presence of blacks and other groups on campus fosters some educational values in certain contexts while having less effect in others. [208]

The Bowen-Bok study strongly defends these assumptions. Using broad-question surveys conducted in 1995-97, it asked these cohorts of former students how they assessed their experiences on racially diverse campuses. Large majorities - especially among blacks and in the more recent cohorts - thought that it was important or very important in life "to work effectively and get along well with people from different races and cultures," and that their college educations helped to cultivate this ability to a significant degree. Bowen and Bok also found that the more blacks in an entering class, the more likely that white students in that class would know two or more blacks well; that 56% of white students said that they knew two or more blacks well; and that the percentage who did so increased with the school's selectivity. These interactions occurred, moreover, even though black students represented fewer than 10% of the students in the schools studied. [209] Relying on a "contact theory" holding that increased contact among racial groups should decrease prejudice, a theory with uncertain empirical support, [210] Bowen and Bok develop a model to predict how this would change if admissions were instead **race-neutral.** Finding that the 56% figure would fall by several percentage points, they conclude that "the drop in interactions would certainly be substantial." [211] These findings ostensibly support the notion that affirmative action cultivates interracial socialization skills that both white and black students value and that they enhance by attending racially diverse institutions. [212]

This conclusion, which is also supported by a study done to support the University of Michigan's legal defense, [213] has been challenged from at least six **[*43]** directions. The first is empirical; a recent review of existing survey data shows that most students and faculty place little weight on ethnic diversity as a cause of positive educational outcomes, and its regression analysis of peer group racial composition effects finds no positive effect on any of the eighty-two outcome variables used by the American Council on Education. [214]

The second challenge is comparative. Stephan and Abigail Thernstrom, prominent critics of the Bowen-Bok study and authors of an earlier analysis of American race relations that strongly opposed affirmative action, [215] point to a 1997 national survey in which 86% of white adults reported having black friends, and to a 1994 survey in which 73% said they had "good friends" who were black. [216] To the Thernstroms, the Bowen-Bok findings justify a different inference: "By these standards, the elite schools are hardly in the proud vanguard of progress. To the contrary, they are lagging woefully behind." [217] Interestingly, the Bowen-Bok and Thernstrom data on college-age and adult friendships both overlook the increasing interracial friendships among youngsters even before they reach college, [218] which would suggest that the college experience may be less central to such friendships than either camp supposes.

A third challenge examines how the education process actually works on campuses. Sandalow maintains that any experiential differences between white and black students "are simply irrelevant to most of what students study in the course of their undergraduate

careers. The irrelevance of those differences is perhaps most obvious in the study of mathematics and the natural sciences, but it is no less true of most of the humanities and the social sciences." [219] Sandalow goes on to consider the argument, crucial to the diversity rationale, that blacks are likely to advance different ideas unfamiliar to whites. His reply accords precisely with my own experience:

[*44]

Even though the subjects I teach deal extensively with racial issues, I cannot recall an instance in which, for example, ideas were expressed by a black student that have not also been expressed by white students. Black students do, at times, call attention to the racial implications of issues that are not facially concerned with race, but white and Asian-American students are in my experience no less likely to do so. [220]

To some scholars, however, Sandalow's empirical observation is beside the point because only racial preferences can secure minority students their "free exercise of race." [221] Mary Anne Case even suggests that barring racial preferences "may work a denial of equal protection to some [students] for whom race is a particularly salient characteristic." [222] But although race is surely quite salient for some students, the admissions office almost never asks about their ideas or points of view, much less how salient race is to them, so this rationale seems even weaker and, insofar as it is based on a gross stereotype, pernicious. [223] Outside the classroom, of course, race-based experiential differences might encourage empathy and openness to diversity of all kinds. [224] On the other hand, those differences might promote greater conflict. [225]

The diversity rationale, as deployed by some of its advocates, masks a deeper confusion about the diversity-value arising out of social interactions. In this view, which Justice Stevens has avowed, diversity demonstrates to people that despite our superficial differences, we are really all alike under the skin. [226] This proposition is clearly true in many respects - recall, for example, the DNA evidence on the similarity of our genetic endowments - but the diversity-value that the diversity rationale invokes is supposed to grow out of decidedly different viewpoints that diverse people are said to bring to these interactions. If we take the rationale seriously, then similarity under the skin may confer negative, not positive, diversity-value. The very logic of this rationale dictates that we should seek differences under the skin since those differences constitute the payoff to diversity. At the very least, those who espouse pieties like Justice **[*45]** Stevens' should be clearer about what they mean.

Two other challenges contend that the schools with diverse student bodies are not fully realizing the pedagogical possibilities this diversity creates, [227] and that students admitted on diversity grounds may suffer special burdens from having to serve in a "representative" capacity [228] - although Bowen and Bok find that low-scoring students admitted to elite schools later express great satisfaction with their college experiences. [229] Finally, the dismaying evidence of persistent racial self-isolation on campuses, including those with affirmative action, also raises questions about the interracial socialization thesis. Orlando Patterson, who supports affirmative action, ruefully concedes that "no group of people now seems more committed to segregation than Afro-American students and young professionals." [230] Jack Citrin, an opponent, believes that the 250-point gap in SAT scores created "a caste system" at Berkeley:

Intellectual Balkanization with large ethnic differences in majors and grades was the outcome of Berkeley's version of affirmative action. Underrepresented minorities did not often major in subjects such as philosophy, mathematics and chemistry, while they were heavily clustered in such areas as sociology and ethnic studies.

Of the Berkeley freshman admitted in fall 2000 [without affirmative action], by contrast, 14.9 percent were members of underrepresented minority groups, but the ethnic gap in test scores was slashed by more than one-third. The smaller number of minority students admitted are more competitive with their peers than previously, a necessary start to ending the academic caste system. [231]

After carefully interrogating the diversity rationale for racial preferences, then, one is left with serious doubts about its coherence and persuasiveness. There is something to it, surely, but not much. Recognizing this problem, some advocates seek to re-conceptualize diversity as something else. In philosopher Elizabeth Anderson's view, for example, diversity is really "another way of talking about integration," a way that can link diversity to the advocates' "core social justice and democratic concerns." [232] In the same spirit, Robert Post sees **[*46]** diversity as the seedbed of "a democratic public culture." [233] But this discursive move is really an effort to change the subject; it defends racial preferences not as a way to enrich the experiences of students and teachers but as a remedy for social inequalities and generalized discrimination. That the Supreme Court has expressly and repeatedly prohibited this justification, of course, is not a conclusive argument against it; the Court, after all, is notoriously fallible. [234] My point, rather, is that the diversity rationale is weak even in its own terms.

VI. The Politics of Affirmative Action

The political dynamics of affirmative action policy have been much studied in recent years. [235] Like any other policy domain, the competition of interests and ideas that swirl around it is complex, often opaque, and issue-and program-specific. The politics of affirmative action, moreover, have evolved in the four decades since President John F. Kennedy first mandated it. The issue became particularly volatile in the mid-1990s when Republicans gained control of Congress and the more individualistic jurisprudence of Reagan-and Bush-appointed judges took hold. In this section, I very briefly sketch this tangled history, review the evidence on public attitudes toward affirmative action, and then seek to explain what is an intriguing political puzzle: the policy's long survival in the face of persistent opposition by both the general public and many leading politicians.

A. Political History

Affirmative action as a policy directive first appeared in the 1935 National Labor Relations Act. There, Congress authorized the National Labor Relations Board to redress an unfair labor practice by ordering the offending party to "cease and desist from such unfair labor practice, and to take such affirmative action ... as will effectuate the policies of this Act." [236] Although Congress used this phrase to describe efforts to enforce fairness in the present, it came a quarter-century later to refer to pro-active government programs seeking to **[*47]** remedy past discrimination. President Kennedy's Executive Order 10925 created the President's Committee on Equal Employment Opportunity (PCEEO) in 1961, mandating federal contractors to "take affirmative action to ensure that the applicants are employed, and that employees are treated during employment, without regard to race, creed, color, or national origin." [237] Because of Kennedy's well-known deference to conservative southern Democrats, his affirmative action programs remained voluntary and ambiguous.

Less than a year after Kennedy's death, President Lyndon B. Johnson signed into law the 1964 Civil Rights Act, which over southern opposition established the Equal Opportunity Commission (EEOC) under Title VII to enforce the Act's employment provisions. Senator Hubert H. Humphrey, the bill's floor manager, argued that nothing in Title VII would allow the EEOC or any court to order "a racial "quota,'" [238] and southern Democrats in Congress further ensured that the Act did not codify racial preferences. Shortly after Johnson's

landslide victory, he issued Executive Order 11246 which terminated the PCEEO and gave the Department of Labor primary responsibility for enforcing affirmative action. The Labor Department created the Office of Federal Contract Compliance (OFCC) to assure that all federal contractors took affirmative, pre-contract steps to hire and promote more minority employees, and use more minority-owned subcontractors. [239] Johnson invoked the anti-caste rationale for his order: "you do not take a person who for years has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "You're free to compete with others,' and still justly believe that you have been completely fair." [240] Johnson's decision to issue his order and administer affirmative action programs through the new OFCC attracted little media or congressional attention and no serious public debate, and the OFCC quickly established a pre-award program requiring construction contractors to prove their readiness to meet affirmative action obligations. In 1967, Johnson added women to the list of favored groups, and in 1968 the OFCC mandated a written affirmative action compliance program including "specific goals and timetables for the prompt achievement of full and equal employment opportunity." In all of this, however, Johnson emphasized recruitment efforts and development programs designed to help workers in relatively low-wage jobs. [241]

Affirmative action began to assume its contemporary form with the election **[*48]** of President Richard M. Nixon, who moved the OFCC into the business of mandating preferences. [242] Nixon had a number of motives. Concerned about growing urban unrest and determined to avoid the riots of the Johnson years, he hoped that reducing the joblessness of young black men would provide an effective antidote. Public opinion about affirmative action had not yet coalesced, [243] so Nixon believed that he had some political leeway. He also hoped that affirmative action would become "yet another wedge to drive between white workers and blacks in the increasingly fractious Democratic party." [244] George Shultz, Nixon's moderate Labor Secretary, revived the Philadelphia Plan, which Johnson had devised but then abandoned as politically untenable. Shultz's version, which sought to compel Philadelphia's segregated construction companies to hire more minority workers, was stringent; it demanded workforce percentages that gave contractors specific target ranges. [245] In February 1970, Shultz extended this demand to all government contractors with fifty or more employees and at least $ 50,000 in government business. Labor Department Order No. 4 defined affirmative action as a set of result-oriented procedures, and used the term "under-utilization." Johnson's programs had defined "under-utilization" to mean having fewer members of a minority group actually employed than would reasonably be expected from their availability. [246] The Order further required "specific goals and timetables," and demanded that all contractors covered by it submit an affirmative action plan to the OFCC within 120 days.

It is highly noteworthy that this program did not cover white ethnic and religious minorities even though affirmative action policymakers knew that these groups too were often victims of job discrimination. [247] In December 1971, OFCC published new proposed rules, explaining that

members of various religious groups, primarily Jews and Catholics, and members of certain ethnic groups, primarily of Eastern, Middle, and Southern European ancestry, such as Italians, Greeks, and Slavic groups, continue to be excluded from executive, middle-management, and other job levels because of discrimination based on their religion and/or national origin. These guidelines are intended to remedy such unfair treatment. [248]

John David Skrentny, a leading chronicler of the history of affirmative action, shows that although these rules provided far less protection to these groups **[*49]** than the OFCC afforded to racial minorities, they were further weakened until they imposed no special obligations on employers at all. A number of justifications were offered for excluding non-

racial groups from affirmative action but these arguments fail to explain the different treatment. Skrentny summarizes this episode:

Ethnics had everything that one would assume would be necessary to gain some rights-oriented, equal-opportunity granting, difference-conscious policy. They had a **Washington** presence. They had advocates in Congress and in the White House. The Nixon White House wanted their votes ... and some in Congress considered them to be an economically disadvantaged group. But ethnics came late, after the affirmative action regulations had reached their carrying capacity. Their disadvantages were seen as below some perceived threshold of victimization. And unlike blacks, Latinos and - at least until the ERA debate in the 1970s - women, ethnics were seen in a much fuller, more multi-faceted way, without reducing them to one identity. [249]

As affirmative action expanded in scope and scale, opponents turned for relief to the federal courts. These critics quickly suffered two decisive setbacks in their battle against racial preferences. First, in March 1970 a federal district judge rejected a challenge to the Philadelphia Plan. A year later, a unanimous U.S. Supreme Court decided Griggs v. Duke Power Co., a class action challenging a promotion requirement for a high school diploma or a passing score on a standardized intelligence test. The Court held that the 1964 Act barred "not only overt discrimination but also processes that are fair in form, but discriminatory in operation... . Congress directed the thrust of the Act to the consequences of employment practices, not simply their motivation." [250] Although the Court did not mention the phrase "affirmative action," its focus on the disparate "consequences" of job requirements seemed to parallel Order No. 4's "result-oriented procedures." [251] After Griggs, the Labor Department revised Order No. 4 to include women as a part of the "affected class."

In the wake of these developments, Congress passed the Equal Employment Opportunity Act of 1972, extending the EEOC's jurisdiction to employers and unions with more than fifteen members, and to all state, local, and federal employees. It encouraged more class actions aimed at systematic bias rather than individual cases, and it defeated the efforts of a southern Democrat-led minority to include clear anti-affirmative action language. In 1973, Labor and an invigorated EEOC successfully challenged AT&T, the nation's largest private employer; it won a consent decree awarding $ 15 million in back pay to 13,000 women and 2,000 minority men and setting out new affirmative action goals. Columbia University also acceded to the EEOC's demands to develop a coherent affirmative action framework.

[*50] The election of a Democratic president, Jimmy Carter, moved affirmative action to new areas. In 1977, Congress approved a 10 percent minority set-aside program under the Public Works Employment Act by large majorities, and in 1978 Carter's Labor Department adopted the Uniform Guidelines on Employee Selection Procedures, which went beyond Revised Order No. 4 to establish an adverse impact framework and a four-fifths rule. The first invalidated employer practices adversely impacting women or minorities unless the employer could demonstrate a business necessity, while the second defined "adverse impact" as a proportional job selection rate falling below four-fifths that of the majority group. A supplement to the Guidelines, moreover, condoned the use of racial preferences to remedy past discrimination. [252]

At the same time, the Supreme Court began to define its own view of racial preferences. Three rulings played a particularly important role in shaping the legal and political climate of the affirmative action debate. Bakke, discussed above, created doubts about racial preferences in higher education and perhaps elsewhere as well. But a year later, in United Steelworkers of America v. Weber, [253] the Court upheld an agreement between the employer and a union to implement a training program allocating a certain number of slots to black workers. Justice William Brennan's majority opinion held that the program was sufficiently

voluntary and temporary to pass muster, but according to one analyst and supporter of affirmative action, resorted to "esoteric doctrines of statutory interpretation and strained readings of legislative history" in reaching this conclusion in the face of "the facially colorblind Title VII." [254] In 1980, the Court in Fullilove v. Klutznick [255] took the bolder step of upholding Congress's 10% set-aside for minority contractors. Chief Justice Burger justified the statutory quota partly as a remedy for past discrimination, but for the most part the majority and concurring opinions relied on a theory of congressional power to enforce civil rights through mandated preferences.

By the 1980 presidential election, the legal status of racial preferences was murky. Everything seemed to turn on an ambiguous distinction between a goal and a quota, on how voluntary a program was, on the nature of its rationale, on whether the preferences had been mandated by Congress or by federal agencies or other levels of government, on how clear the statute's factual findings of discrimination were, and so forth. After Ronald Reagan's victory, his transition team called for a fundamental policy shift, recommending that the new president eliminate not only quotas but all race-conscious affirmative action. Several political factors, however, frustrated this proposal. Polling data indicated widespread opposition to racial preferences, to be sure, but it also indicated strong **[*51]** support for civil rights and for special recruitment and training programs for minorities. In addition, the Supreme Court had upheld federally-mandated preferences, making opposition to them seem vaguely lawless. Reagan could repeal the executive orders providing for affirmative action, of course, but political calculations dictated otherwise. The business community had come to accept some racial preferences, and government contracting preferences might win him some additional support. [256]

Reagan nevertheless launched salvos against affirmative action. He appointed the conservative William Bradford Reynolds, an avowed opponent of racial preferences, to head the Civil Rights Division of the Justice Department, and named Clarence Thomas, another anti-affirmative action conservative, to head the EEOC. Between 1981 and 1983, Reagan cut the EEOC and OFCC budgets by 10% and 24%, respectively, and their staff by 12% and 34%, but his Labor Secretary, Ray Donovan, vigorously opposed efforts to amend or rescind Executive Order 11246. The ideologically polarized viewpoints of his advisers and the messages from business interests favoring goals and timetables appear to have hamstrung Reagan; after his two terms in office, the executive order remained intact. [257]

Reagan's challenge to affirmative action ultimately came through his judicial appointments. At the Supreme Court level, he elevated William Rehnquist to Chief Justice and appointed Justices opposed to preferences. From 1986 to 1988, the Court continued to uphold affirmative action programs even without proof of past discriminatory intent, [258] but 1989 saw several important changes. In Wards Cove Packing Co. v. Atonio, the Court required minority workers who alleged disparate-impact hiring violations to show not only a racial imbalance but also that a specific employment practice created the disparate impact. [259] In City of Richmond v. J.A. Croson Co., [260] an especially important decision, the Court struck down a 30% set-aside program for minority contractors modeled on the one approved in Fullilove, holding that affirmative action set-aside programs are "constitutionally suspect" and cannot be upheld without a **[*52]** finding of intentional discrimination. It also held that future state and local government preferences would be governed by the "strict scrutiny" standard, which demands that the program be narrowly tailored and based on a compelling state interest. In a 1990 detour from its campaign against affirmative action, the Court in Metro Broadcasting v. FCC upheld two federal programs creating preferences in order to increase minority ownership of broadcast licenses. [261] But Metro Broadcasting proved to be just that, a detour, and would be overruled five years later.

Congress reacted decisively to the Supreme Court's 1989 decisions by passing a civil rights bill in 1990 by relatively comfortable, largely partisan margins. Among other things, the Act would overturn Wards Cove by reducing employees' burden in proving discrimination and

establishing new remedies for intentional workplace discrimination. President George Bush, like Reagan a skeptic about affirmative action, vetoed the legislation because he felt that it encouraged quotas. When Congress sustained the veto, a new round of intense legislative negotiations commenced. It culminated in the Civil Rights Act of 1991, which closely resembled the 1990 bill. Bush threatened to veto the law, particularly after the Labor Department revealed instances of "race norming" in which minority test scores are compared only to those of other minorities, and after polling showed widespread public opposition to racial preferences. When the Clarence Thomas-Anita Hill debacle strengthened Congress' threat to override a presidential veto, Bush ultimately signed the bill.

President Clinton took office in 1993 on a platform favoring limited affirmative action. He had strongly condemned quotas during the campaign in an effort to woo Reagan Democrats and to mollify a broader public that had always opposed them, convinced that racial preferences contradicted the merit principle. When Clinton nominated Lani Guinier, whom some opponents dubbed the "quota queen," to head the Justice Department's Office of Civil Rights, he came under intense criticism and eventually withdrew her nomination. In the 1994 midterm elections, the Republicans won the House of Representatives and controlled Congress for the first time since 1952. With conservatives now shaping legislation and with a federal judiciary dominated by Reagan and Bush appointees, Clinton had little room for pro-preference initiatives despite his control of the executive branch. [262]

In June 1995, the Court hurled a thunderbolt. Overruling Metro Broadcasting, it held in Adarand Constructors v. Pena that the strict scrutiny standard applied even to federal set-aside programs and that the program under challenge could not meet this standard. [263] A month later, Clinton delivered a major address on affirmative action at the National Archives summarizing his **[*53]** administration's five-month review of federal affirmative action programs, which had been undertaken in anticipation of Adarand. He largely defended existing affirmative action programs, promised to "mend it [not] end it," and said that it was too soon to eliminate this temporary measure. [264] On the heels of this review, Clinton issued a White House memorandum that set forth new standards for such programs but failed to eliminate any; it was widely viewed as a reaffirmation of the status quo. [265] Republican-sponsored legislation to prohibit federally approved racial preferences never passed. In 1996, Clinton announced new restrictions on government procurement preferences that required specific numbers for minority contractors, while still authorizing "race-conscious" procurement where Justice Department studies could find credible evidence of discrimination in particular industries. By the end of Clinton's two terms, the Adarand restrictions had reduced the number of federal contracts flowing to minority businesses.

The major action is now on two fronts: judicial decisions and state ballot referenda. In 1994, the Fourth Circuit invalidated a University of Maryland scholarship program reserved for black students, [266] but the most uncompromising court ruling came in the 1996 **Hopwood** decision where another appeals court held that Bakke notwithstanding, race could not be used even as a "plus" factor in university admissions. [267] More recently, two federal district judges reached opposite conclusions on the constitutionality of the University of Michigan's race-preferential admissions policies, which had principally relied on a diversity rationale. [268] And in August 2001, an appeals court invalidated the University of **Georgia's** system of undergraduate admissions preferences which had also invoked that rationale. [269] On the other hand, another appeals **[*54]** court has upheld the University of **Washington** Law School's system. [270]

Ballot initiatives are also invalidating racial preferences. Proposition 209 in **California,** which passed by a 54-46 margin in 1996, banned all racial preferences in public employment and public education programs. Voters in **Washington** State approved a nearly identical ballot measure two years later. The success of those referenda has galvanized anti-affirmative action groups in other states to promote similar measures; as of April 2001, however, **Washington and California** remain the only two states to adopt such sweeping repeals.

During the 2000 presidential campaign, George W. Bush attempted to walk a tightrope on affirmative action. He voiced his opposition to preferences but declined to endorse Proposition 209. Ward Connerly, a prominent supporter of Proposition 209, observed that Bush "dragged the red herring of already-illegal "quotas' across his statements on affirmative action" in order to curry favor with the right while not offending the left. [271] Prominent in commentary on the current political status of affirmative action today are metaphors of disavowal and disinheritance. Richard Kahlenberg, for example, argues that "affirmative action is a bastard: the true fathers of liberal race policy (King, Kennedy, and Moynihan) deny paternity, and the true father of affirmative action (Nixon) was a scoundrel," [272] while John Skrentny calls it an "orphan" adopted enthusiastically by the Left after it was abandoned by its original parents. [273]

How did race-based preferences come to be orphaned? In one sense, the question is easy to answer: the voters oppose them. But in another sense, this simply raises a deeper puzzle. How has a policy this unpopular managed to survive politically for four decades? The next two sections explore both matters.

