

# INTEGRATION, AFFIRMATIVE ACTION, AND STRICT SCRUTINY

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*This Article defends racial integration as a central goal of race-based affirmative action. Racial integration of mainstream institutions is necessary both to dismantle the current barriers to opportunity suffered by disadvantaged racial groups, and to create a democratic civil society. Integration, conceived as a forward-looking remedy for de facto racial segregation and discrimination, makes better sense of the actual practice of affirmative action than backward-looking compensatory rationales, which offer restitution for past discrimination, and diversity rationales, which claim to promote nonremedial educational goals. Integrative rationales for affirmative action in higher education also could easily pass equal protection analysis, if only the point of strict scrutiny of racial classifications were understood. Unfortunately, the development of strict scrutiny as an analytical tool has been hampered by the Court's confusion over the kinds of constitutional harm threatened by state uses of racial classification. This Article sorts out these alleged harms and shows how strict scrutiny should deal with them. It shows how narrow-tailoring tests constitute powerful tools for putting many allegations of constitutional harm from race-based affirmative action to rest, and for putting the remainder into perspective. It also argues that there is no constitutional or moral basis for prohibiting state uses of racial means to remedy private-sector discrimination. Integrative affirmative action programs in educational contexts, which aim to remedy private-sector discrimination, can therefore meet the requirements of strict scrutiny, properly interpreted.*

## INTRODUCTION

After three decades of stalled debate over race-based affirmative action, could there be anything new to learn? Yes. Neither the courts nor the practitioners of affirmative action understand the principles upon which they are acting. The practitioners are rationalizing their behavior in terms—"diversity" and compensation for past discrimination—that do not fully make sense of what they are doing, which is pursuing racial integration.<sup>1</sup> The courts are striking down race-based affirmative action programs on the basis of alleged failures to meet

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<sup>1</sup> See *infra* Part I.C.

strict scrutiny of racial classifications, without having a clear grasp of the point of strict scrutiny and hence of how to apply it.<sup>2</sup>

Worse, the current arguments for affirmative action have actually helped perpetuate a confused conception of strict scrutiny and its purposes. This Article examines the principles underlying affirmative action to clarify the debate and promote a better understanding of the role for courts in guarding against discrimination and division.

In Part I, I distinguish two remedial justifications for affirmative action: compensatory and integrative. Compensatory remediation provides restitution for illegal discrimination that took place in the past. Integrative remediation seeks to dismantle *current* barriers to equal opportunity for disadvantaged racial groups. Central to these barriers is de facto racial segregation. Integration is both a direct remedy for segregation in the practicing institution and an indirect remedy for segregation elsewhere in society. I argue that integration makes better sense of the scope and weight of racial preferences in higher education than either compensatory remediation or “diversity.”

In Part II, I assess the constitutionality of integrative affirmative action under strict scrutiny. The Supreme Court is caught between three contradictory conceptions of the rationale for strict scrutiny: skepticism, balancing, and colorblindness. These views differ according to whether they locate the threatened harm in state uses of racial classifications in their purposes, effects, or racial form. I argue that the formal colorblind view is incoherent and that the purposive (skeptical) view is indispensable. The fundamental point of strict scrutiny is to operationalize skepticism about the state’s claim to be acting on a benign purpose when it uses racial means. Interpreted in light of the skeptical view, the various narrow-tailoring tests of the means prong of strict scrutiny constitute powerful tools for demonstrating why many of the standard objections to affirmative action do not apply to properly designed programs. The balancing view, which imposes certain equity constraints on the distribution of material benefits under affirmative action, requires marginal adjustments of affirmative action programs, but it does not pose any deep challenge to them. Nor, despite widespread beliefs to the contrary, does the “compelling interest” prong of strict scrutiny prohibit state use of affirmative action to remedy private-sector discrimination. Strict scrutiny, properly interpreted, poses no substantial obstacles to properly designed race-based affirmative action programs.

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<sup>2</sup> These cases are discussed throughout Part II.

In Part III, I reexamine the animating idea behind the principle of colorblindness—that racial preferences are per se harmful—this time from a moral rather than a legal perspective. I argue that, far from posing a serious challenge to race-based affirmative action, the principle of colorblindness loses all grip on what makes racial preferences wrong.

## I

### COMPENSATORY VERSUS INTEGRATIVE RATIONALES FOR RACE-BASED AFFIRMATIVE ACTION

This Article contrasts two competing conceptions of the kind of remedy race-conscious affirmative action programs offer for centuries of systematic, comprehensive legal and social subordination of African Americans.<sup>3</sup> The *compensatory* conception of remediation aims to compensate victims for *past* discrimination. It waits for wrongs to happen, and compensates the victims after the fact. The *integrative* conception of remediation aims to bring African Americans into the mainstream by dismantling *current* barriers to their advancement. It proactively uses race-conscious means to undo the continuing causes of unjust race-based disadvantage. These two views conceive of the significance of racial segregation differently. The compensatory model represents racial segregation of neighborhoods, schools, and jobs as an *effect* of past discrimination, remediable only to the extent that it was caused by past wrongdoing. The integrative model represents segregation of the major institutions of civil society as a *cause* of unjust racial inequality and a threat to democracy. Segregation is therefore a proper target of direct remediation, whether it is de facto or de jure, whether caused by prior illegal discrimination or not. The integrative model represents race-conscious affirmative action as a forward-looking remedy for segregation, rather than as a backward-looking remedy for discrimination.

Racial integration—the full inclusion and participation as equals of citizens of all races in American institutions—was once viewed as a central goal of the civil rights movement.<sup>4</sup> It was an ideal supported in

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<sup>3</sup> Almost all race-based affirmative action programs have been designed with African Americans in mind as the central beneficiaries. I therefore focus on this as the core case and briefly consider the applicability of affirmative action to other groups in Part II.B.

<sup>4</sup> See Rhoda Lois Blumberg, *Civil Rights: The 1960s Freedom Struggle 2* (1984) (identifying integration—“the full and equal participation of black people in American institutions”—as “the objective” of civil rights movement); John Higham, Introduction: A Historical Perspective, in *Civil Rights and Social Wrongs: Black-White Relations Since World War II*, at 3, 19 (John Higham ed., 1997) (describing desegregation of public schools as “the crucial civil rights project in the late 1960s and early 1970s” and essential to achieving “a more integrated society”); Martin Luther King, Jr., *I Have a Dream* (Aug. 28, 1963),

key desegregation cases following *Brown v. Board of Education*.<sup>5</sup> It informed the Civil Rights Act of 1964.<sup>6</sup> But the courts have turned away from racial integration as a positive ideal for civil society, narrowing their focus merely to remedying discrimination.<sup>7</sup> This narrowing of vision ignores the ways segregation operates as an independent race-based barrier to equality of opportunity that is properly addressed by state intervention. The model of affirmative action defended in this Article regards integration as a *means* for removing barriers to equal opportunity, and to realizing the kind of civil society

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in *A Testament of Hope: The Essential Writings of Martin Luther King, Jr.* 217, 219 (James Melvin Washington ed., 1986) ("I have a dream that one day . . . little black boys and black girls will be able to join hands with little white boys and white girls as sisters and brothers."); Martin Luther King, Jr., *The Ethical Demands for Integration* (Dec. 27, 1962), *supra*, at 117, 118 (calling "the democratic dream of integration . . . the ultimate goal of our national community"); Thomas F. Pettigrew, *Racially Separate or Together?* 297 (1971) (defending "integration" as "the primary goal" of affirmative action, supported by "influential black opinion" during civil rights movement).