B. Public Attitudes

Affirmative action has never had much public support, [274] "with little evidence of change over time." [275] The vast majority of Americans, including more than a third of blacks and more than 70% of Hispanics, oppose racial preferences in hiring and promotion, with the level of this opposition rising somewhat **[*55]** over time. [276] Interestingly, the percentage of black high school dropouts who strongly oppose it was three times higher than among black college graduates. [277] This may reflect lower-class blacks' resentment about a policy that seems to favor the middle class. This differential may also support the view that middle-class blacks are more conscious of discrimination and angrier toward whites than lower-class blacks are, in part because the former interact more frequently with whites. [278] When the issue is college admissions preferences, the opposition is substantial even among blacks and other minorities. [279]

A leading study of public attitudes toward affirmative action finds, consistent with other studies, that "the most fundamental factor behind opposition to affirmative action is one of principle." [280] That is, the opponents view preferences, rightly or wrongly, as inconsistent with the ideals of individualism and merit that almost all strongly endorse. Indeed, even affirmative action supporters feel obliged to honor, affirm, and somehow reconcile these principles with their program - usually by blaming racism and suggesting that the merit and equality of opportunity values can only be achieved through preferences. [281] Researchers on public attitudes toward affirmative action understand that the phraseology of the question asked, as well as other contextual factors, can affect survey results and that multiple interpretations of the data are possible. [282] More specifically, widespread agreement exists on the value of diversity in **[*56]** school classrooms, [283] but support for affirmative action declines the more the question characterizes the remedy as "hard" (mandatory; explicit preferences; numbers) rather than "soft" (voluntary; focused on enhancing opportunity enhancement, as with greater outreach or job training; confined to tie-breaking), and the more it describes the rationale as redistribution or representation rather than fairness or equal opportunity. For this reason, it is hard to know the precise division of opinion. No researcher in this field doubts, however, that the public's opinion remains decidedly and intensely negative, [284] pretty much regardless of how the questions are formulated, the state of the economy, or personal financial conditions. [285] Indeed, simply mentioning affirmative action generates much less favorable responses to a range of other questions related to blacks. [286] Finally, politicians, who have a feel for these things, have long assumed that the electorate staunchly opposes race-conscious programs. [287]

Public opinion researchers appreciate that the interpretation of survey results is as much art

as science. Seymour Martin Lipset, for example, maintains that most Americans hold both egalitarian and individualist values and that the questions asked in polls draw more on the individualist strain; [288] indeed, even limited affirmative action can arouse intense opposition in societies more egalitarian than the United States. [289] Analysts also recognize that the results might be skewed by "social desirability" and "presentational" pressures caused by respondents' concerns about appearing racist to the interviewer, and that opposition to affirmative action might actually be even greater than the respondent's answers would suggest on their face. Attempts to reduce this possible distortion have focused on devising "unobtrusive" measures designed to uncover respondents' true feelings about affirmative action without requiring them to reveal them to the interviewer, who remains blind to the respondents' racial views. [290] Using unobtrusive measures, researchers find that three out of **[*57]** four whites oppose reserving certain job openings for blacks, that almost two out of five oppose giving qualified blacks preference in college admissions, and that their opposition is intensely felt. [291]

What is most interesting and surprising about these analyses, however, is who opposes the preferences. When the researchers use the unobtrusive measures to control for presentation pressures, they find that "opposition to, and anger over, affirmative action is pervasive among the white public and is just as strong among whites on the political left as among those on the political right" - the former being the ones that have the most positive views of blacks and the firmest commitment to racial equality. [292] Here are the conclusions of a recent study by political scientists Paul Sniderman and Edward Carmines, which employs a variety of survey-based experiments in order to tease out public attitudes in a more nuanced way:

(1) The role of racial prejudice in promoting opposition to affirmative action is minor. (2) Rather than opposition to affirmative action signaling a refusal to acknowledge the discrimination and exploitation that black Americans have suffered, a substantial majority of white Americans believe that an extra effort should be make to see that blacks are treated fairly. (3) Opposition to affirmative action is not peculiar to Americans. (4) Opposition to affirmative action does not hinge on the race of the group who benefits but rather on whether the procedures involved are judged to be fair. (5) In addition to dislike of blacks leading to dislike of affirmative action, dislike of affirmative action fosters dislike of blacks. (6) Opposition to and resentment over affirmative action has burst conventional political channels - it is now as prevalent on the left, among liberals and Democrats, as on the right, among conservatives and Republicans. [293]

The large size of racial preferences in certain domains, coupled with their clear offense to principles in which the public fervently believes, means that Americans in varying degrees - blacks and whites, liberals and conservatives, men and women, rich and poor - regard affirmative action's methods to be not merely misguided but morally wrong. Indeed, if the public knew how large affirmative action preferences in selective college admissions and some other areas actually are, opposition would probably be even more intense than it is. This is bound to taint the diversity, real and spurious, that preferences produce and to discredit the larger liberal project. [294] The value that Americans ascribe to diversity surely depends, among other things, on how they evaluate the process and criteria that produced it.

C. Affirmative Action's Political Survival

If public attitudes dictated policy outcomes in some straightforward fashion, **[*58]** race-based preferences would not have been adopted initially, much less survived for four decades. How, then, can we account for their survival and even, in many communities, their expansion? [295] Twenty-five years after Nathan Glazer first posed this question, [296] there still is no simple answer.

Even in a robust democracy, of course, policy outcomes can diverge from public opinion. The reasons for this divergence can transcend the specifics of affirmative action politics. Interest groups intermediate in complex ways between a diffuse public and specific policy outcomes. Strong political leaders can re-orient opinion or gain some leeway or independence from it. [297] Judicial decisions govern certain issues on the basis of constitutional or other legal norms that may trump political ones. Implementation may transform a policy into something quite different than what the politicians approved. Once in place, policies enjoy political inertia that only sustained political efforts by well-organized, highly-focused groups can overcome.

Even when we move from these general propositions to the specifics of affirmative action, its long survival remains something of a puzzle, albeit one to which the political history recounted earlier provides helpful clues. First, affirmative action's early development was relatively invisible, resulting less from minority group lobbying than from bureaucratic resourcefulness, especially by the EEOC. Stephen Steinberg, a strong affirmative action supporter, concedes that it "was never formulated as a coherent policy, but evolved through a series of presidential executive orders, administrative policies, and court decisions." [298] Few public opinion polls on the issue were conducted until the late 1970s when the Bakke decision gave the issue greater notoriety.

Affirmative action's enforcement strategy, its selection of favored groups, and its emphasis on a kind of proportional representation in the workforce were driven largely by an obscure form (Form 40, later EEO-1) originally designed merely to gauge the racial composition of employers' workforces. [299] By the time public opinion had hardened against it, the policy was sufficiently entrenched that the political cost of eliminating it daunted even strong opponents like Reagan. In this account, its survival is a story of obscurity followed by inertia. [300]

[*59] Discussions of affirmative action during the 1960s and early 1970s, moreover, commonly viewed it as a more or less logical or natural extension of morally and politically compelling non-discrimination laws protecting blacks. Simple morality entitled blacks to special solicitude and assistance, and goals and timetables seemed like a limited, appropriate remedy. [301] Only later did these soft measures ossify into programs resembling hard quotas. Initially, black groups had urged the EEOC to enforce non-discrimination rules more effectively rather than pressing the agency to count a workforce's minority group members. Although no group made race-conscious hiring a priority, the EEOC devised such a remedy based on numbers it had collected on its EEO-1 form.

Nor was it clear in affirmative action's early years that it would expand to cover groups other than American blacks. The EEOC began by focusing on them almost entirely, devoting relatively few resources to other minorities and almost none to women. Indeed, according to Skrentny, the agency viewed women's rights "as a distraction at best," [302] did not include them in the government's programs until the 1980s, and periodically dropped Asian-Americans from the list of favored groups. [303] It was mainly elected officials, pursuing the political logic of coalition-building and group mobilization in quest of new voter blocs, who pushed to add more groups, as when President Nixon added Latinos to his employment and minority capitalism programs. [304] The supply of preferences created a demand to expand the programs. [305]

The regulations, moreover, defined these new groups casually and very broadly, thus concealing large intra-group variations. The black group includes individuals from families who migrated to the United States more than a century after slavery ended. The Asian group, which is more highly educated on average than almost any white ethnicity, includes individuals whose families come from 25 different countries spread over 6000 miles and who have little in common with those from other Asian nations. The only commonality of the large Hispanic group, most of whom consider themselves white, is an ancestral language. The Native American category is muddied by very high rates of intermarriage; it also combines

hundreds of tribal groups with highly disparate cultures and languages. Indeed, the incoherence of affirmative action's categories so attenuates the moral basis of many claims for special treatment that it may doom the policy legally if not politically. [306]

[*60] Accounts of affirmative action's survival based on its initial lack of transparency and its largely incremental and bureaucratic growth are certainly plausible, but they can take us only so far. At some point, particularly after the 1978 Bakke decision, the earlier veil lifted. This alerted the public to how the policy had evolved and expanded, and informed politicians of voters' opposition to it. Why did the politicians not turn decisively against it at that point? More explanation is needed. Interest group politics, analyzed in the light of public choice theory, provides additional insights. Affirmative action may be a classic case of what James Q. Wilson called clientist politics, in which a policy's benefits are concentrated on a relatively small but intense group while its costs are spread among a much larger but more diffuse, hard-to-organize group for which the issue is less salient. [307] We saw that the number of white workers, college applicants, and others potentially disadvantaged by affirmative action is large, but that relatively few report actual disadvantage, perhaps because the statistical probability of such disadvantage to an individual white is quite small. (As we shall also see, this statistical result is less true of Asians, which may make them a more potent source of future opposition. [308])

Powerful political interests have indeed supported affirmative action. According to Lemann, "the new meritocratic elite didn't resist affirmative action at all - in fact it voluntarily established affirmative action in every institution under its control." [309] In time, liberal advocates for minority groups placed it high on their policy agendas. As Orlando Patterson explains, black perceptions of white racism are probably heightened (and distorted) by the proportion of the two groups in the population, which increases the policy's salience to blacks. The status quo has been sustained by strong support by ethnic organizations, national media, leading educational institutions, large corporations, government bureaucracies, [310] mainstream foundations, [311] and other opinion leaders. It has been further fortified by the growing acquiescence (and in the districting area, connivance) [312] of national Republican politicians and the inertial advantages of **[*61]** any long-established policy.

Large corporations' strong support for affirmative action might seem counter-intuitive. After all, employers must bear most of the direct compliance costs, and affirmative action often places them between contending employees in an awkward damned-if-you-do, damned-if-you-don't position. Nevertheless, some large companies support affirmative action even in non-business settings. [313] Their leaders emphasize the benefits of ethno-racial diversity in a global market, [314] and the programs are promoted by powerful internal and external constituencies, including some customers. [315] The programs also tend to advantage large companies by imposing onerous reporting, staffing, and other compliance costs on smaller competitors who cannot bear them as easily. [316] Firms also see affirmative action as a safe harbor sheltering them from Title VII claims, helping them to "keep the peace" and avoid adverse publicity. Absent allowable preferences, these claims would come not only from black workers, but also from the vastly larger number of white workers who might allege reverse discrimination. [317] In a notoriously uncertain system, firms favor almost anything, even regulations, that can clarify their legal duties. [318]

All of these corporate interests, taken together, surely help to explain the failure of President Reagan and the first President Bush to move vigorously against affirmative action - except through judicial appointments - despite numerous opportunities to do so. [319] (Johnson, Nixon, Carter, and Clinton, we have seen, supported it in varying degrees.) Today, most Republican politicians, with their eyes on Hispanic and Asian voters (and money), are unwilling to rock the affirmative action boat and risk being pilloried as racist or insensitive to minority interests. [320] It is hardly surprising, then, that the battles against **[*62]** affirmative action (and bilingual education) in **California** and elsewhere have been spearheaded primarily by private political entrepreneurs in ballot referenda, not by elected politicians.

A final explanation of affirmative action's political survival transcends the interests of particular groups and politicians and is undoubtedly important. Many who might otherwise oppose preferences simply do not see any viable alternative. Advocates of preferences have skillfully exploited a deep reservoir of elite guilt about past discrimination. Many who might otherwise oppose them do not see any viable alternative, and others see them as "easier than the slow acculturation that would naturally prepare blacks to compete at school and on the job." [321] Charles Fried notes this dilemma: "without preferences, the elite institutions of this country might rapidly be stripped of much of their African-American presence ... [and] a society that is segmented by race, with all the best jobs, places, honors, and titles going to whites (and Asian Americans) is simply not an integrated society, whatever the reason for the segregation. It is two societies, separated by race." [322] As we saw, this concern is especially acute at the elite schools where the credentials gap makes the re-segregation scenario seem quite plausible. [323] This issue is discussed further in Part VIII.

VII. The Consequences of Affirmative Action

I have considered some of affirmative action's consequences, such as the increase in black representation at selective undergraduate, graduate, and professional institutions; the entry of their graduates into the black middle class; and the public's views on race issues. But these hardly exhaust the consequences; three others remain to be discussed: the rate of black progress, the distribution of affirmative action's benefits, and the incidence and distribution of its costs.

A. Rate of Black Progress

The improvement in American blacks' social and economic conditions has been, in Orlando Patterson's words, "nothing short of astonishing" in almost every respect. [324] The relevant question for present purposes is: how much of this progress is due to affirmative action? Since affirmative action in some domains has been in place as a national policy for more than three decades, this is **[*63]** a difficult question to answer. Two ways to approach it is to compare the trajectory of black progress before and after the policy was established, and to analyze the backgrounds of those who benefited from it in order to draw inferences about whether and to what extent they would have improved their positions without preferences. Both methods produce interesting but uncertain results.

Affirmative action, we saw, has unquestionably had a large effect on the number of blacks admitted to selective institutions. The evidence is murkier in the employment area. Economists John Donohue and James Heckman sought to discover how much of blacks' economic gains since 1940 were due to federal civil rights policy and enforcement under the Civil Rights Act of 1964, particularly Title VII barring employment discrimination. They concluded that this federal activity was "the major contributor to the sustained improvement in black economic status that began in 1965," while noting the difficulty of controlling for important contemporaneous developments such as black migration to the north, selective attrition of older, less skilled blacks from the work force, improvements in black education, the rise in wages resulting from Vietnam War-related shortages, and underlying attitudinal changes among whites. [325] A recent study, using outcome variation among states passing anti-discrimination laws instead of the time series methodology employed by Donohue and Heckman, finds smaller positive effects on blacks than they did; moreover, almost all of the gain was by black females. [326] Some studies, comparing outcomes before and after Title VII, have found negative effects on blacks. [327]

An even greater challenge is to distinguish between gains attributable merely to non-discrimination and those attributable instead to affirmative action preferences. [328] In the South, where Donohue and Heckman found the major gains, non-discrimination presumably was the major enforcement thrust; remedies taking the form of numerical preferences were

often upheld, but only to rectify specific instances of past discrimination. [329] Another economic analyst finds that affirmative action has not improved the employment prospects for the most disadvantaged blacks but has instead redistributed black workers from small and medium-sized firms to large employers and federal contractors most aware of legal requirements, without increasing black employment rates overall. [330] **[*64]** The econometric studies of affirmative action find modest gains for favored groups in employment, government contracting, education, and entrepreneurship, with inconclusive evidence on efficiency effects. [331] Again, however, it may be impossible to disentangle the effects of non-discrimination and affirmative action policies.

B. Distribution of Benefits In and Outside the Favored Group

If we wish to know whom affirmative action directly benefits, we must first disaggregate the broad favored group (e.g., blacks, Hispanics) in order to determine which of its members are helped by the program. Disaggregation is especially necessary with respect to affirmative action. First, even its proponents concede that only a very small fraction of the group can hope to take advantage of it. This is most obvious with selective college admissions and FCC broadcast licenses, discussed immediately below, but it is bound to be true as well for employment that requires special job skills or a certain level of education. Second, affirmative action effects a redistribution of opportunity and status within the favored group; as discussed below, the program's mere existence makes some members worse off - particularly those who, rightly or wrongly, are stigmatized as needing special help when in fact they do not need it and can qualify under conventional **race-neutral** standards. Again, the Bowen-Bok study shows that affirmative action in admission to selective colleges and universities largely benefits students from middle-and upper-class families. [332] This is hardly surprising, as these students are best equipped to apply to such competitive and costly schools. This pre-college advantage is then multiplied when these students, now graduates of the selective schools, go on to apply to selective professional and graduate programs and then proceed with their careers. As we saw, most of them graduate from these programs and do well, but a disproportionate number (at least in law) do not gain entry to the profession. [333]

The skewed distribution of benefits from FCC licensing is even more dramatic, as they are enjoyed by a handful of black entrepreneurs who are already sufficiently successful to be able to meet the complex bidding and licensing standards. Indeed, the black bidders or licensees are sometimes little more than fronts for white business interests seeking to exploit the economic value of affirmative action preferences. [334] Similar abuses have been documented in preferences **[*65]** applying to tens of billions of dollars in federal, state, and local government contracts, [335] and to additional billions intended for minority-owned small businesses under the scandal-ridden Section 8(a) and other set-aside programs. [336] Such programs are designed to help a relatively small number of people who can only take advantage of them if they are already fairly sophisticated and well-connected. [337]

A preference program, moreover, is a zero-sum game in two senses. It not only pits favored groups against nonfavored groups as they compete for a fixed set of resources or advantages - a competition that foments complaints of reverse discrimination - but it also pits each favored group against the other favored groups. Blacks' success in gaining a preference is at the expense, not only of whites, but also of Hispanics, Asians, and other preference-eligible groups - and vice-versa. This intergroup competition is most notorious in higher education and contract preference programs. [338] Such rivalries exacerbate the already-tense conflict over politically-distributed, racially-defined spoils. [339]

Racial preferences' skewed benefits can also be seen in officially-sanctioned or officially-required racial gerrymandering of legislative districts that seeks to benefit blacks. Political analysts have long disagreed over whether this form of affirmative action helps black voters by packing them into a small number of majority-minority districts where they can easily

elect black representatives, or whether their interests would be better served as a substantive matter by line-drawing that leaves them as a significant minority in a larger number of white-majority districts. Those who favor this latter approach find growing empirical support in studies showing that the majority-minority districts benefit the few black politicians who occupy or aspire to the safe seats **[*66]** they yield, but not their black constituents who would be better represented substantively by representatives, white or black, in districts where black voters constitute a significant minority. [340] Indeed, many analysts hold the majority-minority strategy partly responsible for the unseating of a large number of liberal Democratic members of the House by conservative Republicans in 1994. [341] Another example of the conflict of interest between the few black politicians (and others) who benefit from policies concentrating blacks geographically occurs in affirmative action remedies that have the effect of keeping blacks in their isolated neighborhoods rather than moving them to better, hopefully more integrated ones. [342]

This problem - the narrowness and relative affluence of those within the broader preferred group who actually benefit from the preferences - is probably endemic to all affirmative action programs rather than being confined to American ones. Will Kymlicka, a Canadian proponent of preferences there (and in the United States), reports that the same is true of Canada's programs. [343] Studies of preferences in other countries, including less-developed ones like India that target the most disadvantaged groups, find much the same thing. [344] Again, this is predictable; the supply of preference slots and the qualities needed to gain access to and use them are in very limited supply relative to demand.

C. Incidence and Distribution of Costs

I have been discussing affirmative action's beneficiaries. I now ask what are its costs, and who bears them? This is a much more difficult question to answer than on the benefits side. There is, first, a conceptual and normative difficulty. Consider those applicants - the "losers" - who would have been hired or admitted on the merits (however defined), but who are not hired or **[*67]** admitted because of preferences given to others. Should (and do) the losers think of themselves as members of a demographic group and assess their loss in terms of that group's changed probability of admission, or should (and do) they view themselves as individuals and assess their loss accordingly?

In thinking about these questions, two empirical factors might seem to support the argument for affirmative action. First, only 7% of whites surveyed in 1990 claimed to have experienced any form of reverse discrimination themselves, 16% knew of someone close who had, and fewer than 25% said it was something they had witnessed or heard about in their workplaces. [345] Some analysts, however, attribute the low complaint rate of whites to the policy's informality, their reluctance (common to other discrimination victims [346]) to get embroiled with the law, and a dose of "you can't fight City Hall" fatalism. [347]

Second, affirmative action only slightly reduces the ex ante statistical group probability of elite school admission of whites: eliminating it would increase their probability only from 25% to 26.5%. [348] This increase is so small, of course, because the white applicants and admittees vastly outnumber the black ones. Affirmative action advocates correctly argue that when the program is viewed in this ex ante, probabilistic, group-centered way, whites suffer a trivial reduction in its chance of admission so that blacks can more than triple both their ex ante group chance of admission and their representation on campus. [349] Whites might still argue, of course, that this reduction is unfair to them because at the margin and thus for some, it means the difference between admission and rejection. But from the ex ante group perspective, no white can properly claim an individual expectation of admission, much less a right to it, since the individuals who lose slots as a result of the preferences will never know whether they would otherwise have been admitted. Given the loser's anonymity, the most that any one of them can claim is that absent affirmative action, more whites would have been admitted and she might (or might not) have been one of them, depending on how her

application compared to those of other disappointed white applicants.

We must complicate this picture of group consciousness and competition in several respects. First, the 1.5% decline in probability of admission seems trivial, but when applied to the entire group of white applicants it means that a significant number of people are affected [350] - and many more will think they were **[*68]** affected (the flip side of the "anonymous loser" factor). Second, substituting Asians for whites makes the picture look very different and more troubling. Indeed, relatively high-achieving Asians are probably the group most unfairly treated by preferences for blacks. During most of the nineteenth century, many Asian laborers endured a kind of servitude and subordination that was only a cut above slavery. [351] The Chinese Exclusion Case, sometimes called the Dred Scott decision for Asians, rivals the Japanese internment cases for harshness and injustice. [352] Until 1952 (for the Chinese, 1943), Asians could not naturalize as American citizens. Increasingly, affirmative action in effect punishes the stunning academic and economic achievements of many Asians by excluding them, like whites, from eligibility for preferences. This disadvantage, moreover, falls more heavily on Asians than on whites. Because the number of Asian applicants is so much smaller, preferences for blacks reduce the ex ante admission probability of Asians as a group and as individuals much more than they do for individual whites.

A third and related complication arises from the growing possibility that, contrary to my assumption in this scenario, the whites disadvantaged by preferences may in fact think of themselves not as whites but as members of some other group - say, New York City public school students, Muslims, whites with SAT scores of X, outwardly gay women, or any group that they believe is salient to their applicant-identity. Because these non-preference groups are so much smaller than the white group, the preference for blacks may create a much greater disadvantage for them than the 1.5% for whites.

Now suppose that we instead imagine that the white losers think of themselves as individual applicants, not as members of the demographic group "whites." I would expect them to feel a more profound sense of unfairness and personal loss, if not bitterness. [353] Regardless of how large or small their racial group disadvantage was, they will think that it may have been the difference, depriving them of admission on what most will presumably regard as a non-meritorious, hence illegitimate, basis. In psychological reality, and not just by **[*69]** hypothesis, they will not have thought of themselves as "whites" in this connection, at least until they learn that affirmative action disadvantages whites as a group. Perceiving their group membership as a reason, if not the reason, for their rejection is bound to demoralize and anger them in a way that would not occur to those who conceive of themselves not as unique individuals, but rather as members of a specific demographic group that has a statistical chance of admission. [354]

In a culture that ardently affirms the principles of individual freedom, merit, and equality of opportunity, this demoralization and anger must be counted as a very large social cost. It is no less a cost because it is borne by whites, and often less privileged whites at that. If these principles make it unfair to impose this cost, the fact that the unfairness is spread across a large group of people may not make it any more palatable. In fact, diffusing the unfairness in this way will simply increase the number of people who feel themselves aggrieved. The most powerful groups among them may seek protection by seeking new preferences for themselves. These incentives do not fully explain the politics of affirmative action, but they surely are part of the story.

Other costs of affirmative action are also diffuse, invisible, hard to measure, or ineffable. Here as elsewhere, we do well to remember the laws of unintended consequences, of inertia, of program politicization, and of reinforcement of existing advantage - laws that are as implacable and distort affirmative action as much as other well-intended policies. [355] Black students' much higher drop-out rates from the selective schools represent a large financial and psychological cost to the students and to the schools. [356] Shelby Steele, who firmly

opposes **[*70]** affirmative action, sees it as an "iconographic" policy aimed at enhancing whites' virtuous self-image and blacks' sense of power - "the precise qualities that America's long history of racism had denied to each side." [357] The fact that affirmative action is a feel-good policy for white elites, of course, tells us nothing about whether or not it is moral, rational, or effective. Many socially desirable behaviors are actuated by guilt or by the desire to be esteemed by others and by oneself as righteous and generous. Indeed, no community can flourish without such motivations.

Some of affirmative action's iconographic elements, however, are less uplifting. What signals does society send when it exempts one from the normal rules of the game, treats one as a kind of ward of the state or of some other institution, presumes that one needs special help because one cannot make it on one's own, subjects one to others' lowered expectations for oneself, and segregates one - paradoxically, in the service of the integration ideal? [358] No one really knows how program beneficiaries decode the subtle semiotics of preferences; they surely read them in many different ways. Indeed, because these signals are multiple, intricate, and perhaps internally contradictory, the beneficiaries may be as confused as the rest of us about what preferences actually connote.

In any event, one must wonder about the iconographic authenticity of a policy in which most of the feel-good benefits go to those who bear few if any of its costs. Most of affirmative action's costs are borne by young people struggling to reach the first rungs of the long ladder to success, while many of its most influential supporters are elite universities [359] and corporations. [360] In these institutions, domestic tranquility, good governmental relations, and a public image of rectitude are paramount considerations. The best-off members of these institutions, moreover, are the ones least likely to be displaced by it. **[*71]** Again, this fact does not mean that they are wrong to defend affirmative action; it only means that they free-ride on its iconographic journey.

Another subtle aspect of affirmative action is how it reshapes the ways in which merit is defined, measured, and discussed. An example is the trend for select institutions of higher education to move away from national testing toward a consideration of "the whole person," [361] something that elite institutions, of course, always sought and can best afford to do. Which criteria of merit will take its place, however, remains conspicuously unexplained. This question is especially important for large institutions. The University of **California** cannot realistically consider 68,000 applicants for about 28,000 freshman places [362] on any meaningful "whole person" basis. Alternative criteria like personal interviews, recommendation letters, high school rank, and extracurricular activities are likely to have other, perhaps greater, disadvantages for applicant pools drawn from very diverse, hard-to-compare high schools. [363] These questions, of course, intersect with the robust, politically salient national debate over educational standards and testing, which became a centerpiece of the 2000 presidential election. In less rarefied contexts like police departments, the practice of racial or gender norming of qualifications is now common, breeding cynicism, resentment, and uncertain effects on the quality of public services. [364]

Yet another hard-to-measure effect of affirmative action, especially at select institutions of higher education, is the pervasive dissimulation and deformation of thought on all sides due to the felt need to deny or ignore the fact that racial preferences play a large, often decisive role in many admissions decisions. [365] Even more pernicious - and tragic for the individuals involved - is the denial that the preferentially admitted students, as we have seen, tend to have much lower academic performances and higher drop-out rates. The current attack on SAT scores, it seems, is "not because they are uninformative but because they are all too informative: they consistently gives whites and Asians higher scores than blacks and Latinos." [366] These evasions in turn create a perverse rhetorical incentive that encourages double-talk. Below, I discuss a current example of this - **California's** constant revision of its admissions criteria in order to get the **[*72]** "right" ethno-racial mix. [367]

A cost of preferences that is impossible to measure is the insidious innuendo about the deserts of almost all but the most unquestionably superior members of the preferred group - and perhaps even of them. [368] Ironically, this innuendo tends to perpetuate the very stereotypes that affirmative action was supposed to dispel. That these costs are often invisible and unacknowledged does not make them any less real and cruel - or hypocritical, given athletic and other types of preference with even less justification. [369] Fish dismisses this stigma by saying that a particular beneficiary may prefer to bear that cost in order to gain the preference, and that it would not exist if people just stopped thinking that way. [370] The problem, however, is that even unbigoted people do think that way - they still believe in merit despite efforts to discredit the ideal, and they are right to think that preferences often violate it. Moreover, the stigma attaches to every member of the preferred group whether she is willing to accept this bargain or not.

More generally, affirmative action has contributed to the relentless racialization of discourse on a vast range of public and private subjects, some of which actually have little or nothing to do with race. At least two factors are at work here. First, the felt need to defend it against strong public opposition has encouraged many advocates to play the race card at every turn and with a desperation that grows with the effectiveness of the critique. When opportunities are made to turn on race, one is more likely to emphasize one's racial identity rather than the many other identities that one naturally acquires in a society as fluid, complex, and individualistic as ours. Orlando Patterson, a proponent of temporary affirmative action, captures this discursive tic so astutely and succinctly that I can do no better than to quote him at length:

Any reference to Afro-Americans by Euro-Americans that does not acknowledge the totality of racism or flatter all things Afro-American risks sneers of contempt or the charge of racism. Any but the most professionally qualified expression of sympathy is likely to be dismissed as liberal patronage. Any suggestion that an Afro-American person might be responsible, even in some minor way, for his or her condition invites the knee-jerk response that one is blaming the victim. The result is that no Euro-American person, except one insensitive to the charge of racism, dares say what he or she really means... . so much "race" speech has become ritualized and rhetorical... . The overwrought nature of ethno-"racial" talk results in curious forms of self-censorship and privileged speech among ethnic groups in their interactions with each other... . An Afro-American person is privileged to say, "I love my blackness," or "I take pride in the great cultural achievements of my race," or any such chauvinistic clap-trap. No Euro-American person dares say the very same **[*73]** thing, not if she cares about her reputation, even though it is true that nearly all Euro-Americans cherish their appearance and cultural heritage... . Every Afro-American is presumed to be an expert on all aspects of the subject of "race"... . When they are not proving that "race" as a concept has no scientific meaning, most social scientists and even medical researchers are busily controlling away all other variables in a relentless effort to prove that one, and only one, variable explains the condition of Afro-Americans: "race." Having abolished the ontological basis of "race" in biology, American social scientists vie with each other to reestablish its ontological essence as a social fact... . American social science is either uninterested in, or befuddled by, the fact that the vast majority of Afro-Americans, including the majority of those born and brought up poor, overcome their circumstances and led healthy, happy, productive lives... . [371]

Patterson's insistence on the reality of black progress brings us to what may be the most important question of all about affirmative action: What would happen if it were eliminated? What would workplaces, high schools, legislatures, college campuses, and other purlieus of American life look like without affirmative action - or at least without the kinds of preferences that are now in place?

VIII. The Re-segregation Nightmare

The prospect of all-white (and Asian) institutions is deeply repellent to everyone I know. Most Americans who oppose affirmative action in principle, the evidence suggests, are likewise appalled at the thought of returning to a world in which whites seldom interact with minorities, and almost never as social equals. As we have seen, this nightmarish prospect accounts for much of the support for affirmative action. Do we actually face it?

Knowing precisely what America would look like without government-mandated ethno-racial affirmative action is probably impossible. The difficulty is increased by the rhetorical strategy of preference defenders like the University of Michigan, who shift uneasily between arguing that (1) preferences confer only a marginal advantage on minority applicants; and (2) re-segregation would occur absent those preferences. In making predictions, however, we must not lose sight of how much American institutions have changed since the 1950s and how strong the non-legal incentives for maintaining and increasing diversity are today. If diversity depended on racial preferences as much as some advocates imply, even the levels that now prevail in colleges, workplaces, politics, and communities would simply be inexplicable. A key question is how the more selective institutions would react to such a ban. Since private ones often engage in affirmative action now when they are under no legal mandate to do so, it is safe to predict that they would continue the practice, and perhaps even increase it in light of the legal constraints on the public ones. Many private institutions evidently find the organizational, political, and moral considerations **[*74]** compelling, and there is no reason to believe that their reasons would change.

An across-the-board ban on ethno-racial preferences by public institutions would surely make a difference, although it is impossible to know how much. The public universities, most notably in **California and Texas,** have already demonstrated their determination to maintain their black and Hispanic enrollments even in the face of legal prohibitions against preferences. They have substituted other criteria that are not explicitly ethno-racial but effectively maintain or raise the previous levels of minority admissions. **Texas** changed its system to admit the top 10% of graduating high school seniors to the public campus of the students' choice. A recent study of admission data through 1999 finds that the program has had "mixed results" at the flagship campuses there and has helped Asians as much or more than blacks and Hispanics. [372]

California's approach was more restrictive; it was limited to the top 4%, excluded students who have not taken certain preparatory courses, and did not guarantee enrollment at the campus of their choice. [373] Even so, using greater outreach, more individualized review, and "holistic" criteria, 18.6% "under-represented minorities" were admitted to the **California** system in 2001, essentially the same as the 18.8% in the last year of affirmative action (1997), although their distribution among the various campuses in the system was different. [374] Under less political and legal pressure to abandon preferences, **Florida** adopted a plan that admits the top 20% from each high school to the state system, yielding more than 40% minority incoming students and raising black enrollment at its flagship campuses. [375]

But even if the new "percent plans" (as they are called) succeed in maintaining or increasing black and Hispanic enrollments, they will not necessarily be a cause for unequivocal rejoicing. First, they may simply preserve the same objectionable use of ethno-racial preferences by disguising them and effectuating them indirectly. In addition, these programs enable many students who graduate from uncompetitive high schools to gain admission to institutions for which they are ostensibly unqualified, with all the difficulties this entails for them and the institutions. Those admitted under the programs, moreover, will still constitute but a very small fraction of their groups' cohorts. After all, only **[*75]** 6% and 7% of black and Hispanic students, respectively, who graduated from high school in 1998 scored at least 900 on the SAT and ranked in the top 20% of their classes, and neither of these groups would qualify for automatic admission under the plans. [376]

Another dismaying and perverse feature of these plans is that their effectiveness depends on segregated neighborhoods and high schools and on school districting practices that can be manipulated to qualify students under the plans. [377] Furthermore, the percent plans disadvantage minority students (especially those attending good integrated high schools) who fall just below the new cutoff but could succeed academically at the more selective schools. Also disadvantaged are those white students who are more qualified than the whites who, because of their higher class ranking at inferior schools, will be admitted in their place. Indeed, one can predict that the state university systems, under great pressure from minority caucuses in the legislature, will lower academic standards further by raising the percentages specified in the plans and by again reducing the percentage of students who must be admitted on the basis of academic criteria. For all these reasons, the new rules seem likely to lower the credentials of whites as well as minorities in the state system. [378]

Manipulation of the new emphasis on class rank and holism rather than higher standards is already evident, [379] and the **California** system had countenanced if not conspired with these stratagems even when they violate the principle of equal opportunity. [380] Consider, for example, one ruse that benefits Hispanic applicants to the disadvantage of blacks and most whites. [381] High school students who speak Spanish at home are now encouraged to take Spanish as one of their three SAT II tests, which are designed to measure achievement in a specific subject matter area. Not surprisingly, they score very well on the Spanish SAT II as well as on the Spanish advanced placement test (which also strengthens their applications) without ever having taken a course in the subject! Students in one low-performing Los Angeles school who took the Spanish SAT II averaged 715 out of a possible 800 on it compared to an average of 396 on the SAT, far below the national norm. Since the **California** system now weighs the SAT II scores more heavily than the SAT scores, many Hispanic **[*76]** students win a guaranteed slot in the system despite extremely low SAT scores. Other language-minority students, such as Chinese, Koreans, and Japanese, are doing the same thing where the SAT II offers a test in their language, sometimes after heavy ethnic group lobbying and subsidization of test development.

In **California,** the end of legally-mandated ethno-racial preferences did not significantly reduce minority admission to the public university system overall. This outcome, however, rests on two conditions. First, minority students' distribution among the system's campuses changed. At Berkeley, for example, the demise of preferences substantially reduced black enrollment there, especially at its law school, [382] but most of the students who no longer could get into Berkeley attended other schools in the system instead. [383] One would expect this to happen, and it is not necessarily regrettable. Dropping down a rung on the academic ladder in the public systems does not necessarily damage a student's educational and life opportunities. The data presented in Part IV on academic performance, drop-out and bar passage rates, and the educational and career paths of black leaders, suggest that the opposite may be true, at least for those who would have done poorly at the flagship campuses. Less qualified students are more likely to succeed or excel academically at less demanding schools, and failing at a more prestigious school is probably worse than succeeding at a lesser one. [384] In the year before preferences ended at the University of **California,** only one black freshman at the San Diego campus had a GPA of 3.5 or better, as compared with 20% of **[*77]** whites. In 1999, after Proposition 209, 20% of black freshmen at San Diego had GPAs of 3.5 or better, and an internal administration study found no substantial GPA differences based on race or ethnicity. [385]

This outcome, I contend, benefits the minority and white students and the larger society. Even so, of course, this will no more assuage such students' disappointment in not being admitted to their first choice school than white students will be mollified by being told that affirmative action reduces their ex ante chances by only 1.5%. At the lowest rungs of the ladder, to be sure, the most marginal minority students, like their white counterparts, may not gain admission to any of the system's campuses, and some of them may be unable to

afford the tuition at any of the vast number of non-selective private colleges that admit all applicants. We do not know how many are in this predicament and what they will do about.

The second reason why **California** has been able to maintain overall minority enrollments in its public system without formal preferences is that it has kept jiggering its admissions criteria in a determined search for a formula that will produce the numbers it wants. [386] I have already explained why I think this well-intentioned tactic will lower academic standards, disserve and stigmatize those minority students who are unprepared for the schools they attend, engender deep resentment on all sides, encourage subterfuge and dissimulation, have perverse effects at the high school level, and eventually bring a once-great university system into disrepute. My belief that this game is not worth the candle is fortified by the system's ability to maintain or even expand minority enrollments by appropriately redistributing them among its different campuses while also trying to improve their pre-college preparation (discussed below). Obviously, many others disagree.

If past is prologue, the remarkable and hard-won achievements of minorities should lead in the future to greater diversity in higher education, workplaces, and other social institutions - with or without racial preferences. This diversity will occur despite the imperfections of anti-discrimination remedies. [387] Those remedies should be strengthened wherever possible. In addition **[*78]** to the usual law enforcement strategies, for example, the government could deploy many more trained testers disguised as job applicants, homebuyers, borrowers, and so forth to gauge discrimination in various markets, while increasing the penalties for violations. [388] Violators could be required to publicize their violations to suppliers, customers, and communities. Other remedial reform proposals have been advanced and should be seriously considered. [389]

IX. Alternatives

The real choice for America, then, is not between the status quo and a return to the 1950s - or even the 1980s. The powerful processes of immigration and social change, augmented by more vigorous enforcement of the anti-discrimination laws and voluntary private affirmative action, promise to expand diversity in all areas of American life. By the same token, we need not choose between existing forms of affirmative action and none at all. Indeed, many proposals to reform affirmative action have been offered by its defenders and critics alike. I discuss these proposals under six broad rubrics: (1) better targeting within currently-favored groups; (2) disadvantage-based preferences; (3) lottery; (4) addressing root causes; (5) time-limited programs; and (6) voluntary programs.

A. Better Targeting Within Favored Groups

Many of the proposals take cognizance of the over-breadth of the coverage and definition of favored groups - for example, as noted earlier more than 75% of the post-1965 immigrants to the United States qualified as soon as they arrived - and seek to focus more narrowly on particularly compelling claims for preference. The most important of these proposals would limit the preferences to blacks (and, for obvious historical reasons, Native Americans) by virtue of the disadvantages they have suffered from the legacy of black enslavement and pervasive race discrimination. [390] On this reasoning, one might further limit preferences to non-immigrant blacks (i.e., those descended from Afro-American slaves), but programs seldom if ever make this distinction. [391] Any **[*79]** who oppose affirmative action in principle but who also recognize blacks' special moral and historical claims might well support this approach as a better compromise. But the growing political influence of Hispanics, whose leaders often couch the group's claims for preference in similar terms, [392] makes such a change less likely. Distinguishing among blacks in this way might also be administratively unworkable.

Other proposals illustrate just how fine-grained and also how crude these targeting efforts

might need to be. Orlando Patterson, for example, would exclude "first-generation persons of African ancestry from Africa, the Caribbean and elsewhere ... [but] like Mexican-Americans, their children and later generations should be eligible in light of the persistence of racist discrimination in America." He would also exclude all Hispanics except for Puerto Ricans of any generation, and Mexican-Americans of second or later generations, and would exclude "all Asians except Chinese-Americans descended from pre-1923 immigrants... ." [393] With due respect for Patterson's pathbreaking work on race, his specification more resembles a tax code provision governing depreciation expenses than a coherent, workable formula for promoting social justice.

Another recent proposal for an alternative form of affirmative action in legal education would grant admissions preferences on the basis of three criteria: whether the applicant has experienced the effects of racial discrimination; is likely to contribute a perspective or viewpoint on racial justice that is currently not well-represented in the classroom; and is likely to provide legally under-served communities with services and resources. [394] The advantage of these criteria, according to the author, is that they target qualities for which law schools have traditionally used race as a proxy, without themselves being racial classifications and thus constitutionally suspect. This scheme might indeed pass constitutional muster, although this would depend on how it was administered and whether it can be shown to be anything more than a transparent disguise for the kinds of racial preferences that courts have rejected. One wonders, however, how schools - as a practical matter and without relying on impermissible racial stereotypes - would determine the answers to the three questions. The proposal, one suspects, would simply invite institutions, parents, and students to dissemble, with a resulting increase in demoralization of the participants and system.

Rather than amending the categories of favored groups, some targeting proposals would demand more rigorous proof of actual discrimination-based **[*80]** disadvantage before affirmative action could be upheld, [395] a requirement that the Supreme Court has imposed in any event, especially with regard to race-based preferences. [396] President Clinton's proposal to "mend, not end" affirmative action, discussed earlier, took this approach.

B. Disadvantage-Based Preferences

Perhaps the most alluring proposal for targeting would shift the focus from preferences based on race or ethnicity to **race-neutral** preferences based on economic or other disadvantages (e.g., disability). [397] Not only would this limit preferences to those in the currently-favored groups who most need help; it would also extend them to low-income whites, the disabled, and others who are not now favored by affirmative action. Because blacks are disproportionately poor, the thinking goes, they would disproportionately benefit without incurring the hostility that attaches to race preferences. Most Americans, after all, are morally more inclined to assist people on the basis of their economic need than on the basis of their skin color, language, region of origin, or gender. [398]

Despite these supposed advantages of class-based preferences, however, they would be neither administrable nor advantageous to many blacks. First, as others have noted, most poor people are white, not black, so a class-based program would disproportionately favor whites. In response to this problem, some supporters emphasize that poor blacks, unlike poor whites, are separately disadvantaged by race and by class, so their predicament should be assessed on a different scale. [399] In itself, of course, this aspect of class-based programs is not a good argument against them - poor people are poor whatever their color - but it does reduce the enthusiasm for such programs on the part of many affirmative action proponents who primarily want to benefit blacks. [400] For example, Berkeley's law school, Boalt Hall, like the rest of the **California** university system, [401] experimented with a socio-economic disadvantage criterion (among others) instead of race, but abandoned it after one year when it produced no additional black admissions - thereby signaling both the inefficacy of this particular **[*81]** targeting strategy and the institution's determination to find some way to

get the numbers that it wanted.

Second, determining economic need would be a very tricky business, as it has proved to be in the administration of need-based social welfare programs more generally. [402] For all the arbitrariness and over-breadth of existing affirmative action categories, they are far more objective and administrable than a need-based program would be. After all, it is much easier and less contestable for a bureaucrat accurately to detect one's skin color, language, ethnicity, and gender than to make the kinds of empirical and normative judgments necessary to determine the extent, and even more controversially, the causes of one's economic need. [403] Morally, it matters to most people whether another's poverty is due, for example, to discrimination or to drug abuse. Journalist Michael Kinsley, who favors some forms of affirmative action, imagines what would happen:

Is it worse to be a cleaning lady's son or a coal miner's daughter? Two points if your father didn't go to college, minus one if he finished high school, plus three if you have no father? (Or will that reward illegitimacy, which we're all trying hard these days not to do?) Communist societies tried this kind of institutionalized reverse discrimination - penalizing children of the middle class - without any enviable success. Officially sanctioned affirmative action by "disadvantage" would turn today's festival of competitive victimization into an orgy. [404]

Some targeting proposals would focus on "place, not race," allocating government contracts to companies located in economically distressed areas rather than their owners' race. [405] Some propose distinguishing between jobs that merely require an employee to be competent, for which preferences could be used, and those for which a high level of performance is necessary and merit is an overriding value. The locational proposal, however, seems suspiciously similar to an economic development program for distressed areas, which has little or nothing to do with the rationales for affirmative action and which have often been shown to be problematic in their own right. The competence-achievement job distinction, like the class-based program, would be very difficult to administer. It would also place even more of affirmative action's burdens on low-income workers who happen to be white while leaving well-off workers unaffected, an outcome that seems distributionally perverse.

[*82]

C. Lottery

Lani Guinier, noting that affirmative action is a winner-take-all, us-against-them system, has proposed substituting a lottery to allocate slots in desirable schools. The school would allow all students scoring above the minimum total that now secures admission to compete by random selection, with the school allocating additional lottery tickets to students it thinks possess special talents. Under this system, Guinier says,

no one would feel "entitled" to admission; nor would anyone feel unjustly excluded. Such an approach recognizes that claims of "merit" and "diversity" are equally legitimate. It does not set "us" against "them." It does not assume that only one group wins. It avoids a zero-sum solution in favor of a positive-sum solution that more broadly accommodates the goals of diversity and genuine merit. [406]

Although Guinier's proposal does possess the virtue, lacking in some reform proposals, of assuring that all admittees would possess at least a minimal level of merit (as defined by the school), it is objectionable on both practical and principled grounds. By flooding the applicant

pool with whites who are only minimally qualified and who would not otherwise have applied, it would reduce the overall quality of admitted students without necessarily increasing black admissions at all - and perhaps decreasing them. Americans, moreover, emphatically do not believe that the claims of merit and demographic diversity are equally legitimate; they value diversity only when it is achieved in ways that are consistent with deeply-held moral values like merit (however defined). Guinier offers no moral justification for denying people who excel by dint of hard work and sacrifice the fruits of their efforts, nor does she consider that her plan sends the wrong messages and creates the wrong incentives for people to strive for excellence, not just minimally satisfactory performance.