<sup>5</sup> 347 U.S. 483, 495 (1954) (rejecting segregated schools as "inherently unequal"). In key cases after *Brown*, the Supreme Court acknowledged the right of public school districts to assign students for the purpose of promoting racial integration, even if they did not need to do so as a remedy for prior unconstitutional discrimination. See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) (striking down statewide anti-busing law as unconstitutionally burdening local school district's efforts to promote racial integration beyond that required by Constitution); *Bustop, Inc. v. Bd. of Educ.*, 439 U.S. 1380 (1978) (upholding right of California to engage in racial assignment of students to pursue integration beyond what would be required under U.S. Constitution); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 242 (1973) (Powell, J., concurring) (observing that schools may exceed constitutional requirements in pursuing racial integration); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (asserting that schools may pursue racial integration "to prepare students to live in a pluralistic society" even in absence of constitutional violation).

<sup>6</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a-h (2001)) (prohibiting racial discrimination and segregation in public accommodations, schools and facilities, federally assisted programs, employment, and voting); see President Kennedy's Report to Congress Outlining a Civil Rights Bill (June 19, 1963) (objecting to segregation of public accommodations as "a daily insult which has no place in a country proud of its heritage—the heritage of the melting-pot, of equal rights, of one nation and one people"), reprinted in *The Civil Rights Reader: Basic Documents of the Civil Rights Movement* 245, 247 (Leon Friedman ed., 1967); 110 Cong. Rec. 7204 (1964) (statement of Sen. Clark) (objecting to employment discrimination for the ways it has "kept the Negro out of the mainstream of American life"); 110 Cong. Rec. 6552 (1964) (statement of Sen. Humphrey) (arguing that Civil Rights Act promotes desire of excluded "to be part of our national life," providing legal framework for advancing "the full participation of the American people in their society and in their community life").

<sup>7</sup> See *Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123, 131 (4th Cir. 1999) (quoting *Tuttle v. Arlington County*, 195 F.3d 698, 705 (4th Cir. 1999), in declaring "nonremedial racial balancing" unconstitutional); *Wessmann v. Gittens*, 160 F.3d 790, 796-97 (1st Cir. 1998) (rejecting *Swann*'s support for integration as justification for Boston Latin School to engage in racial assignment); *Capacchione v. Charlotte-Mecklenburg Sch.*, 57 F. Supp. 2d 228, 255-57 (W.D.N.C. 1999) (enjoining Charlotte-Mecklenburg schools from race-based assignment of students for purposes of racial integration beyond that required to remedy prior de jure segregation).

needed for democracy. In Section A of this Part, I outline the various ways segregation imposes race-based barriers to equality. In Section B, I develop an integrative rationale for race-conscious affirmative action in employment, and contrast it with the dominant compensatory rationale. In Section C, I articulate an integrative rationale for race-conscious affirmative action in educational contexts, contrasting it with both compensatory and “diversity” rationales.

### A. Segregation as a Cause of Race-Based Barriers to Equality

Racial segregation in the institutions of American civil society operates at three main levels: residential, educational, and occupational. Residential segregation is the norm for most African Americans. According to a study based on 1980 census results, in the thirty metropolitan areas containing a majority of all blacks in the United States, sixty-eight percent of blacks would have to move to achieve a uniform racial composition across the metropolitan area.<sup>8</sup> The average African American in these cities lives in a census tract that is about two-thirds black, indicating a relatively low probability of contact with whites.<sup>9</sup> This is not simply an “underclass” phenomenon. Rates of residential racial segregation for blacks do not decline with income.<sup>10</sup> Because most K-12 schools draw their students from local neighborhoods, they are also profoundly segregated. One-third of black students attend schools in which less than ten percent of the students are white.<sup>11</sup> In such large states as New York, Michigan, Illinois, and California, less than twenty-five percent of the average black student’s classmates are white.<sup>12</sup> In the United States as a whole, fewer than one-third of the average black student’s classmates are white.<sup>13</sup> Notwithstanding *Brown*, racial segregation in the schools has been *increasing* in almost every state, even during the 1990s.<sup>14</sup>

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<sup>8</sup> Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* 64 tbl.3.1 (1993). According to Census 2000 data, in U.S. metropolitan areas as a whole, sixty-five percent of blacks would have to move to attain a uniform distribution, a modest decline since 1980. Lewis Mumford Ctr., *Ethnic Diversity Grows, Neighborhood Integration Lags Behind* 1-2, 5 (Dec. 18, 2001), <http://mumford1.dyndns.org/cen2000/WholePop/WPreport/MumfordReport.pdf> (calculating Index of Dissimilarity, which “captures the degree to which two groups are evenly spread among census tracts in a given city,” and presenting chart summarizing black-white segregation).