D. Root Causes

Other alternatives to affirmative action are more attractive on their merits and may be more politically feasible. One might be called a "root cause" strategy; it begins from the premise that the main reason why affirmative action seems necessary is the inadequacy of the education and training received by youngsters in the favored groups, which renders them unable to compete on equal terms with their counterparts. In this view, affirmative action is simply a poultice that not only fails to treat the underlying wound, but also conceals its true dimensions. A root cause strategy would emphasize the desperate need to improve the schools that low-income children attend, provide remedial assistance to those who cannot progress without it, expand job training for low-skill **[*83]** workers who cannot otherwise compete in the labor market, and help minority entrepreneurs build stable, competitive businesses. [407]

No one really doubts that these are essential elements of any effective solution to the inequality problem that affirmative action seeks to remedy, or that the root causes of this inequality begin to operate very early in a child's life. Adopting a root cause approach to reforming affirmative action yields the same difficulties that this approach faces in other social policy areas. Root causes usually remain root causes for one of three reasons: we do not know how to eliminate them, or we (think we) know how but consider it too costly to do so in terms of resources or competing values, or we believe it is worth doing but simply cannot muster the necessary political will. When these impediments to attacking root causes exist - with violent crime, for example [408] - our best course may be to focus on managing symptoms until we can figure out how to remove the more fundamental causes. In such cases, insisting on a root cause strategy may in effect be a prescription for inaction, futility, rhetorical excess, and (because root causes are hard to understand) sloppy analysis.

To the extent that the academic performance of low-income children can be improved by remediation and educational reform, this is clearly the road that we should travel - and hopefully are traveling [409] - even as we search for other ways to improve their life prospects. But to the extent that we do not understand the causes of their inferior performance, or those causes seem to lie in more recalcitrant social structures of low-income neighborhoods, or the politics of educational and social reform impede desired solutions, such measures may be ineffective - or worse.

E. Time Limits

Another alternative approach to affirmative action is to concede its offense to liberal values but insist that it is desirable if it is temporary. This, of course, is hardly a novel proposal. I know of no proponent of affirmative action who **[*84]** does not endorse this objective; the program is always defended as a short-term remedy, as a temporary expedient to be continued only until the favored groups can achieve ... what? Very few proponents have specified, even in principle, which conditions would trigger its termination. They seem disinclined to speculate, perhaps because they believe that existing inequalities are so large and intractable that they will not be erased in the foreseeable future. Indeed, Justice Thurgood Marshall spoke in this spirit when he remarked that it would take at least 100

years. [410]

Still, many Americans worry about the indefinite continuation of a policy that raises the most difficult moral and political questions and that has always been rationalized as a temporary remedy. They have good reason to ask, and are entitled to know: what measure of equality would be enough to end affirmative action? My point is not that this question is unanswerable - indeed, one can easily imagine any number of plausible answers - but that almost no proponent of preferences seriously addresses it. [411]

I say "almost" because at least one individual, Orlando Patterson, has done so - although his fifteen-year termination date is actually a conversion date on which race-based affirmative action would become a wholly class-based program that would continue indefinitely. In light of his conviction that affirmative action "is a major factor in the rise of the Afro-American middle class, the single greatest success story of the past forty years," and that its benefits "far outweigh its costs," one is struck by Patterson's failure to explain why he would phase it out at all, much less in fifteen years. [412] Is the desired equality now in view? Or is it simply that he and affirmative action's other defenders can no longer hold off the incessant attacks by its misguided and gullible assailants? In short, is his phase-out a principled proposal consistent with his praise of the policy, or is it instead merely a pragmatic concession to political reality? One cannot tell.

Whatever the content of Patterson's proposal, the political reality is that once affirmative action preferences are established, they are almost impossible to dismantle. So far as one can tell, this has been the universal experience of the other countries that have established them. [413] The United States is no different. **[*85]** As we saw earlier, when conservative Republican presidents and congresses have been in power, they have not seriously challenged existing preferences despite their avowed opposition to them. The logic of coalition-building among groups and don't-rock-the-boat politics dictates that these preferences will remain with us for the foreseeable future.

F. Voluntary Programs

Voluntary affirmative action is a final example of another approach that might meet or minimize some of the objections to current programs, particularly the criticisms that they are coercive, legalistic, inflexible, and insufficiently sensitive to specific contexts. Strong reasons exist to believe that many, though certainly not all, [414] educational institutions and businesses that now practice mandatory affirmative action would continue to do so without legal compulsion if the law permitted it. The fact that much affirmative action would exist without legal compulsion, of course, is not a conclusive argument against mandating it. For one thing, a program might be quite different depending on whether it is voluntary or mandatory. For another, as I have been at pains to show, even voluntary preferences are problematic, especially when they are used as the basis for allocating valuable social resources whose principle of distributive justice is and should be merit, properly defined. In addition, mandating preferences would address the market failure argument discussed earlier in Part V, Section E.

Be that as it may, entities often have their own political, ideological, and self-interested reasons, quite apart from legal considerations, for seeking to diversify (as they define the term) their student bodies, faculties, work forces, and markets. [415] Corporate leaders, for example, have been expanding their management desiderata to include diversity of thought, lifestyle, culture, dress, and other attributes not covered by affirmative action law even as they explicitly disassociate themselves from affirmative action mandates. [416] More generally, elite institutions, as we have seen, are among the most influential groups that favor affirmative action, along with the Democratic Party even (or especially) **[*86]** in its Clintonian, "New Democrat" make-over. [417] Sociologist Alan Wolfe, who calls this voluntary approach "prudential affirmative action," notes that it has the additional advantage of not

requiring American society to take a clear-cut principled position on a policy for which in truth no favorable political consensus exists or is ever likely to form. [418]

Certain arguments for making affirmative action voluntary are a bit too facile. I believe that private entities (Stanford University, the Boy Scouts, or the Catholic Church, for example) should be able, as a legal and a policy matter, to make many choices that the government may not properly make. Nevertheless, this cannot explain why as a matter of principle private decisions to allocate resources and opportunities on the basis of skin color are any less objectionable than governmental ones. After all, a large body of public law, now more than three decades old, prohibits not only governmental discrimination but also much private, voluntary discrimination in areas like employment, public accommodations, some contracting, and government-assisted activities covered by the Civil Rights Act of 1964. The coverage of state anti-discrimination laws is sometimes even greater. Even if we put the law to one side, why are preferences that are arbitrary and morally wrong when government employs them not at least prima facie arbitrary and morally wrong when private entities do so? To many people private voluntary affirmative action is no less problematic than a governmental mandate, and there is no satisfying normative basis for distinguishing between them. [419] Finally, mandating preferences would address the market failure argument discussed earlier in Part V, Section E.

I disagree. A racial preference mandated by public law is much more objectionable than one that a private entity decides to establish to reflect its own values and for its own purposes. Let me be clear about why this is so. Governmental preferences are more objectionable, in my view, not because they deploy public funding or authority while private ones do not, and not because public institutions are invariably more powerful than private ones. In fact, public law pervasively shapes private entities, and private influence in society may match or exceed that of government agencies. Critics often use these facts to discredit both the public-private distinction and its constitutional analogue, the "state action" doctrine, under which the Constitution's due process and equal protection guarantees do not limit private conduct. [420] Although the state action doctrine has a dubious constitutional pedigree, the Court has reaffirmed it so often and recently that its continuing authority cannot really be doubted. [421]

[*87] But even if no state action doctrine existed, a liberal polity with a genuine commitment to diversity would have to invent something very much like it to permit private associational choices to exclude groups not entitled to heightened constitutional protection. Such permission safeguards the autonomy and freedom that are diversity's lifeblood. Mandatory racial preferences threaten these values more than otherwise similar private ones do. In part this difference reflects the nature of all legal regulation. Mandates are more coercive than voluntary actions not only by definition but as a quantitative matter; they regulate more people and more activity than voluntary ones that govern only those who elect it and apply only to activities they choose. Prima facie, they offend liberal values more.

Other differences are qualitative. For reasons I have explained elsewhere, [422] legal rules issued from the center tend to be more simplistic, slower to develop and to correct, and less contextualized than voluntary practices that can be tailored to specific needs and situations. A legal rule reflects interest group politics or the vagaries of judicial decision, whereas a voluntary practice is the product of the chooser's own (albeit socially conditioned and economically constrained) assessment of benefits and costs. When change is desirable, a voluntary practice is easier to reform or abandon than a legal rule. One who opposes a voluntary practice can avoid its burdens more easily than one who opposes a mandatory rule. [423] Voluntary practices can assume more diverse forms than mandated ones; this facilitates social learning and problem solving. [424]

Most important, public law speaks authoritatively for the entire society, binding all who are subject to it. Indeed, many legal theorists maintain that law's expressive and symbolic functions, by signaling community values and commitments, shape social behavior. It does

so quite apart from - and perhaps even more powerfully than - the sanctions it may impose. [425] While a public law preference does express a certain kind of compassion for and commitment to the preferred groups, other signals dominate its message - among them, that American society thinks it just to group people by race and ethnicity, to treat those groups monolithically, and to allocate precious resources and opportunities accordingly; that it holds equal treatment and individual merit as secondary, dispensable ideals; that the preferred groups cannot succeed without special public favors; that such favors do not stigmatize them in the minds of fair-minded others; that those who oppose preferences thereby oppose the aspirations of the preferred groups; and that society can assuage old injustices by creating **[*88]** new ones. When public law says such things, it speaks falsely, holds out vain promises, and brings itself into disrepute.

A private, voluntary preference is very different. Rather than sending a strong, authoritative signal about what society does and does not value and how social goals should be pursued, it expresses only the values of those who choose to engage in it. Because most of my substantive objections to preferences apply whether to private ones as well, I would probably not choose them for my own academic institution. But many others who also cherish the non-discrimination and merit principles and conscientiously weigh the competing values reach different conclusions.

One who affirms, as I do, the broad freedom of an individual, group, or entity to choose how to order its own affairs cannot simply dismiss such conclusions out of hand. Suppose that a private university chooses to sacrifice some level of academic performance in order to gain greater racial diversity and whatever educational or other values it thinks this diversity will bring. [426] (If the university perceives no sacrifice, then it follows that there is no problem and no need for a preference, except perhaps in the rare case of a tie-breaker.) I may view its choice as profoundly misguided and think it will disserve many of those it prefers because of their skin color, unjustly harm those rejected for that reason, diminish its own institutional values, and erode overriding social commitments. But I cannot say categorically that its choice is morally indefensible. More to the point, the law should not categorically say this either.

This distinction between public and private morality, between the values law should mandate and those it should leave to the disparate choices of a diverse civil society, lies at the core of a liberal society. Tamar Jacoby, who studied affirmative action and race relations in three cities, put it well:

No one who understands what makes America great can quarrel with ethnic pride. At home, on the weekend, in the family and the neighborhood, Jews will be Jews, Italians Italian - and there is no reason blacks should be any different. Religion and ethnicity are essential parts of our lives, and government should not curtail how we express them in the private sphere. But when it comes to public life, even the benevolent color coding of recent decades has proved a recipe for alienation and resentment... . Society need not be color-blind or color-less, but the law cannot work unless it is color-neutral, and the government should not be in the business of abetting or paying for the cultivation of group identity. [427]

Americans, Jacoby suggests, must each find their own ways to reconcile their ethnicity and their common citizenship. Preferences, many believe, promise to accelerate this process, but in fact there are no shortcuts. [428]

A post-affirmative action law, I believe, should harmonize the non-discrimination principle with the important liberal principle of private ordering **[*89]** (or autonomy) by preserving a limited space for private, voluntary preferences that meets minimal conditions of norm compliance and public accountability. The private ordering principle holds that society must

respect a private entity's decision about how to conduct its own affairs, absent some overriding public justification for regulating that decision (laws barring racial discrimination, for example, or First Amendment neutrality requirements in intra-church property disputes). [429]

How much private ordering through preferences can the non-discrimination principle accommodate? So far, the law has answered "very little," allowing a private entity to use preferences only if they are narrowly tailored to remedying its own past discrimination. Private ethno-racial preferences have largely escaped judicial scrutiny, but it is only a matter of time before they too are challenged in the courts. Such preferences may be upheld on the basis of the kind of "expressive association" defense that the Supreme Court recently extended in Boy Scouts of America v. Dale, [430] but the availability of that defense to large private universities and other diverse organizations is by no means clear. [431] For example - and perhaps ironically - the diversity of a large private institution might militate against recognizing an expressive association defense for a preference rationalized on diversity grounds; the argument would be that the institution's very diversity precludes the kind of coherent, self-defining point of view that the expressive association defense is meant to protect.

I want to suggest another exception to the non-discrimination principle for private preferences, one that depends on their transparency. Private entities that now use preferences seldom admit this fact to the public, preferring obfuscation and outright deception to candor. One may argue that silence is golden here, that opacity about racial preferences minimizes social disputes over abstract, irreconcilable principles and sustains desirable social myths. [432] Although this argument for opacity has force in some contexts, it is notably weak as applied to affirmative action. There, divisions and suspicions already abound and dissimulation serves only to magnify and multiply them, as people who assume that preferences are even more widespread than they actually are stigmatize even those who did not receive them. Concealment of the truth about preferences inflames these social conflicts and injustices.

The relative benignity of private voluntary preferences justifies allowing **[*90]** them as an exception to the non-discrimination principle, but only on two conditions. First, the entity must publicly disclose the preference in advance; it must describe its criteria and weighting system and state why it thinks the preference serve its goals. Second, the preference must not disadvantage a group that enjoys the highest level of constitutional protection against discrimination.

The first condition, transparency, is designed to discipline the granting of preferences by forcing institutions to be more candid about their value choices and by triggering reputational, market, and other informal mechanisms that make the entity bear more of the costs of adopting preferences instead of shifting them to innocent third parties. Customers, students, alumni, investors, journalists, and other interests to which the entity must be attentive can then hold it accountable, rewarding, punishing, or ignoring the preferences, as they see fit. I can only agree with my colleague Jed Rubenfeld, a grudging advocate of preferences, when he writes that "institutions with affirmative action plans should be open about them or scrap them." [433] The same is true, I believe, of legacies and other kinds of non-racial preferences, though it is doubtful that federal law can or should compel disclosure in those situations.

Disclosure, of course, is no panacea for the moral and other problems that preferences create, and it would entail some problems of its own. Institutions presumably dissemble for reasons they think are important, perhaps even humane. Harvard, for example, believes that it would be poor educational policy to reveal to the public high school students from Boston and Cambridge to whom it gives admission preferences that they are less academically qualified than others. [434] And someone - a legislature, agency, court, or contracting parties -

will have to decide what full and accurate disclosure means. Even so, challenges would go to the nature of the preference and whether it was fully disclosed, issues that are simpler and less costly to resolve than the legality issues under the current affirmative action regime. The law might promote transparency in other, possibly less intrusive and litigious ways. Adequate disclosure, for example, might be a defense in a subsequent civil rights challenge or at least limit damages, much as some retraction statutes do in libel cases.

The second condition, non-discrimination against groups entitled the highest level of constitutional protection, underscores the important distinction between non-discrimination and affirmative action preferences discussed early in this Article. [435] This will not persuade those who deny this difference and believe that preferences are as normatively compelling as non-discrimination. But others like me who view the distinction as fundamental (while conceding that it can blur at the edges) should favor a strong presumption that the value of non-discrimination against groups that society believes need special constitutional **[*91]** protection must trump the value of private ordering. With this constraint satisfied, the law should accommodate fully disclosed voluntary affirmative action preferences that do not discriminate against those groups entitled to the highest level of constitutional protection.

Whether voluntary affirmative action can survive under these conditions is an empirical question. Under this regime, a private educational institution wishing to prefer ethno-racial minority students or those suffering from disabilities for diversity, anti-caste, or other reasons could presumably satisfy both conditions, as could a private employer wishing to favor such minorities or the disabled. But an institution or employer that wanted to favor whites would violate the second condition. Although whites are protected by the same non-discrimination principle that protects everyone else, they do not enjoy the highest level of protection that the Constitution owes ethno-racial minorities and thus could not qualify for an exception to the presumptive ban on even private preferences.

I have explained why preferences by public entities differ normatively and empirically from preferences adopted by private ones, and why the law should treat them differently. This means barring government-sponsored preferences except in the relatively narrow remedial situations that the courts now permit, while permitting private ones that can satisfy the two conditions just discussed. This distinction places great weight on the "state action" line, and some will say that the weight is more than it can bear. Nevertheless, the liberal goal of individual autonomy demands that it be drawn and the courts long ago grew accustomed to doing so. The line can be blurry when, as is common, the public and private spheres converge, and one can certainly argue that courts have drawn it poorly in particular cases. That, however, is a different question than whether the line should be drawn at all. I hope I have convinced the reader that it should.

X. Conclusion

It would be comforting if the arguments about preferences on one side or the other were compelling and conclusive, but in truth they are not. Most advocates of affirmative action, one suspects, feel some discomfort at the tension (if not contradiction) that the policy creates with the values of individualism and merit that command such powerful, almost universal allegiance in American culture. We can see this in much of the dissimulation about affirmative action [436] and in the support by many advocates for a more targeted and temporary policy. On the other side, even the vast majority of Americans who oppose affirmative action in principle also exhibit some ambivalence about it, seeking to hedge their bets against the dread possibility that social institutions without affirmative **[*92]** action would be almost lily-white or would further inflame the sense of injustice that many blacks already feel and that most whites acknowledge. In their more candid moments, the opponents may concede that merit is to some degree in the eye of the beholder and that American society has sometimes compromised the merit principle when it concluded that one or another group needed a leg up in order to catch up. Opponents may also acknowledge

that the alternative to existing affirmative action programs, at least in higher education, may be something worse because of institutions' determination to reshuffle the deck or dissemble until they get the demographic representation they want. Finally, opponents may recognize that our system of pluralist, interest-group politics is just that, a politics of groups - one in which individuals seek politically-allocated benefits by aligning themselves with others whom they think are similar in relevant respects.

But to say that the arguments over affirmative action are more evenly balanced than most disputants will admit is not to say that these arguments are equally persuasive. The debate over affirmative action is not simply about how the law should allocate scarce resources and opportunities, important as that allocation decision obviously is. An even greater stake, important in voluntary programs as well, is how society should encourage us to think of ourselves, organize ourselves, and present ourselves to others. Viewed this way, the issue is whether, for example, society should promote policies and norms that encourage individuals and groups to compete with one another in comparative victimization, with all of the demoralization, distortion, and dependency that this kind of competition tends to foster. Shaping and communicating these self-understandings, incentives, and interactions are among the most vital functions both of law [437] and of the informal social norms with which law interacts. [438]

Race is perhaps the worst imaginable category around which to organize group competition and social relations more generally. At the risk of belaboring the obvious, racial categories in law have played an utterly pernicious and destructive role throughout human history. This incontrovertible fact should arouse wonder at the logic of those who view racial preferences as no more troubling than athletic scholarships, [439] and at the hubris of those who imagine that we can distinguish clearly enough between invidious and benign race discrimination to engrave this distinction into our constitutional order. [440] Vast **[*93]** human experience mocks this comforting illusion, as does the fact that most Americans, including many minorities, think racial preferences are invidious, not benign. Whether benignly intended or not, using the category of race - which affirmative action proponents oddly depict as socially constructed and primordial and immutable - to distribute advantage and disadvantage tends to ossify the fluid, forward-looking political identities that a robust democratic spirit inspires and requires. Justice Blackmun's earnest hope that we could get beyond race by emphasizing it has not been borne out.

Quite the contrary. Today, ironically, the proponents of affirmative action have the greatest stake in infusing our private and public discourse with a relentlessly racialist rhetoric and sensibility that, in my view, deform the debate and impede further progress. This vested interest in racialism often deploys the diversity ideal in a dubious way. Christopher Lasch observed that "'diversity' - a slogan that looks attractive on the face of it - has come to mean the opposite of what it appears to mean. In practice, diversity turns out to legitimate a new dogmatism, in which rival minorities take shelter behind a set of beliefs impervious to rational discussion." [441]

Let us come at the problem of racial preferences in another way. Suppose that we stood behind John Rawls' famous veil of ignorance in order to frame rules of justice for our society. [442] Suppose further that we knew only three things about the society: that legally-countenanced race consciousness had caused incalculable suffering and injustice in the past; that the society still contained many inequalities, some (but not all) of them caused by racism; and that it was seeking to redress these inequalities through various individual and collective actions. Finally, suppose (as the veil image and logic invite us to do) that we were ignorant of our own demographic traits and thus could not frame the rules opportunistically. Under these conditions, [443] how likely is it that we would adopt a rule permitting the government to use race as the basis for allocating scarce resources and opportunities? I think that we would view such a rule as terribly misguided, [444] and that almost any other plausibly fair distribution rule would strike us as both wiser and more just.

Even as traditionally defined, race's correlation with social disadvantage is **[*94]** weaker than it once was, and there is every sign that it will weaken further in the future. [445] By almost any measure, and despite frequent denials of this fact, racism in the United States has declined dramatically in recent decades. [446] Those accused (however unfairly) of racism (however innocently) must propitiate public opinion through public rituals of apology and self-abasement - like the earnest District of Columbia official who felt obliged to resign after a barrage of criticism for having used the word "niggardly" in a correct manner. [447] Data from the 2000 Census will likely confirm that this decline in racism, which has been occurring since at least World War II, is accelerating. The effects of this decline are apparent everywhere. The income of young, intact black families already approaches the income of demographically similar white families. On almost every other social indicator, the black-white gap has narrowed significantly. [448] For young black women, the gaps have largely disappeared. [449]

Even these comparisons understate the prospects for closing the black-white gaps in the future, for several reasons. First, much of racism's cruel legacy is permanently impounded in the low education and income levels of retirement-age blacks who grew up under Jim Crow and who, economically speaking, bear little resemblance to their better-educated children and grandchildren. Second, blacks are considerably younger than whites on average and thus are less likely to have reached their peak earning years. Even in residential housing where black isolation has remained stubbornly high; the long decline in residential segregation nationally seems to have continued in the 1990s, particularly in the fastest-growing population areas. [450]

My point, emphatically, is not to deny that appalling inequalities persist; no informed person could possibly do so with a straight face. Rather, it is to insist that race today is a poor proxy for the conditions affirmative action is supposed **[*95]** to remedy and that it is steadily becoming an ever cruder and more misleading proxy as multi-racial Americans increase and as intra-group differentiations proliferate. At some point, the arbitrariness of the traditional race-as-proxy-for-egregious-disadvantage becomes so unmistakable and insupportable that it must fail the judicial strict scrutiny test for the constitutionality of race preferences.

Each of the race-related changes I have just discussed adds to the already heavy burden of showing that preferences are also "narrowly tailored" to this end - even assuming, contrary to the earlier analysis, that they can be shown to implement a compelling governmental interest in diversity. [451] In their somewhat different ways and contexts, the Supreme Court in Croson, the Fifth Circuit in **Hopwood (the Texas** law school case), and the trial court in Grutter (the Michigan law school case) have cast serious doubts on whether race preferences can still meet this demanding constitutional test. As I have tried to show, those doubts are well-justified.