<sup>9</sup> Massey & Denton, *supra* note 8.

<sup>10</sup> *Id.* at 84-88.

<sup>11</sup> Jeffrey Rosen, *Bus Stop: The Lost Promise of School Integration*, *N.Y. Times*, Apr. 2, 2000, § 4, at 1.

<sup>12</sup> *Id.* (presenting table documenting statistics for all fifty states).

<sup>13</sup> *Id.* (indicating that U.S. average has declined since 1989-1990).

<sup>14</sup> *Id.* (listing only three exceptions: New Jersey, North Dakota, and Tennessee).

Similar, but less drastic, patterns of de facto segregation exist in the job market. Jobs are segregated at the regional, firm, and intrafirm levels. Firms located outside black neighborhoods and beyond the reach of public transportation are significantly less likely to hire black employees.<sup>15</sup> At the firm level, the race of the owner is a strong predictor of the racial composition of the workforce in privately owned firms. Fifty-eight percent of white-owned firms in major metropolitan areas where minorities live have no minority employees at all, whereas eighty-nine percent of black-owned firms have workforces that are at least seventy-five percent minority.<sup>16</sup> The effect of the race of the employer on workforce racial composition is not merely a function of firm location. Even among white-owned firms located in black neighborhoods, one third still have *no* minority employees.<sup>17</sup> Within the firm, employers practice occupational segregation. One survey of jobs found that half of all job titles were occupied by whites only, and one-quarter of blacks worked in jobs to which only blacks were assigned.<sup>18</sup> A slaughterhouse in North Carolina assigns the butchering jobs to black men, knife work to Mexicans, warehouse jobs to Indians, and mechanic and supervisor positions to whites.<sup>19</sup>

From a compensatory point of view, such patterns of segregation are objectionable as *effects* of massive, continuing, and illegal private housing<sup>20</sup> and employment<sup>21</sup> discrimination, historic state policies sup-

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<sup>15</sup> This is the "spatial mismatch" hypothesis discussed in William Julius Wilson, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy* (1987). It has been confirmed in multiple studies. See generally Harry J. Holzer & Keith R. Ihlanfeldt, *Spatial Factors and the Employment of Blacks at the Firm Level*, *New Eng. Econ. Rev.* May-June 1996, at 65; Keith R. Ihlanfeldt & David J. Sjoquist, *Job Accessibility and Racial Differences in Youth Employment Rates*, 80 *Am. Econ. Rev.* 267 (1990); John Kain, *The Spatial Mismatch Hypothesis: Three Decades Later*, 3 *Housing Pol'y Debate* 371 (1992); Michael A. Stoll et al., *Within Cities and Suburbs: Racial Residential Concentration and the Spatial Distribution of Employment Opportunities Across Sub-Metropolitan Areas*, 19 *J. Pol'y Analysis & Mgmt.* 207 (2000).

<sup>16</sup> Timothy Bates, *Banking on Black Enterprise: The Potential of Emerging Firms for Revitalizing Urban Economies* 140 (1993).

<sup>17</sup> *Id.*

<sup>18</sup> Donald Tomaskovic-Devey, *Gender and Racial Inequality at Work: The Sources and Consequences of Job Segregation* 24 (1993).

<sup>19</sup> Charlie LeDuff, *At a Slaughterhouse, Some Things Never Die; Who Kills, Who Cuts, Who Bosses Can Depend on Race*, *N.Y. Times*, June 16, 2000, at A1.