On a strictly consequentialist view of affirmative action, reasonable people will surely assess its costs and benefits differently. These differences will reflect not only people's diverse values, but also their empirical uncertainty on at least two important points: first, how much of blacks' progress is due to affirmative action, as distinct from migration to better jobs in the north, improved education, reduced discrimination, and other factors; and second, how segregated would American society be if mandatory affirmative action were now eliminated. In some cases, the consequentialist verdict seems quite clear - and clearly negative. For example, affirmative action's benefits in the spectrum licensing and minority business set-aside programs discussed earlier seem so marginal if not irrelevant to any defensible conception of social justice that they are almost certainly outweighed by the cynicism and abuse (and possible inefficiency) that have widely discredited such programs. Most racial gerrymandering practices under the Voting Rights Act also fail a consequentialist test, not just a constitutional one, albeit for quite different reasons. [452] Class-based and race-based preferences designed to integrate housing also seem to have had disappointing, not to say corrupting, effects. [453] One could cite many other examples **[*96]** along the same lines. [454]

Affirmative action in initial [455] hiring and college admissions presents much closer cases, for it is in these areas that the evidence best supports the view that blacks as a group gain more from preferences than whites as a group lose. Even here, as we saw, these are precisely the areas in which considerable internal pressure, self-interested as well as ideological, would remain to maintain or increase existing levels of diversity, at least if voluntary affirmative action were constitutionally permissible. [456] Proponents of affirmative action hope, in Hollinger's words, that we can avoid "mistaking a tactic for a truth." [457] But after four decades of affirmative action, this understandable hope remains a vain one. The diversity rationale has transformed a temporary, limited tactic into an almost theological orthodoxy that skin color per se confers diversity-value, an orthodoxy affirmed by many elites who should, and do, know better. This is not the first time that hard cases and wishful thinking made bad law and policy.

I have explained why this comparison of group gains and losses from affirmative action, while significant as far as it goes, is both misleading and even irrelevant when we consider how most Americans (black and white) conceive of themselves and compete with each other, how the ethnic composition of the United States is changing so much faster than the law, and how short-term group benefits can turn out to be long-term group costs. For better and for worse, and recognizing the complications and ambiguities, American culture remains highly individualistic and liberal in its values and premises, even at some sacrifice (where compromise is necessary) to its goal of substantive equality. [458] One need not ignore the illiberal strands in our tangled history, which enslaved, excluded, and subordinated members of despised groups, [459] in order to conclude that racial preferences increasingly compromise our deeply engrained but incompletely realized commitment to legal-formal equality. The progress of this principle has advanced only through long and heroic struggle. It has served Americans well - even though, tragically, it has not yet served all of us equally well.

FOOTNOTES:

n1. Legalized abortion under Roe v. Wade is a possible exception, but there are some important differences. Roe's foundation is judicial, not political. Roe, decided in 1973, has not been in place quite as long as affirmative action. Public opinion about abortion is not as sharply divided, though in both cases the precise division depends on the formulation and context of the questions. Finally, Roe's legal status is reasonably secure for now. President Bush and his Attorney General, John Ashcroft, have disclaimed any serious effort to reverse it. In contrast, affirmative action is beleaguered as never before both in politics, where several states have limited it, and in the courts, where it is under intense challenge.

n2. My reasons for using the unsatisfactory term "blacks" rather than the even more unsatisfactory term "African-Americans" are set forth in Peter H. Schuck, Reflections on the Effects of Immigrants on African Americans - and Vice-Versa, in Help or Hindrance? The Economic Implications of Immigration for African Americans 361, 361-63 (D.S. Hamermesh & F.D. Bean eds., 1998).

n3. The data are presented and analyzed at length in Orlando Patterson, The Ordeal of Integration: Progress and Resentment in America's "Racial" Crisis 15-82 (1997). See infra text accompanying notes 324-331, 445-450 for further discussion.

n4. Infra text accompanying notes 22-24 and Part V, Section B.

n5. Eric Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 753 (1985). This claim is sharply disputed by Paul Moreno, Racial Classifications and Reconstruction Legislation, 61 J. Southern Hist. 271 (1995) (relying on legislative history and the administration of the law). Moreno's position is buttressed by evidence of Frederick Douglass's strong opposition to affirmative action during Reconstruction. Seymour Martin Lipset, Two Americas, Two Value Systems: Blacks and Whites, 13 Tocqueville Rev. 137, 170 (1992).

n6. Peter H. Schuck, Diversity in America: Keeping Government at a Safe Distance (Harvard University Press, forthcoming 2003).

n7. I say "perhaps" because deciding whether it is wise and just to do so would depend on a number of considerations that will appear in my analysis.

n8. E.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-98 (1989) (discussing judicial requirements for remedially-based preferences); United States v. Paradise, 480 U.S. 149 (1987) (same).

n9. For a more extended description, see John David Skrentny, The Ironies of Affirmative Action 6-8 (1996) [hereinafter Ironies]. For discussion of competing definitions, including Skrentny's, see Deborah C. Malamud, Race, Culture, and the Law: Values, Symbols, and Facts in the Affirmative Action Debate, 95 Mich. L. Rev. 1668, 1691-94 (1997).

n10. This equivalence is endorsed by some affirmative action enthusiasts like Stephen Steinberg, not just by opponents. David A. Hollinger, Group Preferences, Cultural Diversity, and Social Democracy: Notes Toward a Theory of Affirmative Action, in Race and Representation: Affirmative Action 97 (Robert Post & Michael Rogin eds., 1998).

n11. On its outcome-determinativeness, see, for example, Samuel Issacharoff, Can Affirmative Action Be Defended?, 59 Ohio St. L.J. 669, 671-72 (1998).

n12. In the race context, this is sometimes called "color-blindness." Skrentny, Ironies, supra note 9, at 7-8. See generally Andrew Kull, The Color-Blind Constitution (1992).

n13. Its psychological contours are doubtless complex and opaque. E.g., Linda Hamilton Krieger, Civil Rights Perestroika: Intergroup Relations After Affirmative Action, 86 **Calif.** L.

Rev. 1251, 1329 (1998) ("When a person is color-blind, there is simply much he will not see.").

n14. Patterson, supra note 3, at 15-16 ("Viewed from the perspective of comparative history and sociology, it can be said, unconditionally, that the changes that have taken place in the United States over the last fifty years are unparalleled in the history of minority-majority relations.").

n15. Alan Wolfe, Strangled by Roots, New Republic, May 28, 2001, at 33 (review of Gary Gerstle, American Crucible: Race and Nation in the Twentieth Century (2001)).

n16. Malamud, supra note 9, at 1691; see also infra Part V, Section B.

n17. E.g., Hollinger, supra note 10, at 101.

n18. Even a rule merely requiring regulated companies to report the number of minorities who apply and who are hired is not impact-neutral, as it makes it more likely that the agency will investigate and impose sanctions. E.g., Stephen Labaton, Court Rules Agency Erred on Mandate for Minorities, N.Y. Times, Jan. 17, 2001, at A16. By the same token, giving dyslexic test-takers advantages such as additional time and spell-check programs may do more than merely equalize opportunity. E.g., Daniel Golden, Disabled Students Gain More Aid on Tests, Wall St. J., Feb. 1, 2001, at B2 (settlement of lawsuit demanding accommodation for special education students).

n19. E.g., David Neumark & Wendy A. Stock, The Effects of Race and Sex Discrimination Laws, NBER Working Paper No. 8215, at 39 (April 2001) (numerical guidelines now affect both Title VII and affirmative action program enforcement); Eric Schnapper, The Varieties of Numerical Remedies, 39 Stan. L. Rev. 851 (1987).

n20. Conversation with Derek Bok, former president of Harvard University (Aug. 11, 2001).

n21. E.g., Iris Marion Young, Justice and the Politics of Difference 193-98 (1990).

n22. See Part VI, Section B, infra.

n23. It is also central to Americans' views of procedural fairness. E.g., E. Allen Lind & Tom R. Tyler, The Social Psychology of Procedural Justice (1988); John Thibaut & Laurens Walker, Procedural Justice: A Psychological Analysis (1975).

n24. Krieger, supra note 13, at 1291-1302.

n25. E.g., Jacques Steinberg, Usefulness of SAT Test Is Debated in **California,** N.Y. Times, Nov. 17, 2001, at A11 (some schools dropping main SAT requirement); Jodi Wilgoren, Mount Holyoke Drops SAT Requirement, N.Y. Times, June 7, 2000, at A28.

n26. David A. Hollinger, Postethnic America: Beyond Multiculturalism 8 (1995).

n27. Eduardo Porter, Even 126 Sizes Don't Fit All, Wall St. J., Mar. 2, 2001, at B1.

n28. Romer v. Evans, 517 U.S. 620 (1996) (rejecting claim that Colorado's Amendment 2 merely barred "special rights" for homosexuals).

n29. Even a law that prohibits most affirmative action may leave some limited space for using it. But see Hi-Voltage Wire Works, Inc. v. City of San Jose, 24 **Cal.** 4th 537, 562-68 (2000) (Proposition 209 bars "targeted outreach").

n30. The authoritative study is Charles Moskos & John Sibley Butler, All that We Can Be: Black Leadership and Racial Integration the Army Way (1996). See also David K. Shipler, A Country of Strangers: Blacks and Whites in America 532-59 (1997).

n31. E.g., Aileen Cho, Uneasy Path for Diversity Effort in Building Industry, N.Y. Times, Apr. 8, 2001, at B6. For a detailed account of how these programs actually operated in New York, Detroit, and Atlanta during the 1990s, see Tamar Jacoby, Someone Else's House: America's Unfinished Struggle for Integration (1998).

n32. This enthusiasm, however, appears to conceal much faculty opposition. Stephen H. Balch, What Professors Really Think of Preferences, NAS Update, Dec. 1996 (indicating widespread opposition); Carl Auerbach, The Silent Opposition of Professors and Graduate Students to Preferential Affirmative Action Programs: 1969 and 1975, 72 Minn. L. Rev. 1233 (1988). Auerbach notes that law professors were strongly opposed to potent affirmative action for minorities in 1969 and 1975 responses to a survey by the Carnegie Commission. Only 9% of them favored strict goals and timetables for admissions, and only 7% favored such a program for faculty hiring. Id. at 1237 & n.10. A further 30% favored a less restrictive

program of preferences in admissions. Id. at 1238 & n.14.

n33. E.g., Amy Dockser Marcus, The New Battleground over Race and Schools: Younger Students, Wall St. J., Dec. 29, 1999, at B1; Latin Lesson, New Republic, Dec. 14, 1998, at 7 (Boston Latin case).

n34. Sally L. Satel, Science by Quota, New Republic, Feb. 27, 1995, at 14. Satel cites an NIH estimate that the new law would necessitate multiplying the size of treatment studies by "a factor of 5 to 10 with a stultifying effect on budget ... and, paradoxically, could hamper planned investigations of racial/ethnic differences." Id.

n35. For an account of why affirmative action got off to a slow start in federal housing programs, see Chris Bonastia, Why Did Affirmative Action in Housing Fail During the Nixon Era? Exploring the "Institutional Homes" of Social Policies, 47 Soc. Problems 523 (2000) (detailing bureaucratic politics as impediment).

n36. Schuck, supra note 6.

n37. This is affirmative action, but with a difference. Here, unlike in most other affirmative action domains, there is no "natural" or normatively compelling standard like merit to which one can compare the preference. Line-drawers must use some more or less arbitrary criteria to do so; the question is how much weight they may (or must) give to race. Richard H. Pildes, Principled Limitations on Racial and Partisan Redistricting, 106 Yale L.J. 2505 (1997).

n38. E.g., Samuel Issacharoff, Pamela S. Karlan, & Richard H. Pildes, The Law of Democracy: Legal Structure of the Political Process 582 (1998).

n39. The Court's latest word on this subject is Hunt v. Cromartie, 532 U.S. 234 (2001) (upholding redistricting despite lower court finding that "race, not politics" determined boundaries).

n40. Charles S. Bullock, III & Richard E. Dunn, The Demise of Racial Districting and the Future of Black Representation, 48 Emory L.J. 1209 (1999).

n41. E.g., Robert Hanley, Judges Uphold New Districts in New Jersey, N.Y. Times, May 3, 2001, at B1 (upholding dismantling of majority-minority districts); Robert Pear, Race Takes Back Seat as States Prepare to Redistrict, N.Y. Times, Feb. 4, 2001, at 17. Such racial gerrymandering of legislative districts in the name of affirmative action has led some states

to do likewise for jury districts. Randall Kennedy, The Racial Rigging of Juries, Am. Experiment, Fall 1994, at 1.

n42. In contrast, the Supreme Court, applying less than strict scrutiny, upheld an FCC preference program authorized by statute. Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990), overruled by Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (overruling the level-of-scrutiny point).

n43. Stephen Labaton & Simon Romero, A Flawed Wireless Auction, N.Y. Times, Feb. 13, 2001, at A30 (reporting that despite bidding subsidies, auction failed to attract small firms).

n44. MD/DC/DE Broadcasters Ass'n v. FCC, 236 F.3d 13 (D.C. Cir. 2001).

n45. Labaton, supra note 18; Stephen Labaton, Deregulation Called Blow to Minorities, N.Y. Times, Dec. 12, 2000, at C1 (summarizing studies).

n46. Stephen Labaton, Bush Appoints Powell's Son to Lead F.C.C., N.Y. Times, Jan. 23, 2001, at C1 (reporting Powell is skeptical about a link between ownership diversity and programming diversity).

n47. Ian Ayres, Pervasive Prejudice? Unconventional Evidence of Race and Gender Discrimination 315-95 (2001). According to Ayres, the designated bidders in the set of auctions he studied (for regional narrowband licenses in 1994) agreed to pay the government, net of the bid subsidy, $ 151.9 million over time at sub-market interest rates. The subsidy's value, then, is probably $ 60-75 million. Ayres argues, interestingly and counter-intuitively, that designated bidders actually increase government auction revenue by fostering bidding competition, and that the fiscal effects of bidding subsidies could be extended to government procurement. Id. His overall efficiency analysis, however, seems too complicated, contextual, and ultimately indeterminate to support firm policy conclusions.

n48. Jonathan Rauch, Color TV, New Republic, Dec. 19, 1994, at 9, 10.

n49. Michael Kinsley, The Spoils of Victimhood, New Yorker, Mar. 27, 1995, at 62, 69.

n50. Stephen Labaton & Simon Romero, F.C.C. Auction Hit with Claim of Unfair Bids, N.Y. Times, Feb. 12, 2001, at A1 (legal challenges to this practice). The FCC auctions have also encountered other problems. NextWave Personal Communications, Inc. v. FCC, Nos. 00-1402 & 00-1403, 2001 WL 702069 (D.C. Cir.) (invalidating FCC cancellation of auctioned licenses

for non-payment of installments by a bankrupt licensee); Yochi J. Dreazen & Andrea Petersen, The Fate of NextWave's Licenses for Wireless Spectrum Is Unclear, Wall St. J., June 28, 2001, at C1 (decision creating grave uncertainties and risks for other auction winners).

n51. E.g., Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 481-83 (1986); Pennsylvania v. Local 542, Int'l Union of Operating Eng'rs, 619 F. Supp. 1273, 1275 & n.4 (E.D. Pa.), aff'd, 770 F.2d 1068 (3d Cir. 1985).

n52. James Podgers, New Diversity Initiatives, A.B.A. J., April 2000, at 97.

n53. Michael Walzer, Spheres of Justice 3-33 (1983).

n54. For an exploration of this point in the context of affirmative action in higher education, see Akhil R. Amar & Neal Katyal, Bakke's Fate, 43 UCLA L. Rev. 1745 (1996).

n55. The U.S. Supreme Court rejected an equal protection challenge to this system. Personnel Admin. v. Feeney, 442 U.S. 256, 279 (1979) (upholding a Massachusetts law considering veterans for state civil service ahead of nonveterans because its purpose was not to exclude women). President Roosevelt apparently opposed the preference as well but could not defeat it politically. Skrentny, Ironies, supra note 9, at 41-42.

n56. E.g., James L. Shulman & William G. Bowen, The Game of Life (2001). The authors calculate that in 1999 at one school in their sample, legacies had even more of an advantage than "minorities" with the same SAT scores. Id. at 40-41. This was not generally true in the years covered by the Bowen-Bok study discussed infra at text accompanying note 80.

n57. Including capital costs, inter-collegiate sport is seldom a money maker, and Shulman and Bowen find that large donors generally prefer to reduce emphasis on athletics. Andrew Hacker, The Big College Try, N.Y. Rev. Books, Apr. 12, 2001, at 52 (citing sources, including Shulman and Bowen).

n58. See also Jim Chen, Is Affirmative Action Fair? Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny, 59 Ohio St. L.J. 811, 893-94 (1998).

n59. Russell Thornton, What the Census Doesn't Count, N.Y. Times, Mar. 23, 2001, at A19 (Native Americans); Eric Schmitt, Multiracial Identification Might Affect Programs, N.Y. Times, Mar. 14, 2001, at A20; Eric Schmitt, For 7 Million People in Census, One Race Category Isn't Enough, N.Y. Times, Mar. 13, 2001, at A1.

n60. Peter Skerry, Counting On The Census? 51-54 (2000).

n61. For a full explanation, see U.S. Census Bureau, Census 2000 Brief: Overview of Race and Hispanic Origin (2001).

n62. Quoted in Amitai Etzioni, The Monochrome Society 30 (2001).

n63. The Census has issued different allocation rules for purposes of legislative districting and other government decisions using such demographic categories. Nathaniel Persily, Color by Numbers: Race, Redistricting, and the 2000 Census, 85 Minn. L. Rev. 899, 932 n.127 (2001) (brief discussion).

n64. Office of Management and Budget, Bulletin No. 00-02, rule #2 (March 2000). Responses including two or more minority races are allocated to the race on which a complainant claims discrimination was based. Id. It is not clear whether the Bush administration will retain these rules.

n65. Eric Schmitt, Census Data Show a Sharp Increase in Living Standard, N.Y. Times, Aug. 6, 2001, at A1.

n66. Steven A. Holmes, The Confusion Over Who We Are, N.Y. Times, June 3, 2001, at WK1 (discussing National Health Interview Survey data).

n67. Gallup poll (Sept. 1, 2000), available at http://www.gallup.com/poll/fromtheed/ed0009.asp.

n68. For an exploration of the implications of multi-racialism, see Rachel F. Moran, Interracial Intimacy: The Regulation of Race and Romance 154-78 (2001).

n69. Kenneth Prewitt, Director of 2000 Census, Remarks at Brookings Press Briefing (Mar. 15, 2000) at http://www.brook.edu/comm/transcripts/20000315.htm. The color coding in Brazil, which is proposing to create racial quotas for universities, civil service jobs, and other areas, is likely to be far more complex and perhaps unworkable. Larry Rohter, Multiracial Brazil Planning Quotas for Blacks, N.Y. Times, Oct. 2, 2001, at A3 (over 300 terms for different skin colors and more elastic racial categories).

n70. Etzioni, supra note 62, at 26-27.

n71. E.g., Persily, supra note 63. But see Joshua R. Goldstein & Ann J. Morning, Back in the Box: The Dilemma of Using Multiple-Race Data for Single-Race Laws (Mar. 9, 2001) (unpublished manuscript, Office of Population Research, Princeton University) (on file with author) (noting that allocation rule will disadvantage Asian-Americans and reassign many who traditionally self-identified as white).

n72. Gregory Rodriguez, When Perception Is Reality, N.Y. Times, June 3, 2001, at WK1 (quoting Margo J. Schlanger).

n73. Id.

n74. The phrase was popularized by Justice Blackmun. Regents of Univ. of **California** v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in judgment and dissenting in part).

N75. E.g., Issacharoff, supra note 11, at 690.

n76. E.g., Paul M. Sniderman & Edward G. Carmines, Reaching Beyond Race 23-27 (1997) (discussing "Two Meanings Experiment"). But see Martin Gilens, Paul M. Sniderman, & James H. Kuklinski, Affirmative Action and the Politics of Realignment, 28 Brit. J. Pol. Sci. 159, 167 (1998) (finding that over 37% oppose it even in its milder, extra outreach forms).

n77. Issacharoff, supra note 11, at 675-76 (discussing effect on debate at University of **Texas)**.

n78. This point has been made by a number of commentators, including Malamud, supra note 9.

n79. Infra Part VIII.

n80. William G. Bowen & Derek Bok, The Shape of the River: Long-Term Consequences of

Considering Race in College and University Admissions (1998).

n81. Id. at 15; see also Thomas J. Kane, Racial and Ethnic Preferences in College Admissions, in The Black-White Test Score Gap 431, 436 (Christopher Jencks & Meredith Phillips eds., 1998) (in a sample of 36,000 high school students from 1000 high schools, over 90% who applied to colleges in the bottom three-fifths were admitted).

n82. Robert Lerner & Althea K. Nagai, Center for Equal Opportunity, Pervasive Preferences: Racial and Ethnic Discrimination in Undergraduate Admissions Across the Nation (2001) (study of 47 public colleges and universities).

n83. For one thing, we do not know the test scores of the white and Asian-American students in the Bowen-Bok sample who would have been admitted in place of the blacks who were admitted because of preferences. For another, Bowen and Bok only had adequate test score data for five of the twenty-eight institutions, though they believe that these are roughly representative of the larger group.

n84. Kane, supra note 81, at 431-32.

n85. For discussion and citations, see Terrance Sandalow, Minority Preferences Reconsidered, 97 Mich. L. Rev. 1874, 1877 & n.4 (1997). This fact is also acknowledged by Nathan Glazer, The Case for Racial Preferences, Public Interest, Spring 1999, at 45, 57, who is a prominent advocate of affirmative action for blacks.

n86. Sandalow, supra note 85, at 1880-81 (citing to Bowen & Bok).

n87. Bowen & Bok, supra note 80, at 27.

n88. Gratz v. Bollinger, 135 F. Supp. 2d 790 (E.D. Mich. 2001).

n89. Elizabeth Anderson, From Normative to Empirical Sociology in the Affirmative Action Debate: Bowen and Bok's The Shape of the River, 50 J. Legal Ed. 284, 287 (2000).

n90. Lerner & Nagai, supra note 82, at Figure 5.

n91. For discussion of these issues, compare Richard O. Lempert et al., Michigan's Minority Graduates in Practice: The River Runs Through Law School, 25 Law & Social Inquiry 395 (2000) [hereinafter Law School], with Richard Sander, The Tributaries to the River, 25 Law & Social Inquiry 557 (2000), and Richard O. Lempert et al., Michigan's Minority Graduates in Practice: Answers to Methodological Queries, 25 Law & Social Inquiry 585 (2000) [hereinafter Methodological Queries].

n92. Sandalow, supra note 85, at 1891-94 (reviewing Linda F. Wightman, The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions, 72 N.Y.U. L. Rev. 1 (1997)).

n93. Sandalow, supra note 85, at 1895-96 (reviewing Linda F. Wightman, LSAC National Longitudinal Bar Passage Study, Law School Admission Council Res. Rep. Series (1998)).

n94. E.g., Anderson, supra note 89, at 286-87; Lempert et al., Methodological Queries, supra note 91, at 586.

n95. Bowen & Bok, supra note 80, at 37 (citing Wightman study of law school admissions).

n96. Lempert et al., Law School, supra note 91, at 401.

n97. Sander, supra note 91, at 562; see also id. at 561.