<sup>20</sup> See Massey & Denton, *supra* note 8, at 96-109 (documenting discrimination against blacks by real estate and mortgage lending officers); Margery Austin Turner & Ron Wienk, *The Persistence of Segregation in Urban Areas: Contributing Causes*, in *Housing Markets and Residential Mobility* 193, 199 (G. Thomas Kingsley & Margery Austin Turner eds., 1993) (finding that blacks and Hispanics seeking same housing as whites face discrimination about fifty percent of time); John Yinger, *Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination* 31-49 (1995) (offering comprehensive docu-

porting segregation of neighborhoods and schools,<sup>22</sup> officially race-neutral policies that have dramatic racial effects (e.g., class-exclusionary zoning),<sup>23</sup> and perhaps also legally permitted expressions of racial antipathy (e.g., white flight).<sup>24</sup> The integrative view focuses more on the *causal impact* of segregation on two core ideals: equality of opportunity and democracy. Segregation is objectionable as a continu-

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mentation of housing discrimination against blacks and Hispanics); John Yinger, *Housing Discrimination Study: Incidence of Discrimination and Variation in Discriminatory Behavior*, at xvi (1991) (finding, based on Housing and Urban Development study, sixty- to ninety-percent likelihood that each additional housing unit shown to whites would not be recommended or shown to blacks).

<sup>21</sup> For sources documenting employment discrimination, see, for example, Michael Fix et al., *An Overview of Auditing for Discrimination*, in *Clear and Convincing Evidence: Measurement of Discrimination in America* 1, 18-25 (Michael Fix & Raymond J. Struyk eds., 1994) (finding high levels of employment discrimination against blacks and opportunity denial); Margery Austin Turner et al., *Opportunities Denied, Opportunities Diminished: Racial Discrimination in Hiring* (1991) (same). See also Joleen Kirschenman & Kathryn M. Neckerman, "We'd Love to Hire Them, But . . .": The Meaning of Race for Employers, in *The Urban Underclass* 203, 209-13 (Christopher Jencks & Paul Peterson eds., 1991) (documenting prejudicial perceptions of employers regarding work ethic of minorities); George Wilson et al., *Reaching the Top: Racial Differences in Mobility Paths to Upper-Tier Occupations*, 26 *Work & Occupations* 165, 179-80 (1999) (showing evidence that white employers promote blacks to superior positions by narrow and circumscribed route stressing formal criteria and prior experience in same job and firm, but they promote whites to superior positions on basis of more informal and open criteria).

<sup>22</sup> See Massey & Denton, *supra* note 8, at 51-59 (discussing ways that federal lending policies, urban renewal, highway construction, and siting of public housing reinforce residential racial segregation); Thomas J. Sugrue, *The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit* 56-88 (1996) (documenting same factors in creation of racial segregation in Detroit).

<sup>23</sup> See *S. Burlington County NAACP v. Township of Mt. Laurel*, 336 A.2d 713, 718-24 (N.J. 1975) (including extended discussion of many ways that Mt. Laurel and other segregated New Jersey cities use zoning power to exclude poor people, who are disproportionately black and Hispanic, from residing in town); Nancy Burns, *The Formation of American Local Governments: Private Values in Public Institutions* 83-91 (1994) (finding powerful evidence that desire of whites to use municipal zoning powers to exclude blacks from town was major cause of new city formation in 1950s).

<sup>24</sup> See generally Massey & Denton, *supra* note 8, at 88-96 (documenting white antipathy to having black neighbors); Stephen Grant Meyer, *As Long as They Don't Move Next Door: Segregation and Racial Conflict in American Neighborhoods* (2000) (chronicling history of white resistance to black neighbors in twentieth century); Sugrue, *supra* note 22, at 209-29 (providing history of same in Detroit and documenting white flight). Stephan Thernstrom and Abigail Thernstrom contest explanations of current racial segregation in terms of discrimination and white antipathy, arguing that virtually no whites object to living near moderate numbers of blacks. They contend that black preferences to live in majority-black neighborhoods, plus lower black income, can explain most observed segregation. Stephan Thernstrom & Abigail Thernstrom, *America in Black and White: One Nation, Indivisible* 224-30 (1997). Nancy A. Denton explains why this view is implausible in *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 *Minn. L. Rev.* 795, 807-11 (1996) (documenting that whites are far more reluctant to live with blacks than vice versa, and that income differentials explain little black segregation).

ing cause of multiple, systematic, mutually reinforcing race-based inequalities, operating independently of and in conjunction with discrimination, in both the economic and political spheres.