n98. E.g., Issacharoff, supra note 11, at 675-76.

n99. Infra Part VIII.

n100. Infra Part VII, Section C.

n101. Stanley Fish, The Trouble With Principle 32 (1999).

n102. Patterson, supra note 3, at 147-69.

n103. Nathan Glazer, In Defense of Preference, New Republic, Apr. 6, 1998, at 18.

n104. E.g., Boris I. Bittker, The Case for Black Reparations (1993).

n105. For an exploration of the need principle, see Walzer, supra note 53, at 25-26.

n106. Gratz v. Bollinger, 135 F. Supp. 2d 790, 796-801 (E.D. Mich. 2001). Although the University seemed to concede that it was "a passive participant," id. at 801, the court found no evidence of this.

n107. E.g., Stephanie Wildman et al., Privilege Revealed: How Invisible Preference Undermines America (1996); Frances Lee Ansley, Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship, 74 Cornell L. Rev. 993, 1005-23 (1989); cf. Thomas Ross, Innocence and Affirmative Action, 43 Van. L. Rev. 297 (1990) (describing "rhetoric of innocence" used by whites claiming to be victims of affirmative action).

n108. To cite just one of many complications, evidence suggests that discrimination against a group, while damaging in the short run, often strengthens their economic and perhaps social positions in the long run. Peter H. Schuck, Citizens, Strangers, and In-Betweens: Essays on Immigration and Citizenship 273-75 (1998) (reviewing evidence cited by Thomas Sowell).

n109. Hugh Davis Graham, Collision Course: The Strange Convergence of Affirmative Action and Immigration Policy in America 2 (forthcoming 2002) (drawing on James S. Robb, Affirmative Action for Immigrants: The Entitlement Nobody Wanted (1995)). Peter Schrag estimated that more than 75% of the post-1965 immigrants immediately qualified for affirmative action benefits. Peter Schrag, So You Want to Be Color-Blind: Alternative Principles for Affirmative Action, American Prospect, Summer 1995, at 41.

n110. E.g., Fullilove v. Klutznick, 448 U.S. 448 (1980); Franks v. Bowman Transp. Co., 424 U.S. 747, 777 (1976) (when effectuating a properly tailored remedy to cure effects of prior discrimination, "a sharing of the burden" by innocent parties is permissible). For more recent decisions by the Court that strictly limit the scope and nature of the discrimination that affirmative action may remedy, see Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); United States v. Paradise, 480 U.S. 149 (1987).

n111. E.g., Issacharoff, supra note 11, at 681-82.

n112. E.g., Young, supra note 21, especially 192-225.

n113. Nicholas Lemann, The Big Test 345 (1999).

n114. Fish, supra note 101, at 30.

n115. E.g., Patterson, supra note 3, at 155-65.

n116. Sandalow, supra note 85, at 1914 (quoting Richard Delgado). Some critics of this radical challenge to the merit principle view it as thinly-veiled anti-Semitism. E.g., Daniel A. Farber & Suzanna Sherry, Beyond All Reason: The Radical Assault on Truth in American Law 52-71 (1997). For a thoughtful review of this position, see Edward L. Rubin, Jews, Truth and Critical Race Theory, 93 Nw. U. L. Rev. 525 (1999).

n117. Ronald Dworkin, Sovereign Virtue: The Theory and Practice of Equality 327 (2000).

n118. E.g., Glenn C. Loury, One by One from the Inside Out: Essays and Reviews on Race and Responsibility in America (1995); Shipler, supra note 30, at 506.

n119. Kinsley, supra note 49, at 65 ("Republicans, who were slow to approach the C.B.E.O. [color-blind equal opportunity principle] in the 1960s, have often charged past it in the years since. If color blindness is a virtue, hypocrisy is in this case the tribute virtue pays to vice.").

n120. Jeffrey Rosen, Without Merit, New Republic, May 14, 2001, at 20.

n121. E.g., John Feinstein, The Last Amateurs: Playing for Glory and Honor in Division I College Basketball (2000) (neglect of academics in college basketball programs); Shulman & Bowen, supra note 56; Robert Lipsyte, Backtalk: The Devil and an Angel Envision a Revolution in College Sports, N.Y. Times, Feb. 4, 2001, at 11 (effort of beleaguered female professor at University of Tennessee to curb academic abuses by scholar-athletes and athletic department).

n122. E.g., John H. McWhorter, Losing the Race: Self-Sabotage in Black America (2000)

(recounting personal experiences).

n123. George A. Akerlof, The Market for "Lemons": Quality Uncertainty and the Market Mechanism, 84 Q.J. Econ. 488 (1970).

n124. E.g., Sander, supra note 91, at 561 (example of law graduates).

n125. Fish, supra note 101, at 32-33.

n126. E.g., Philip A. Klinkner & Rogers M. Smith, The Unsteady March: The Rise and Decline of Racial Equality in America (1999); Cass R. Sunstein, Designing Democracy 177-82 (2001); Bryan K. Fair, Review Essay: America's Equality Promise: Where Do We Go From Here?, 19 J. Amer. Ethnic Hist. 94, 96 (2000); Owen M. Fiss, Groups and the Equal Protection Clause, 5 Phil. & Pub. Affairs 107 (1976); Jed Rubenfeld, Affirmative Action, 107 Yale L.J. 427, 456 (1997).

n127. E.g., Elizabeth S. Anderson, Integration, Affirmative Action, and Strict Scrutiny, N.Y.U. L. Rev. (forthcoming).

n128. Chang-Lin Tien, Diversity and Excellence in Higher Education, in Debating Affirmative Action 237, 239 (Nicolaus Mills ed., 1994).

n129. Amar & Katyal, supra note 54, at 1779 (quoting Kenneth Karst).

n130. Patterson, supra note 3, at 161-62.

n131. Martin Duberman, The "New" (1997) Scholarship on Race Relations, in Left Out: Politics of Exclusions/Essays/1964-1999, at 369, 385 (1999).

n132. Regents of Univ. of **California** v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in judgment and dissenting in part).

n133. Supra note 5.

n134. Patterson, supra note 3, at 65-66.

n135. Jack Citrin, Affirmative Action in the People's Court, Public Interest 39, 48 (Winter 1996).

n136. Affirmative action's political origins are discussed infra in Part VI, Section A.

n137. E.g., Deborah C. Malamud, Affirmative Action, Diversity, and the Black Middle Class, 68 U. Colo. L. Rev. 939, 953 (1997).

n138. Patterson details this progress, supra note 3, at 17-51, although he still favors continuing affirmative action for fifteen years, then to be transformed into class-based programs, id. at 147-69. I discuss this further in Part IX, Section E. See also Stephan Thernstrom & Abigail Thernstrom, America in Black and White: One Nation, Indivisible 183-202 (1997) [hereinafter Black and White].

n139. E.g., Thomas Sowell, Migrations and Cultures: A World View (1996). I have explored some of the complexities of this comparison. Schuck, supra note 2.

n140. E.g., Patterson, supra note 3, at 147-203.

n141. Robert William Fogel, The Fourth Great Awakening & the Future of Egalitarianism (2000).

n142. Sunstein, supra note 126, at 181.

n143. For a recent review of these inequalities, see Angela Glover-Blackwell, Stewart Kwoh, & Manuel Pastor, Searching for the Uncommon Ground: New Dimensions on Race in America (forthcoming 2002).

n144. See, for example, text accompanying notes 102-106, 126-131 supra.

n145. Christopher Lasch, for example, opposes affirmative action because, among other reasons, it would strengthen the dominant position of the middle class, further estranging it from lower-income people. Christopher Lasch, The Revolt of the Elites and the Betrayal of Democracy 79, 137 (1995).

n146. Bowen & Bok, supra note 80, at 116.

n147. The Bowen-Bok data do reveal a substantial, persistent, and unexplained earnings gap between white and black male graduates of the sampled institutions, though not for females. See also Sandalow, supra note 85, at 1908-10 (discussing possible explanations). And some studies do find performance differentials. E.g., John R. Lott, Does a Helping Hand Put Others at Risk?: Affirmative Action, Police Departments, and Crime, 38 Econ. Inquiry 239 (2000). On the other hand, a study of Michigan Law School's white and minority graduates shows their earnings, arguably a proxy for performance, to be quite comparable. Lempert et al., Law School, supra note 91, at 447-53. But see Sander, supra note 91 (discussing response rate, cohort, aggregation, and other methodological considerations).

n148. Issacharoff, supra note 11, at 684-88.

n149. As Sandalow puts it, "It is entirely predictable ... that African-American students at those institutions will, in their later lives, be actively involved in civic organizations. The importance of attending a selective college lies elsewhere, not in leading students to engage in civic activities, but in enhancing the quality of their efforts." Sandalow, supra note 85, at 1909-10.

n150. Bowen & Bok, supra note 80, at 48-49. Stephan and Abigail Thernstrom question the causal assumption of the leadership cadre rationale. Rather than these schools creating a black middle class, they say, the black middle class sends its children to these schools. Thernstrom & Thernstrom, Black and White, supra note 138; see also Stephan Thernstrom & Abigail Thernstrom, Racial Preferences: What We Now Know, 107 Commentary 44, 44-50 (1999) [hereinafter Racial Preferences] (reviewing the Bowen-Bok study).

n151. Lerner & Nagai, supra note 82. Some of these other institutions, it now appears, also use preferences. Id.

n152. Thernstrom & Thernstrom, Racial Preferences, supra note 150, at 49. These colleges educate 15% of black college students and produce 30% of all black graduates. Darien A. McWhirter, The End of Affirmative Action 150 (1996). For an argument that these institutions may now be unconstitutional, see Mark Strasser, Plessy, Brown and HBCUs: On the Imposition of Stigma and the Court's Mechanical Equal Protection Jurisprudence, 40 Washburn L.J. 48 (2000).

n153. Diana Jean Schemo, Black Colleges Lobby Hard to Lure the Best and Brightest, N.Y. Times, Mar. 8, 2001, at A10.

n154. E.g., Jack Citrin, Scores Do Measure Talent, Berkeley Professor Insists, San Jose Mercury News, Mar. 4, 2001; see infra text accompanying note 383.

n155. E.g., Stewart Schwab, Is Statistical Discrimination Efficient?, 76 Am. Econ. Rev. 228 (1986).

n156. Issacharoff, supra note 11, at 682.

n157. See discussion infra in Part IX, Section F.

n158. Issacharoff, supra note 11, at 690-92.

n159. E.g., Sanford Levinson, Diversity, 2 U. Pa. J. Const. L. 573, 577-78 (2000); Rubenfeld, supra note 126, at 471.

n160. For this reason, some have seen the diversity rationale as a diversion from the anti-caste project. E.g., Barbara Phillips Sullivan, The Gift of **Hopwood:** Diversity and the Fife and Drum March back to the Nineteenth Century, 34 **Ga.** L. Rev. 291, 298 (1999).

n161. Samuel Issacharoff, Law and Misdirection in the Debate Over Affirmative Action, 2002 U. Chi. Legal F. (forthcoming).

n162. **California's** Proposition 209, passed in the November 1996 election, dismantled affirmative action in public education and public employment; **Washington** State's Proposition 200, passed in the November 1998 election, yielded a similar outcome.

n163. Terrance Sandalow observes that "the importance of racial diversity in the educational process has become something of a mantra in higher education circles in the years since Justice Powell's pivotal opinion in Bakke." Sandalow, supra note 85, at 1905. Sanford Levinson likens this to a game of "Simon Says" in which the Court tells the players that "Simon says, "Start talking about diversity - and downplay any talk about rectification of

past social injustice ...'." Levinson, supra note 159, at 578.

n164. Univ. of **Cal.** Regents v. Bakke, 438 U.S. 265, 311-13 (1978) (Powell, J., concurring in result) (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957)). As Issacharoff points out, Powell's discussion of diversity was abstract, as it was not an issue in Bakke. Issacharoff, supra note 11, at 677. The Supreme Court had alluded to the benefits of diversity in higher education long before Bakke, though not in so many words, not as a rationale for affirmative action, and only as to how blacks would benefit from being with whites, not the reverse. Sweatt v. Painter, 339 U.S. 629, 634 (1950); McLaurin v. Okla. State Regents, 339 U.S. 637, 641 (1950). For an argument that Powell's diversity rationale did not command majority support among the Justices, see Thomas E. Wood & Malcolm J. Sherman, Race and Higher Education: Why Justice Powell's Diversity Rationale for Racial Preferences in Higher Education Must Be Rejected, Part I, at http://www.nas.org/rhe.pdf (May 2001).

n165. Michael Selmi, The Facts of Affirmative Action, 85 Va. L. Rev. 697, 729 (1999) (reviewing Bowen & Bok, supra note 80).

n166. Id. at 733; see also id. at 729 nn.152-153 (citing sources). As the successful lawyer in **Hopwood** points out, "if the [University of **Texas]** Law School with its notorious past cannot rely on historical discrimination as a predicate for preferential admissions, then no institution of higher learning ... can rely on a remedial rationale for affirmative action." Michael S. Greve, **Hopwood** and its Consequences, 17 Pace L. Rev. 1, 6 (1996).

n167. E.g., Sheila Foster, Difference and Equality: A Critical Assessment of the Concept of "Diversity," 1993 Wisc. L. Rev. 105, 107; Ronald Dworkin, Race and the Uses of Law, N.Y. Times, Apr. 13, 2001, at A17.

n168. Eugene Volokh, Diversity, Race as Proxy, and Religion as Proxy, 43 UCLA L. Rev. 2059, 2060 (1996).

n169. Quoted in Chen, supra note 58, at 815.

n170. Malamud, supra note 137, at 953 ("[The] diversity rationale makes it unnecessary to answer the hardest question about ... affirmative action: the question of when it is time to stop.").

n171. Kenneth L. Karst, Law's Promise, Law's Expression: Visions of Power in the Politics of Race, Gender, and Religion 105-07 (1993) (emphasizing "enacted narrative" of "doing things together over a period of time").

n172. Based on a 1993-94 survey of 710 law faculty at the top 100 law schools and the AALS data from the 1996-97, 80% of law faculty are Democratic or lean Democratic (compared with 46% of the working population). Although about 15% of full-time working women are Republicans, only 0.5% of women law professors are Republicans. James Lindgren, Measuring Diversity, tbl.2 (January 1, 1999) (unpublished manuscript, on file with author).

n173. Rachel Moran cites two recent surveys finding that "university faculty in general, and law faculty in particular, express high levels of support for diversity and affirmative action." Symposium on Law in the Twentieth Century: Diversity and its Discontents: The End of Affirmative Action at Boalt Hall, 8 **Calif.** L. Rev. 2241, 2267 n.137 (2000). She cites American Council on Education and American Association of University Professors, Does Diversity Make a Difference? Three Research Studies on Diversity in College Classrooms (2000) (on file with author); and Richard A. White, Preliminary Report: Law School Faculty Views on Diversity on the Classroom and the Law School Community (May 2000) (on file with author). But see Balch, supra note 32 (indicating opposition).

n174. I say few of the costs, not none. Some of their students who receive preferences are less well-prepared academically and thus harder to teach. Institutions may pressure faculty not to fail minority students. In addition, affirmative action in faculty hiring and promotion introduces more conflict and tension, acknowledged or not, into relations with colleagues and students. Sandalow, supra note 85, at 1902-05. It also bears noting that a diversity rationale for admission preferences would not necessarily justify them for faculty hiring and promotion. Indeed, Derek Bok, a supporter of admission preferences, opposed them in hiring and tenure decisions while Harvard University's President and in his writing. Id.

n175. "Diversity-value" is the sum of any of the social values associated with diversity. Diversity-value should be distinguished from "value-diversity," which is a domain of diversity - for example, a classroom in which students possess different values - that may best be thought of as "cultural-ideological." These concepts and distinctions are developed in Schuck, supra note 6.

n176. Schuck, supra note 6; see also Martha Minow's discussion of the "dilemma of difference" in her The Supreme Court, 1986 Term - Foreword: Justice Engendered, 101 Harv. L. Rev. 10, 12 (1987). On equality, see Peter Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537 (1982).

n177. Foster, supra note 167, at 109. For an unusually thoughtful exception, see Guido Calabresi, Diversity in Faculty Hiring (July 31, 1990) (unpublished manuscript, on file with author).

n178. Including, but by no means limited to, these: race is a spurious category; miscegenation has occurred since colonial times and is common today, producing a very large number of mixed-race individuals; even recent immigrants are included; Hispanics are not a racial group and Asians are a composite of many ethnic, religious, linguistic, and national-origin groups with little or nothing in common with one another, and indeed histories of deep conflict.

This last, however, is not the reason why pressures are growing to exclude Asians from diversity programs. The usual grounds for doing so are that Asians are already well represented on university campuses, their average family income is relatively high, they would qualify for admission on a **race-neutral** basis, and giving them preferences would leave few slots left for more deserving minorities, notably blacks. Not surprisingly, these grounds are disputed by Asian groups complaining that such "model minority" stereotypes overlook the many disadvantages these groups face. E.g., Chris Hedges, Fighting a Happy Image of Self-Sufficiency, N.Y. Times, Mar. 6, 2001, at B2 (Asian Americans for Equality group in New York City).

n179. James Lindgren, What Groups Think: Viewpoint Diversity Among Demographic Groups (Aug. 1, 2001) (unpublished manuscript, on file with author).

n180. Volokh argues that religious preferences under a diversity rationale would be unconstitutional for the same reason that he thinks racial preferences are - even though the lack of religious diversity at many schools is "at least as severe as the lack of racial diversity." Volokh, supra note 168, at 2072.

n181. Hollinger, supra note 26, at 120.

n182. Schuck, supra note 6.

n183. Indeed, Volokh contends that affirmative action that covers race while not covering religion casts doubt on the integrity of this use of the diversity rationale and thus would also be unconstitutional. Noting this conflict between the core principles of anti-discrimination law and of affirmative action law, he asks the law, "How exactly does what you praise differ from what you damn?" Volokh, supra note 168, at 2076.

n184. James Lindgren's survey of law professors during the 1990s indicates that nearly 27% were Jewish, and another 26% profess no religion, compared with 2% and 8%, respectively, in the full-time working population. Protestants accounted for 32% and Catholics for 14%, compared with 60% and 26%, respectively, in the full-time working population. James Lindgren (unpublished manuscript, on file with author).

n185. Some argue that because test score differences between religious groups are not as

great as between racial ones, affirmative action for the former are unnecessary to assure diversity; it will take care of itself. E-mail from Nathan Glazer (Aug. 24, 2001) (on file with author). But even if this were true as to students, it cannot explain why university employment preferences, particularly in faculty hiring, show no interest in religious diversity.

n186. Levinson, supra note 159, at 603 n.120.

n187. Hollinger, supra note 26, at 177-78.

n188. Amar and Katyal see the need for a "critical mass." Supra note 54, at 1777. See also Chen, supra note 58, at 883-84 (justification of "comfort level" for minority students "conflates diversity with the distinct and doctrinally unsound role model rationale").

n189. E.g., Chen, supra note 58, at 825-26 (reviewing the caselaw).

n190. E.g., Christopher A. Ford, Administering Identity: The Determination of "Race" in Race-Conscious Law, 82 **Calif.** L. Rev. 1231 (1994); Levinson, supra note 159, at 599-601.

n191. Compare, e.g., Grutter v. Bollinger, 137 F. Supp. 2d (E.D. Mich. 2001), with Gratz v. Bollinger, 135 F. Supp. 2d 790 (E.D. Mich. 2001) (sharp split between district courts over diversity rationale).

n192. This issue is analyzed in Johnson v. Board of Regents of the University of **Georgia,** Nos. 00-14340 & 00-14382, 2001 WL 967756, at 9-12 (11th Cir. Aug. 27, 2001).

n193. Regents of Univ. of **California** v. Bakke, 438 U.S. 265, 315-18 (1978). This emphasis on "the whole person," with race merely one consideration among many, is echoed by some commentators sympathetic to affirmative action. E.g., Amar & Katyal, supra note 54, at 1772-73.

n194. Some programs purport to do so. Tien, supra note 128, at 243-44 (stating that Berkeley's admissions policy "assures that our doors are open to low-income, older, immigrant, disabled, special talent," and geographically diverse students).

n195. Bakke, 438 U.S. at 316-17, 322-23.

n196. For a careful - but for the reasons presented here and others, unconvincing - argument that affirmative action in higher education meets this test, see Goodwin Liu, The Diversity Rationale as a Compelling Interest, 33 Harv. C.R.-C.L. L. Rev. 381 (1998).

n197. Adarand Constructors v. Pena, 515 U.S. 200 (1995) (overruling Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990), for failing to apply strict scrutiny). Some commentators doubt that this decision, which dealt with minority set-asides in government contracting, should apply to higher education. E.g., Amar & Katyal, supra note 54, at 1746-49.

n198. Kirk Kennedy, Race-Exclusive Scholarships: Constitutional Vel Non, 30 Wake Forest L. Rev. 759, 774 (1995); see also McWhirter, supra note 152, at 152.

n199. E.g., Issacharoff, supra note 11, at 678-79 (describing the process at the University of **Texas)**.

n200. Not everywhere. According to Bowen and Bok, America's most selective institutions reject about 25% of black applicants with SAT scores between 1400 and 1500. Bowen & Bok, supra note 80, at 27.

n201. "All" may be too strong. If only a small percentage of a group's members lack the desired quality, it may still be worthwhile to confer the benefit on all members in order to avoid the administrative costs of identifying the few who lack it.

n202. Volokh, supra note 168, at 2062.

n203. Hollinger, supra note 26, at 32. For a lively and passionate development of this idea, see Jim Sleeper, Liberal Racism 1-21 (1997).

n204. E. John Gregory, Dunwoody Commentary: Diversity Is a Value in American Higher Education, But It Is Not a Legal Justification for Affirmative Action, 52 **Fla.** L. Rev. 929, 950 (2000). For my views on profiling, see Peter H. Schuck, The Case for Profiling, Am. Lawyer (Jan. 2002).

n205. Anthony T. Kronman, Is Diversity a Value in American Higher Education?, 52 **Fla.** L. Rev. 861 (2000).

n206. E.g., Amar & Katyal, supra note 54, at 1773-76 (but insisting that programs meet certain other criteria); Paul Brest & Miranda Oshige, Affirmative Action for Whom?, 47 Stan. L. Rev. 855, 862 (1995).

n207. Levinson, supra note 159, at 577.

n208. Id. at 592-608.

n209. Selmi, supra note 165, at 725.

n210. The evidence is summarized id. at 724 n.141.

n211. Bowen & Bok, supra note 80, at 236; see also id. at 220-27, 231-40.

n212. For a development of this argument with respect to workers, see Cynthia L. Estlund, The Workplace in a Racially Diverse Society: Preliminary Thoughts on the Role of Labor and Employment Law, 1 U. Pa. J. Lab. & Emp. L. 49 (1998).

n213. Expert Report of Patricia Gurin, at http://www.umich.edu/<diff>urel/admissions/legal/expert/ gurintoc.html (last updated October 2001).

n214. Wood & Sherman, supra note 164, at Part IV.

n215. Thernstrom & Thernstrom, Black and White, supra note 138, at 386-492.

n216. Thernstrom & Thernstrom, Racial Preferences, supra note 150, at 47; see also Patterson, supra note 3, at 45 (57% of blacks claimed to have a good Euro-American friend "to whom they felt they could really say anything they thought"). Patterson emphasizes that workplace contacts matter more to friendships than neighborhood ones, noting a recent study in "hypersegregated Detroit" finding "a level of personal friendships with people from the other group that was wholly inconsistent with the dismal accounts of hypersegregation being reported by spatially oriented scholars." Id. at 44-46.

n217. Thernstrom & Thernstrom, Racial Preferences, supra note 150, at 47.

n218. E.g., D'Vera Cohn & Ellen Nakashima, Crossing Racial Lines, Wash. Post, Dec. 13, 1995, at A1 (newspaper poll indicating that more than three-quarters of **Washington**-area 12-to 17-year olds say they have a close friend of another race); Corey Takahashi, Selling to Gen Y: A Far Cry from Betty Crocker, N.Y. Times, Apr. 8, 2001, at WK3 (in 1997, 57% of teens who dated said they had dated interracially and another 30% had no objection to doing so). But see Gary Orfield & Dean Whitla, The Civil Rights Project, Harvard Univ., Diversity and Legal Education: Student Experiences in Leading Law Schools, at http://www.law.harvard.edu/groups/civilrights/publications/lawsurvey.html (Aug. 1999) (blacks and Hispanics admitted to elite colleges had more interracial contacts in high school than whites did).

n219. Here Sandalow cites to none other than Derek Bok, when president of Harvard University. Sandalow, supra note 85, 1906 & n.78.

n220. Id. at 1906-07. If I may indulge in a personal anecdote, I once stated in a seminar discussion of affirmative action that any experienced, conscientious teacher, regardless of her race, could and would get on the table any of the arguments that ought to be there, including ideas normally associated with racism or other analogous experiences not personally experienced by the teacher. One of my best students responded, "Yes, but you wouldn't say it with the same conviction or affect as one who had experienced it personally." This is a point I had to concede, as Sandalow does: "At times, the importance of what is said depends less upon the idea expressed than upon the identity of the speaker and the manner of expression." Id. at 1907; see also Levinson, supra note 159, at 596-97 (race and ethnicity may be good proxies for probability of interest and knowledge about an issue).

n221. Neil Gotanda, A Critique of "Our Constitution Is Color-Blind," 44 Stan. L. Rev. 1, 64-68 (1991).

n222. Mary Ann Case, Lessons for the Future of Affirmative Action from the Past of the Religion Clauses?, 2000 Sup. Ct. Rev. 325, 337 n.48.

n223. McWhirter, supra note 152, at 151.

n224. Sandalow, supra note 85, at 1906-07; see also Orfield & Whitla, supra note 218.

n225. Issacharoff, supra note 161 (manuscript at 24, on file with author) (citing studies of

effects of workplace diversity).

n226. E.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 315-17 (1986) (Stevens, J., dissenting).

n227. Rachel F. Moran, Diversity and its Discontents: The End of Affirmative Action at Boalt Hall, 88 **Cal.** L. Rev. 2245, 2331-42 (2000) (large classes, focus on abstract concepts and universal principles, intense competition, and hierarchy prevent schools from capitalizing on diversity).

n228. Malamud makes the point in the workplace context:

The diverse candidates must do their jobs, be role models, and teach the rest of the workforce how the world looks from their diverse perspectives. They can never be at peace in the same way as those whose right to be on the job is socially constructed as based on their pure individual merit.

Supra note 9, at 1709. But as Derek Bok points out, we don't worry about this as to musicians, students from rural areas, and other "diversity" admissions. Personal communication (Aug. 11, 2001).

n229. Bowen & Bok, supra note 80, at 193-98.

n230. Patterson, supra note 3, at 157.

n231. Citrin, supra note 154. This emphasis on differences in academic preparation, program, and performance, however, neglects the psychological and other factors that surely contribute to this separation.

n232. Anderson, supra note 127 (manuscript at 24). Anderson imaginatively argues that diversity, so re-conceived, can satisfy the Supreme Court's "compelling interest" and "narrowly tailored" tests for strict scrutiny, which she also re-conceives.

n233. Robert Post, Introduction to Race and Representation: Affirmative Action 21-24 (Robert Post & Michael Rogin eds., 1998).

n234. In a notorious recent example, Clinton v. Jones, 520 U.S. 681 (1997), events proved that the majority had vastly underestimated the potential burden on the President of private

litigation.

n235. E.g., Lemann, supra note 113, at 161-65, 200-11, 277-83; McWhirter, supra note 152 (1996); Sunita Parikh, The Politics of Preference: Democratic Institutions and Affirmative Action in the United States and India (1997); Jeremy Rabkin, Judicial Compulsions: How Public Law Distorts Public Policy (1989); Color Lines: Affirmative Action, Immigration, and Civil Rights Options for America (John D. Skrentny ed., 2001); Skrentny, Ironies, supra note 9; John D. Skrentny, The Minority Rights Revolution (forthcoming 2002) [hereinafter Minority Rights]; Bob Zelnick, Backfire: A Reporter's Look at Affirmative Action (1996).

n236. 29 U.S.C. 160(c) (2000) (emphasis added). For another account of the origin of the term, this in 1961, see Lemann, supra note 113, at 162.

n237. Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 8, 1961).

n238. Euel Elliott & Andrew I.E. Ewoh, The Evolution of an Issue: The Rise and Decline of Affirmative Action, 17 Pol'y Stud. Rev. 212, 215 (2000) (quoting Donald Altschiller, Introduction to Affirmative Action 8 (Donald Altschiller ed., 1991)).

n239. Albert G. Mosley & Nicholas Capaldi, Affirmative Action: Social Justice or Unfair Preference? 5 (1996).

n240. President Lyndon B. Johnson, Address at Howard University Commencement (June 4, 1965), quoted in Jacoby, supra note 31, at 76.

n241. Elliot & Ewoh, supra note 238, at 215.

n242. McWhirter, supra note 152, at 35.

n243. Howard Schuman et al., Racial Attitudes in America: Trends and Interpretations 62-63, 68 (rev. ed. 1997).

n244. Thomas Sugrue, The Tangled Roots of Affirmative Action, 41 Amer. Behav. Scientist 886, 895 (1998).

n245. Nicolaus Mills, Introduction to Debating Affirmative Action, supra note 128, at 10.

n246. Carol Lee Bacchi, The Politics of Affirmative Action 32 (1996).

n247. This paragraph draws heavily on Skrentny, Minority Rights, supra note 235 (manuscript at chapter 9).

n248. Quoted in Skrentny, Minority Rights, supra note 235 (manuscript at 442).

n249. Id. at 473-74.

n250. Griggs v. Duke Power Co., 401 U.S. 424, 431-432 (1971) (emphasis in original).

n251. Mills, supra note 245, at 12.

n252. Id. at 14.

n253. United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

n254. Malamud, supra note 9, at 1676.

n255. Fullilove v. Klutznick, 448 U.S. 448 (1980).

n256. In another action, oddly detached from the politics swirling around affirmative action in other areas, Reagan supported and signed the "Dole Compromise," part of the 1982 amendments to the Voting Rights Act in which Congress, while adding language seeming to say the opposite, approved of racial gerrymandering.

n257. Robert K. Detlefsen, Civil Rights Under Reagan, at 136-38 (1991). Darien McWhirter argues that Reagan ultimately declined to make dramatic changes in the civil rights regime because "big business likes regulations. In a survey of 128 CEOs of major corporations, 122

said they would continue some kind of "numerical objective' program even without government regulations." McWhirter, supra note 152, at 43-44.

n258. E.g., Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (holding that subjective or discretionary employment practices can be analyzed under the disparate impact approach); Johnson v. Transp. Agency, 480 U.S. 616 (1987) (upholding voluntary plan benefiting women); Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 481-83 (1986) (approving "race-conscious affirmative relief" to remedy "long-standing or egregious discrimination").

n259. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

n260. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

n261. Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990).

n262. Elliott & Ewoh, supra note 238, at 220.

n263. Adarand Constructors v. Pena, 515 U.S. 200 (1995).

n264. Holly Idelson, Clinton Comes to Defense of Affirmative Action, 53-2 C.Q. Weekly Report 2194 (1995).

n265. Evaluation of Affirmative Action Programs, Memorandum from The White House to Heads of Executive Departments and Agencies (July 19, 1995), reprinted in Daily Lab. Rep. (BNA) No. 147, at S-45 (Aug. 1, 1995). For an argument that Clinton could and should have pushed affirmative action more aggressively, see Girardeau A. Spann, Writing Off Race, 63 Law & Contemp. Probs. 467 (2000).

n266. Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994).

n267. **Hopwood** v. **Texas,** 78 F.3d 932 (5th Cir.), cert. denied, 518 U.S. 1033 (1996). Issacharoff, who helps to defend **Texas's** program in court, argues that opponents of race-based admission preferences could not mount effective court challenges before then, as they lacked standing to sue unless they could prove that they were "next in line" (i.e., that they would actually have been admitted absent the preferences) until Northeastern **Fla.**

Contractors v. City of Jacksonville, 508 U.S. 656 (1993). E-mail from Samuel Issacharoff (Apr. 26, 2001) (on file with author). On the other hand, a similar plaintiff's standing had been upheld in Bakke, and some other non-education, pre-Jacksonville rulings had required only that the plaintiff wish to be considered. E.g., Quinn v. Millsap, 491 U.S. 95 (1989); Turner v. Fouche, 396 U.S. 346 (1970).

n268. The undergraduate college's preference system was upheld in Gratz v. Bollinger, 135 F. Supp. 2d 790 (E.D. Mich. 2001), while the law school's was struck down in Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001).

n269. Johnson v. Board of Regents, Nos. 00-14340 & 00-14382, 2001 WL 967756 (11th Cir. Aug. 27, 2001).

n270. Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188 (9th Cir. 2000).

n271. Quoted in Bushwhacked?, 11 Amer. Enterprise 8 (2000).

n272. Cited in Malamud, supra note 9, at 1696.

n273. Skrentny, Ironies, supra note 9, at 242.

n274. Schuman et al., supra note 243, at 182. These authors report that, depending on question phrasing, "support has ranged from at most a third of the white public down to just a few percentage points." See also Benjamin Page & Robert Y. Shapiro, The Rational Public: Fifty Years of Trends in Americans' Policy Preferences 74 (1992) (public opinion stable over time).

n275. Schuman et al., supra note 243, at 182; accord Charlotte Steeth & Maria Krysan, Affirmative Action and the Public, 1970-1995, 60 Pub. Opin. Qtrly. 128, 132 (1996) (decline in support during mid-1990s) ("Attitudes about affirmative action policies for which we have continuous data have not shifted dramatically for whites since 1965, and, even among African Americans, they remain constant for the most part.").

n276. Citrin, supra note 135, at 43-44 (reviewing American National Election Studies). Citrin cautions against using data on Hispanic and Asian opinions due to the small number sampled in most surveys. Id. at 43 n.2.

n277. See Virginia Shapiro et al., National Election Studies, 1998 & 2000 [datasets]. Ann Arbor, MI: University of Michigan, Center for Political Studies [producer and distributor], 2001 at http://www.umich.edu/<diff>nes; Katherine Tate, National Black Election Study, 1996 [Computer file]. ICPSR version. Columbus, OH: Ohio State University [producer], 1997. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [distributor], 1998, Table 4b. See also Patterson, supra note 3, at 149-52 (noting greater support for hiring preferences among black women).

n278. E.g., Patterson, supra note 3, at 51-52. There is a growing literature about middle-class black rage. E.g., Ellis Cose, The Rage of a Privileged Class (1993); Joe R. Feagin & Melvin P. Sikes, Living with Racism: The Black Middle Class Experience (1994); Lawrence Otis Graham, Member of the Club: Reflections on Life in a Racially Polarized World (1995); Melvin L. Oliver & Thomas M. Shapiro, Black Wealth/White Wealth: A New Perspective on Racial Inequality (1995); Patricia J. Williams, The Alchemy of Race and Rights: Diary of a Law Professor (1991).

n279. Shikha Dalmia & Henry Payne, Blacks Against Racial Preferences, Reason Online, Dec. 3, 2001, at http://reason.com/hod/sd120301.shtml (reporting recent studies).

n280. Sniderman & Carmines, supra note 76, at 145.

n281. Id. Not all researchers agree with this interpretation. E.g., David O. Sears, Symbolic Racism, in Eliminating Racism: Profiles in Controversy, Perspectives in Social Psychology 53 (P. Katz & D. Taylor eds., 1988) (emphasizing symbolic racism); Lawrence D. Bobo, Race, Interests, and Beliefs About Affirmative Action: Unanswered Questions and New Directions, in Color Lines 91, supra note 235 (emphasizing interest group conflict).

n282. For thorough reviews of the methodological issues, see Schuman et al., supra note 243, at 58-98, and Donald R. Kinder & Lynn M. Sanders, Divided By Color: Racial Politics and Democratic Ideals 163-195 (1996).

n283. Bowen and Bok found that less than half of whites who graduated from the elite schools favored placing "a great deal of emphasis on diversity" in admissions. Supra note 80, at 248.

n284. Nor is the simple "angry white male" story a credible explanation for this opposition. E.g., Sniderman & Carmines, supra note 76, at 144-45 ("Younger men are less, not more, likely than older men to oppose it, and women are overwhelmingly opposed to it as well. Opposition to affirmative action is one-sided, intense, and remarkably invariant over time."); Gilens et al., supra note 76. Oddly, Orlando Patterson seems to endorse this hypothesis even while emphasizing, correctly, that only 7% of whites claim to have been personally injured in

any way by affirmative action. Supra note 3, at 64. Most uncharacteristically, Patterson here joins other affirmative action proponents in retreating to reductionist explanations of complex phenomena.

n285. Sniderman & Carmines, supra note 76, at 40-45; Sam Howe Verhovek, In Poll, Americans Reject Means but not Ends of Racial Diversity, N.Y. Times, Dec. 14, 1997, at A1.

n286. Paul Sniderman & Thomas Piazza, The Scar of Race 102-03 (1993).

n287. Steeth & Krysan, supra note 275, at 128.

n288. Seymour Martin Lipset, Equal Chances Versus Equal Results, 523 Annals of Amer. Acad. of Pol. & Soc. Sci. 63 (1992). Steeth and Krysan report that when programs and their rationales are defined more specifically, opinion is much more moderate. Supra note 275, at 140.

n289. E.g., Suzanne Daley, Elite French College Tackles Affirmative Action, N.Y. Times, May 4, 2001, at A4 (uproar and court challenge to program in elite Science Po).

n290. For a detailed description of this method, see Gilens et al., supra note 76, at 163-67.

n291. Id. at 167.

n292. Id. at 163; see also id. at 161.

n293. Sniderman & Carmines, supra note 76, at 17-18.

n294. Id. at 141-55.

n295. Jacoby, supra note 31, at 432-462 (expansion of Atlanta's set-asides before and after Croson).

n296. Nathan Glazer, Affirmative Discrimination (1975).

n297. Lawrence R. Jacobs & Robert Y. Shapiro, Politicians Don't Pander: Political Manipulation and the Loss of Democratic Responsiveness (2000) (politicians taking more deviant policy positions, using it to craft strategies for re-shaping public opinion).

n298. Stephen Steinberg, Turning Back: The Retreat from Racial Justice in American Thought and Policy 165 (1995), quoted in Hollinger, supra note 10, at 99; see also Skrentny, Ironies, supra note 9, at 127-44; Lemann, supra note 113, at 164.

n299. Skrentny, Ironies, supra note 9, at 127-28.

n300. For variations on this theme, see, for example, Cass R. Sunstein, Reshaping Remedial Measures: The Importance of Political Deliberation and Race-Conscious Redistricting: Public Deliberation, Affirmative Action, and the Supreme Court, 84 **Calif.** L. Rev 1179, 1192 (1996); Drew S. Days III, Fullilove, 96 Yale L.J. 453 (1987); McWhirter, supra note 152, at 30 ("stealth policy").

n301. E.g., Charles Fried, Uneasy Preferences: Affirmative Action, in Retrospect, Am. Prospect, September-October, 1998, at 51.

n302. E-mail from John Skrentny (Nov. 4, 2001) (on file with author).

n303. Hugh Davis Graham, Affirmative Action for Immigrants?, in Color Lines, supra note 235, at 62.

n304. Skrentny, Ironies, supra note 235, at 231-45.

n305. Citrin, supra note 135, at 47 (citing Martin Weiner).

n306. John D. Skrentny, Inventing Race, Pub. Interest 97, 111-12 (Winter 2002).

n307. Peter H. Schuck, The Limits of Law: Essays on Democratic Governance, 91-138

(2000) (reviewing The Politics of Regulation (James Q. Wilson, ed., 1980)); see also Citrin, supra note 135, at 48 ("In the American political system, policies that distribute important material and psychological benefits to intense, restricted constituencies can survive and flourish despite the opposition of a majority of voters. The story of affirmative action fits this pattern.").

n308. Infra paragraph accompanying note 350.

n309. Lemann, supra note 113, at 165.

n310. Even the conservative George W. Bush administration is defending a federal affirmative action program that the Supreme Court invalidated earlier as unconstitutional. Brief of Respondents Norman Mineta, Secretary of Transportation, et al., Adarand Constructors, Inc. v. Mineta, 121 S. Ct. 1401 (2001) (grant of certiorari), available at http://supreme.lp.findlaw.com/supreme<uscore>court/briefs/00-730/ 2000-0730.mer.aa.pdf (accessed Oct. 14, 2001). The Supreme Court subsequently dismissed the writ of certiorari as improvidently granted. 2001 WL 1488214 (U.S. Nov. 27, 2001) (per curiam).

n311. E.g., Jodi Wilgoren, Michigan: Diversity Grant for University, N.Y. Times, July 13, 2001, at A12 (Ford Foundation grants $ 600,000 to University of Michigan to finance research to support its defense of affirmative action in the courts).

n312. There, the Republicans argue and litigate in favor of mandating majority-minority districts. E.g., Hanley, supra note 41.

n313. A number of Fortune 500 firms have filed amicus briefs defending the programs in the pending University of Michigan cases. Jim Sleeper notes that Boeing, Microsoft, and other corporate giants were the major defenders of preferences in **Washington** State's 1998 referendum, "a fact that made some on the left wonder whether the color-coding of American identity is really so "progressive' after all, and some on the right to wonder whether private-sector bureaucrats can be just as stultifying as public ones." Jim Sleeper, Yankee Doodle Dandy, L.A. Times, July 2, 2000 (reviewing Norman Podhoretz , My Love Affair With America (2000)).

n314. E.g., Bowen & Bok, supra note 80, at 11-13.

n315. E.g., Nelson Lund, Reforming Affirmative Action in Employment: How to Restore the Law of Equal Treatment, The Heritage Foundation Committee Brief No. 17, at 8 (1995).

n316. Similar reasons may have motivated Philip Morris to advocate federal regulation of tobacco. Gordon Fairclough, Philip Morris Pushes for FDA Tobacco Regulation, Wall St. J., Apr. 11, 2001, at A2. In addition, the settlement of state suits over tobacco has created significant barriers to new competition over both price and safer cigarettes.

n317. E.g., Frederick R. Lynch, The Diversity Machine: The Drive to Change the "White Male Workplace" (1997); cf. David E. Bernstein, Color Bind, Reason, at 69 (May 1996).

n318. McWhirter, supra note 152, at 14.

n319. E.g., John D. Skrentny, Republican Efforts to End Affirmative Action: Walking a Fine Line, in The New Politics of Public Policy (Marc Landy et al. eds., 2001); see also Detlefsen, supra note 257; Lemann, supra note 113, at 278-79; McWhirter, supra note 152, at 43-44.

n320. Neal Devins, Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis, 50 Duke L.J. 1169, 1203-05 (2001); Skrentny, supra note 319. Indeed, President George W. Bush has given preference advocates the government's support in defending an affirmative action program the Supreme Court had held unconstitutional. Supra note 310.

n321. Jacoby, supra note 31, at 541.

n322. Fried, supra note 301, at 55.

n323. See discussion supra at text accompanying notes 80-97.

n324. Patterson, supra note 3, at 15. The major exception is the illegitimate birth rate, especially to teenagers. Id. at 35-38. The teenage birth rate has declined slightly in recent years. Id. at 36.

n325. John J. Donohue III & James Heckman, Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks, 29 J. Econ. Literature 1603 (1991).

n326. Neumark & Stock, supra note 19.

n327. E.g., James P. Smith & Finis R. Welch, Black Economic Progress After Myrdal, 27 J. Econ. Literature 519 (1989) (black-white wage gap closed more rapidly before than after affirmative action); Thomas Sowell, Civil Rights: Rhetoric or Reality? (1984) (similar).

n328. On the need to distinguish the contributions of non-discrimination and affirmative action, see Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws 245-62 (1992).

n329. E.g., Schnapper, supra note 19 (classifying remedies cases).

n330. Farrell Bloch, Antidiscrimination Law and Minority Employment (1994). Like Donohue and Heckman, supra note 325, Bloch emphasizes that because existing employees are much more likely to file civil rights complaints than people applying for jobs in the first instance, employers have an incentive to avoid hiring potentially litigious minorities. Bloch, supra, at 88-116.

n331. Harry Holzer & David Neumark, Assessing Affirmative Action, 38 J. Econ. Lit. 483, 558-59 (2000) (summarizing literature).

n332. See discussion supra at text accompanying note 150.

n333. See discussion supra at text accompanying note 93.

n334. E.g., U.S. Gen. Acct. Office, Small Business Administration: 8(A) Is Vulnerable to Program & Contractor Abuse (1995); Edmund L. Andrews & Geraldine Fabrikant, The Black Entrepreneur at a Firestorm's Center, N.Y. Times, Feb. 10, 1995, at D1 (tax benefits for sales of cable properties to minority-owned company received by a company with significant nonminority investment); Paul M. Barrett, Foes of Affirmative Action Target SBA's 8(a) Program, Wall St. J., Mar. 18, 1996, at B2; see also Ian Ayres, Symposium on Affirmative Action: Narrow Tailoring, 43 UCLA L. Rev. 1781, 1823 n.113 (1996) (minority-owned broadcasters hired higher proportions of minority workers than non-minority ones; however, he found little information on this trend in other fields).

n335. E.g., Cho, supra note 31 (preferences for female-owned construction and engineering firms).

n336. E.g., U.S. Gen. Acct. Office, supra note 334; Barrett, supra note 334; Steven A. Holmes, What Is a Minority-Owned Business?, N.Y. Times, Oct. 12, 1999, at C4 (efforts to expand definition); Dirk Johnson, Chicago Minority Program Aids Firm Run by White Men, N.Y. Times, Jan. 4, 2000, at A15; Jane Larson, Woes Plague Program for Minorities, Ariz. Republic, July 20, 1997, at D1.

n337. But see Maria E. Enchautegui et al., Urban Institute, Do Minority-Owned Businesses Get a Fair Share of Government Contracts? (December 1997), available at http://www.urban.org/civil/civil1.htm (reviewing post-Croson "disparity studies" and finding large disparity, especially absent affirmative action programs, between share of minority-owned firms and share of contracts received - but not testing for discrimination).

n338. E.g., Cho, supra note 31 (contracts to female-headed firms send "alarm bells ringing in many minority business communities").

n339. Mary Anne Case's analogy of ethno-racial preferences to the free exercise of religion, criticized above, also founders on her failure to recognize that the former are zero-sum and the latter is not. Case, supra note 222, at 329.

n340. E.g., Carol M. Swain, Black Faces, Black Interests: The Representation of African-Americans in Congress (1993); Charles Cameron et al., Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?, 90 Am. Pol. Sci. Rev. 794 (1996); Bernard Grofman et al., Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence, 79 N. Car. L. Rev. (forthcoming 2001). Indeed, as white voters increasingly support moderate black candidates, such candidates are also being elected from majority-white districts. E.g., David Grann, Close Races, New Republic, Mar. 9, 1998, at 11; Robert Hanley, Expert Backs New Districts as Unbiased, N.Y. Times, May 2, 2001, at B5 (giving examples); Fred Siegel, Fair Philly, New Republic, Nov. 1, 1999, at 13. For a contrary view, see, for example, Pamela S. Karlan, Loss and Redemption: Voting Rights at the Turn of the Century, 50 Vand. L. Rev. 291 (1997).

n341. David Lublin, The Paradox of Representation: Racial Gerrymandering and Minority Interests in Congress (1997).

n342. Schuck, supra note 6.

n343. E.g., Will Kymlicka, Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship 198 (2000).

n344. E.g., Marc Galanter, Competing Equalities: Law and the Backward Classes in India (1984); Thomas Sowell, Preferential Policies: An International Perspective (1990); Myron Weiner, Sons of the Soil: Migration and Ethnic Conflict in India (1978); Sunita Parikh, Affirmative Action, Caste, and Party Politics in Contemporary India, in Color Lines 297, supra note 235.

n345. Patterson, supra note 3, at 148-49.

n346. Kristin Bumiller, The Civil Rights Society 99-100 (1988).

n347. E.g., Frederick R. Lynch, Invisible Victims: White Males and the Crisis of Affirmative Action 51-91 (1989).

n348. Bowen & Bok, supra note 80, at 36.

n349. Id. at 33-34 (without affirmative action, blacks' chance of admission would decline from 42% to 13%; their percentage of the student body would decline from 7.1% to 2.1%).

n350. Extrapolating from Bowen and Bok's figures, almost 2000 more white students in the 1976 cohort would have been admitted to the schools that were studied.

n351. E.g., Bill Ong Hing, Making and Remaking Asian America Through Immigration Policy (1993); Charles L. McClain, Jr., In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America 10-11 (1994); Lucy Salyer, Law Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law (1995); Ronald Takaki, Strangers From a Different Shore: A History of Asian Americans 85 (1989); John Hayakawa Torok, Reconstruction and Racial Nativism: Chinese Immigration and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws, 3 Asian L.J. 55 (1996).

n352. Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581 (1889); Korematsu v. United States, 323 U.S. 214 (1944). Neither case has been overruled; both are occasionally cited by the Court. E.g., Zadvydas v. Davis, 121 S. Ct. 2491, 2501 (2001) (citing Chinese Exclusion Case); Missouri v. Jenkins, 515 U.S. 70, 121 (1995) (Thomas, J., concurring) (citing Korematsu).

n353. For experimental evidence on these feelings, see, for example, Frederick R. Lynch, Casualties and More Casualties: Surviving Affirmative Action (More or Less), in Affirmative

Action: Social Justice or Reverse Discrimination? 90 (Francis J. Beckwith & Todd E. Jones eds., 1997).

n354. Bowen and Bok found that graduates rejected by their first-choice schools were as supportive of diversity efforts as those who were admitted. Supra note 80, at 251-52. On the other hand, almost all applicants to selective schools apply to a large number of them and presumably do not expect to get into their first choices (commonly called a "reach") anyway.

n355. See generally Schuck, supra note 307, at 419-79. Despite methodological and interpretive difficulties, some researchers have studied the effects, if any, of affirmative action on behaviors in "micro" policy contexts. Results are mixed. E.g., Brandice J. Canes & Harvey S. Rosen, Following in Her Footsteps: Women's Choices of College Majors and Faculty Gender Composition, 48 Indus. & Lab. Rel. Rev., 486 (1995) (adding more female role models to three faculties had no effect on gender composition of undergraduate majors); Lott, supra note 147 (increasing black and minority police officers increased crime rates, especially in heavily black neighborhoods, by lower hiring standards for both minority and non-minority officers; no effect found with female recruits); C.J. Chivers, From Court Order to Reality: A Diverse Boston Police Force, N.Y. Times, Apr. 4, 2001, at A1 (positive effects on policing); Barbara Whitaker, When **California** Lights Dim; Utilities' Turmoil also Hits Program that Aids Concerns Owned by Women and Minorities, N.Y. Times, Feb. 28, 2001, at C1 (describing "Women, Minority and Disabled Veterans Business Enterprises Program for Public Utilities" as a "national model for minority contracting efforts" but also an example of the perils of dependence on particular revenue sources).

n356. See generally Bowen & Bok, supra note 80, at 258-59; Thernstrom & Thernstrom, Black and White, supra note 138, at 405-12; Sandalow, supra note 85, at 1884-1891. Although the former Chancellor of the University of **California** at Berkeley claims that it is a "myth" that students admitted under affirmative action do not succeed academically, his own figures from his own campus belie this claim: the five-year graduation rate for blacks was 46%, for Chicanos 56%, for Latinos 59%, for Filipinos 63%, for whites 76%, and for non-Filipino Asians 78%. Tien, supra note 128, at 245.

n357. Shelby Steele, Affirmative Action Must Go, N.Y. Times, Mar. 1, 1995, at A19 (arguing that opponents of affirmative action can gain moral authority by criminalizing discrimination).

n358. E.g., Shelby Steele, The Content of Our Character (1990); see also Missouri v. Jenkins, 515 U.S. 70, 122 (1995) (Thomas, J., concurring) (""Racial isolation' itself is not a harm; only state-enforced segregation is. After all, if separation itself is a harm, and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, segregation injures blacks because blacks, when left on their own, cannot achieve. To my way of thinking, that conclusion is the result of a jurisprudence based upon a theory of black inferiority."); Alex M. Johnson, Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again, 81 **Cal.** L. Rev. 1401 (1993); supra text accompanying notes 122-125.

n359. Even so, many of their front-line shock troops may be having second thoughts. One survey of professors suggests that they reject group preferences by overwhelming margins. Balch, supra note 32, at 2. Competitive trends at the elite schools may also reduce the schools' enthusiasm for preferences. As one economist said in 1997, "if affirmative action raised hackles in the 1980's and 1990's, watch what happens when a third more students are competing for the same number of places in class." Peter Passell, Economic Scene, N.Y. Times, May 1, 1997, at D2.

n360. On the importance of corporate support for affirmative action, see discussion supra at text accompanying notes 313-318. See also Judith H. Dobrzynski, Some Action, Little Talk, N.Y. Times, Apr. 20, 1995, at D1 (noting that executives prefer a low-key, behind-the-scenes approach).

n361. Supra note 25.

n362. Lexington, Disabling the National Education Defence System, Economist, Feb. 24, 2001, at 36.

n363. These are tests, after all, that were devised to enable colleges to compare applicants from high schools with extraordinarily diverse programs, standards, and student bodies. Under pressure by the many groups that hope for more minority admissions, the tests have often been revised in order to minimize their supposed cultural and other biases. See generally Lemann, supra note 113.

n364. For examples, see Zelnick, supra note 235, at 107-18 (police and fire departments).

n365. For one participant-observer account of how this dissimulation multiplies, see G. Kindrow, The Candidate: Inside One Affirmative Action Search, in Debating Affirmative Action, supra note 128, at 140. For others, see Lynch, supra note 347, at 51-82; see also Issacharoff, supra note 11, at 675 n.14 (describing how Attorney General of **Texas** falsely denied racial preferences' role in the law school's program even though the law school had admitted it).

n366. Lexington, supra note 362.

n367. Infra text accompanying notes 373-374.

n368. Glazer, supra note 85, at 59 (quoting Bowen and Bok's statement that stigmatization helps explain institutions' reluctance to discuss the degree of preference given black students).

n369. For a careful review of the psychological evidence, see Krieger, supra note 13. For more anecdotal evidence, see, for example, Lynch, supra notes 347, 353.

n370. Supra text accompanying note 125.

n371. Patterson, supra note 3, at 2-4.

n372. Marta Tienda, College Admission Policies and the Educational Pipeline: Implications for Medical and Health Professions, in The Right Thing to Do, the Smart Thing to Do: Enhancing Diversity in Health Professions 117, 128-29 (Brian D. Smedley et al. eds., 2001).

n373. James Traub, The Class of Prop. 209, N.Y. Times Magazine, May 2, 1999, at 44, 78. Some argue that this "top X% solution" may not simply increase minority admissions but, by altering parents' incentives, may also improve the quality of the weaker high schools. David Orentlicher, Affirmative Action and **Texas'** Ten Percent Solution: Improving Diversity and Quality, 74 Notre Dame L. Rev. 181 (1998).

n374. University of **California,** New **California** Freshman ADMITS, Fall 1997 through 2001, http://www.ucop.edu/news/factsheets/2001/ethnicity.pdf (accessed June 26, 2001).

n375. Rick Bragg, Minority Enrollment Rises in **Florida** College System, N.Y. Times, Aug. 30, 2000, at A18.

n376. Tienda, supra note 372, at 128.

n377. Id. at 139.

n378. Nate Tabak, Acceptance Policies May See Major Changes, Daily Californian, July 3, 2001, at 1.

n379. E.g., Daniel Golden, College Entry in U.S. Inspires New Calculation, Wall St. J. (Euro ed.), May 16, 2000, at 34 (describing schools' manipulations); see Issacharoff, supra note 11, at 687 (without affirmative action, public universities in **Texas** will lower standards "as far as necessary to avoid re-segregation").

n380. Citrin, supra note 154 (among students with same credentials and family income and background, black and Latino students are more likely to receive higher holistic ratings; faculty opponents of affirmative action excluded from admissions committees).

n381. Daniel Golden, Admission: Possible: Language Test Gives Hispanic Students a Leg Up in **California,** Wall St. J., June 26, 2001, at A1.

n382. For the situation in 1997, the first post-affirmative action year there, see John E. Morris, Boalt Hall's Affirmative Action Dilemma, Am. Lawyer, November 1997, at 73. For the situation in 2000, see University of **California** at Berkeley School of Law (Boalt Hall), 2000 Annual Admissions Report. The entering class in 2000 contained only seven blacks (twenty-eight received offers) and ten Chicanos (thirty-two received offers), constituting 3% and 4% of the class, respectively. Id. at frontspiece (unnumbered first page). The number of blacks who applied to Boalt declined almost 50% between 1996 and 2000; the Chicano application decline was about 30%. Id. at 5. The share of those who accepted Boalt's offer dropped only slightly for blacks (26% to 25%) but substantially for Chicanos (42% to 31%). Id. at 9. Those who declined the offer almost certainly went to comparable or higher-ranked law schools. Morris, supra, at 78 (eleven of the fifteen who received offers in 1997 went "to schools with more cachet than Boalt"). Boalt's problem was that the pool of blacks and Chicanos who met their minimum standards was exceedingly small to begin with - only sixteen blacks and forty-five Hispanics nationwide even came close to the median for whites entering Boalt (id. at 74) - and most of those in that pool chose to attend other schools.

n383. University of **California,** Distribution of New **California** Freshman Admit Offers, Fall 1997 through 2001, http://www.ucop.edu/news/factsheets/2001/campus.pdf (accessed June 26, 2001).

n384. The evidence on how attending institutions of varying selectivity affects future earnings is mixed and hard to interpret. Compare Bowen & Bok, supra note 80, at 128 (without controlling for pre-college aptitude, finds wage premium for attending selective institution), with Stacy Berg Dale & Alan B. Krueger, Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables, Working Paper #409, Industrial Relations Section, Princeton University (July 1999) (controlling for pre-college aptitude, finds no wage premium for attending selective institution for either whites or blacks, though sample of blacks was small). Recent studies indicate that the returns to additional years of schooling are now about equal for blacks and whites. Alan Krueger, Michael Boozer, & Shari Wolkon, Race and School Quality Since Brown vs. Board of Education, in Brookings Papers on Economic Activity: Microeconomics 269-326 (Martin N. Baily and Clifford Winston eds., 1992).

n385. Stephan Thernstrom & Abigail Thernstrom, Racial Preferences in Higher Education: An Assessment of the Evidence, One America? Political Leadership, National Identity, and the Dilemmas of Diversity 206-07 (Stanley A. Renshon ed., 2001).

n386. U. of **California** Alters Admission Policy, N.Y. Times, July 20, 2001, at A12 (starting in fall 2003, top 12.5% of high school class assured eventual place at a university campus; most of those between 4% and 12.5% must first complete two years at community college); Barbara Whitaker, University of **California** Moves to Widen Admissions Criteria, N.Y. Times, Nov. 15, 2001, at A26 (replacing two-tier system with "comprehensive review" system that considers applicant's success in overcoming disadvantages).

n387. For a decidedly less optimistic prediction based on cognitive psychology research, see Krieger, supra note 13, which leads her to advocate continued affirmative action. Krieger shows that subtle cognitive biases make discrimination hard to detect and remedy, in part because of the salience and persistence of intergroup distinctions. The psychological literature she cites is complex; it indicates that racial preferences may magnify these distinctions in some ways while reducing them in others. Krieger believes that effective legal remedies can deal with such unconscious biases, but I am not fully persuaded. E-mail from Linda Hamilton Krieger (Mar. 9, 2001) (on file with author).

n388. E.g., A National Report Card on Discrimination in America: The Role of Testing (Michael Fix & Margery Austin Turner eds., 1998); Ayres, supra note 47, at 396-427.

n389. E.g., Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 Stan. L. Rev. 1161 (1995) (favoring goals and timetables as well as preferences); Vicki Schultz, Reconceptualizing Sexual Harassment, 107 Yale L.J. 1683 (1998).

n390. Nathan Glazer is most prominently associated with this position. Nathan Glazer, We Are All Multiculturalists Now (1997).

n391. According to a leading expert on affirmative action, employment preferences do not make such a distinction. Hugh Davis Graham, Affirmative Action for Immigrants, in Color Lines, supra note 235, at 54 (noting that nineteen percent of the black faculty recruited under the university's affirmative-action program were foreign-born).

n392. E.g., Kymlicka, supra note 343, at 197-98; Peter Skerry, Mexican Americans: The Ambivalent Minority (1995); see also Paul Brest & Miranda Oshige, Affirmative Action for Whom, 47 Stan. L. Rev. 855 (1995) (distinguishing Latino claims from black claims).

n393. Patterson, supra note 3, at 193.

n394. Daria Roithmayr, Direct Measures: An Alternative Form of Affirmative Action, 7 Mich. J. of Race & Law (forthcoming 2001).

n395. E.g., Days, supra note 300.

n396. E.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989) (explaining "strict scrutiny" test).

n397. E.g., Richard D. Kahlenberg, The Remedy: Class, Race, and Affirmative Action (1996); Patterson, supra note 3, at 193.

n398. Carol M. Swain, Kyra R. Greene, & Christine Min Wotipka, Understanding Racial Polarization on Affirmation Action: The View from Focus Groups, in Color Lines, supra note 235, at 214.

n399. Malamud, supra note 9, at 1707 (agreeing with others on this point).

n400. See also Tanya K. Hernandez, An Exploration of the Efficacy of Class-Based Approaches to Racial Justice: The Cuban Context, 33 U.C. Davis L. Rev. 1135 (2000) (arguing that Afro-Cuban disadvantage and subordination persists despite class-based redistribution in Cuba).

n401. Sarah Kershaw, **California's** Universities Confront New Diversity Rules, N.Y. Times, Jan. 22, 1996, at A10 (up to half of applicants meeting minimum academic standards to be evaluated on basis of "special circumstances," including social disadvantage).

n402. Some proponents apparently ignore this problem. Patterson, for example, would include those of "lower class background," without noting that the meanings of both "lower class" and "background" are highly debatable in this context. Patterson, supra note 3, at 193.

n403. Richard Kahlenberg has responded to these and other criticisms, unpersuasively in

my view. Supra note 397.

n404. Kinsley, supra note 49, at 66.

n405. E.g., Paul M. Barrett & Michael K. Frisby, "Place, Not Race" Could Be Next Catch Phrase in Government's Affirmative-Action Programs, Wall St. J., Oct. 19, 1995, at B16.

n406. Lani Guinier, Democracy's Conversation: Beyond Winner Take All, Nation , Jan. 23, 1995, at 88. For another lottery proposal, see Jack Citrin, Editorial, For True Diversity, Universities Should Consider a Lottery, Sacramento Bee, July 22, 2001.

n407. E.g., Paul M. Barrett, Birmingham's Plan to Help Black-Owned Firms May Be Alternative to Racial Set-Aside Programs, Wall St. J., Feb. 27, 1995, at A14; see also Lemann, supra note 113, at 348-49 (favoring restraints on local schools); Rubenfeld, supra note 126, at 471 (favoring "a massive capital infusion into inner-city day care and educational facilities").

n408. This problem is discussed in James Q. Wilson, Thinking About Crime 51, 73 (1975).

n409. States have substantially increased spending on public elementary and secondary education in recent years; their per pupil expenditures increased almost 50% in constant dollars between 1980 and the late 1990s. U.S. Census Bureau, Statistical Abstract of the United States: 2000, at 164 tbl.262, available at http://www.census.gov/statab/www/ (last accessed Dec. 3, 2001). Their general fund spending in fiscal 2002 will increase 3.7% above 2001 levels. Jessica L. Sandham, States Slowing Spending for Public Schools, Educ. Week, Sept. 5, 2001, available at http://www.edweek.org/ew/ newstory.cfm?slug=01downturn.h21 (last accessed Oct. 15, 2001). At the same time, federal elementary and secondary education spending will enjoy its largest rise ever, with a 20% increase in Title I spending, outstripping Bill Clinton's previous record increase of $ 3.6 billion for fiscal year 2001. The new legislation also increases teacher and school accountability. Adam Clymer, Congress Reaches Compromise on Education Bill, N.Y. Times, Dec. 12, 2001, at A1.

n410. According to John Jeffries, Lewis Powell's biographer, Justice Stevens speculated during the Supreme Court's deliberations in Bakke that blacks might not need preferences much longer. Justice Marshall "broke in to say that it would be another hundred years." John C. Jeffries Jr., Justice Lewis F. Powell, Jr. 487 (2001).

n411. The U.S. Supreme Court has confronted this question, but only in the special context of the dismantling of previously segregated school systems that have been under court order. United States v. Fordice, 505 U.S. 717 (1992).

n412. Patterson, supra note 3, at 192-93.

n413. Sowell, supra note 344; Erik Bleich, The French Model: Color-Blind Integration, in Color Lines, supra note 235, at 270; Parikh, supra note 344; Steven M. Teles, Positive Action or Affirmative Action? The Persistence of Britain's Antidiscrimination Regime, in Color Lines, supra note 235, at 241.

n414. It seems unlikely, for example, that banks would voluntarily invest in distressed neighborhoods where it seems unprofitable, nor would many companies regulated by the FCC and other agencies co-venture with, or give stock to, members of favored groups if that did not help them to obtain government licenses.

n415. On corporations, see, for example, Thernstrom & Thernstrom, Black and White, supra note 138, at 452-53; Lauren B. Edelman et al., Diversity Rhetoric and the Managerialization of Law, 106 Am. J. Sociol. 1589 (2001); Levinson, supra note 159, at 585-89 (example of Coca-Cola); Dobrzynski, supra note 360; Alan Wolfe, Affirmative Action, Inc., New Yorker, Nov. 25, 1996, at 106, 107 ("The support of business for affirmative action is one of the better-kept secrets of the debate.") On selective educational institutions, see supra discussion in Part V, Section G.

n416. Edelman et al., supra note 415 at 1581 (managers and their consultants believe that "diversity is directly valuable to organizational efficiency and important in its own right rather than because it might promote legal ideals").

n417. E.g., Christopher Edley, Jr., Not All Black and White: Affirmative Action, Race, and American Values (1996) (written as a defense of the administration's essentially stand-pat position on affirmative action).

n418. Wolfe, supra note 415, at 114-15.

n419. E.g., Kinsley, supra note 49, at 67.

n420. Symposium on The Public/Private Distinction, 130 U. Pa. L. Rev. 1289 (1982).

n421. E.g., Brentwood Academy v. Tennessee Secondary School Athletic Ass'n., 121 S. Ct.

924, 930 (2001).

n422. Schuck, supra note 307, at 419-79.

n423. The classic exploration of this distinction is Albert O. Hirschman, Exit, Voice and Loyalty: Responses to Declines in Firms, Organizations, and States (1970).

n424. See generally Schuck, supra note 307, at 434-54.

n425. E.g., Richard H. McAdams, An Attitudinal Theory of Expressive Law, 79 Ore. L. Rev. 339 (2000).

n426. For a discussion of what these values might be, see Levinson, supra note 159, at 592-608.

n427. Jacoby, supra note 31, at 541.

n428. Id.

n429. E.g., Kent Greenawalt, Hands Off! Civil Court Involvement in Conflicts Over Religious Property, 98 Colum. L. Rev. 1843, 1901 (1998) (rejecting extreme deference to church decisions).

n430. Boy Scouts of Am. v. Dale, 120 S. Ct. 2446 (2000). For my initial reaction to this decision, see Peter H. Schuck, Diversity Demands Exclusivity, Am. Lawyer, Sept. 2000, at 67.

n431. Compare David E. Bernstein, The Right of Expressive Association and Private Universities' Racial Preferences and Speech Codes, 9 Wm. & Mary Bill Rts. L.J. 619 (2001), with Mark Tushnet, The Redundant Free Exercise Clause?, 33 Loy. U. Chi. L.J. 71 (2001) (noting possible limits on defense).

n432. For an exploration of considerations sometimes favoring opacity, see Guido Calabresi & Philip Bobbitt, Tragic Choices (1978).

n433. Rubenfeld, supra 126, at 471.

n434. Conversation with Derek Bok, former president of Harvard University (Aug. 11, 2001).

n435. Supra Part II, Section A.

n436. See supra text accompanying note 365 through paragraph accompanying note 381.

n437. E.g., McAdams, supra note 425.

n438. For example, Edelman et al., supra note 415, explains how civil rights and affirmative action law have influenced diversity management in organizations, and vice-versa.

n439. Justice Blackmun's opinion in Bakke is an example. Post, supra note 233, at 18 (Blackmun "fails to engage Powell's central point, which is that when it comes to state action the country's history has made race and ethnicity special and problematic categories.").

n440. Many leading scholars, however, take this view. E.g., Laurence H. Tribe et al., Constitutional Scholars' Statement on Affirmative Action After City of Richmond v. J.A. Croson Co., 98 Yale L.J. 1711 (1989) (statement signed by thirty scholars).

n441. Lasch, supra note 145, at 17.

n442. John Rawls, A Theory of Justice (1971).