### 1. *Equality of Economic Opportunity*

Consider, first, how segregation undermines racial equality of economic opportunity, defined as a structure of opportunities in which one's racial status has no net causal impact on the value of one's employment, investment, business, and consumption prospects.

*Isolation from social networks.* Who one knows is at least as important as what one knows in determining one's access to opportunities. At least sixty percent of employers frequently advertise job openings through informal social networks, typically by word-of-mouth through a firm's current employees.<sup>25</sup> Segregation means that whites who get information about job openings are unlikely to know many blacks at work, in school, or in their neighborhoods. Thus, even if whites did not discriminate, blacks would still be excluded from many jobs due to their isolation from the predominantly white social networks of communication and referral that regulate access to mainstream opportunities.<sup>26</sup>

*Spatial mismatch of residence from job opportunities.* We have seen that residential segregation causes job segregation.<sup>27</sup> This would not lead to systematic disadvantage for African Americans, but for the fact that they live primarily in cities and near suburbs with declining job opportunities, while most job growth has occurred in predominantly white suburbs.<sup>28</sup> The cost per mile of traveling to work is at least fifty percent higher for African Americans than for whites.<sup>29</sup> Housing discrimination imposes barriers to moving where the jobs are located. These factors lead to substantial depression in urban African American wages.<sup>30</sup>

*Increased discrimination.* Job segregation heightens the salience of race as a marker of employees in ways that encourage unconscious employment discrimination. If a particular job is held only by members of a particular race, the employer's unconscious stereotype of the sort of employee most likely to be suited for that type of job will tend

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<sup>25</sup> See Peter V. Marsden, *The Hiring Process: Recruitment Methods*, 37 *Am. Behav. Scientist* 979, 980-85 (1994); *id.* at 981 (describing how those "who distribute information through interpersonal channels will tend to pass it along to socially similar persons").

<sup>26</sup> Barbara F. Reskin, *The Realities of Affirmative Action in Employment* 32-33 (1998).

<sup>27</sup> See discussion *supra* notes 15-17.

<sup>28</sup> See citations *supra* note 15.

<sup>29</sup> Holzer & Ihlanfeldt, *supra* note 15, at 70.

<sup>30</sup> *Id.* at 79.



to be racialized. Job segregation is therefore a cause as well as an effect of job discrimination.<sup>31</sup> It is also a cause of racial antipathy in the workplace. Conflicts endemic to the firm's division of labor—for example, between management and labor, or between occupants of different positions in an assembly line who may be inconvenienced by holdups in other parts of the line—become racialized when different races predominate in different positions.<sup>32</sup>

*Reduced opportunities for capital accumulation and access to credit.* Blacks' confinement to segregated neighborhoods systematically reduces their access to investment opportunities. The middle class invests the largest share of its wealth in housing equity, which amounts to forty-three percent of white assets and sixty-three percent of black assets.<sup>33</sup> Because blacks are confined to less-desired neighborhoods, on average the value of their housing grows less than that of whites. Consequently, blacks attain a substantially lower average rate of return on their housing investment than do whites. The current generation of black homeowners has, as a result, suffered a cumulative loss of \$58 billion.<sup>34</sup> Because creditworthiness depends on wealth, blacks' lower home values mean they are less able to obtain credit on favorable terms than otherwise equally qualified whites. The current generation of blacks has suffered a cumulative loss of \$24 billion due to denial of mortgages and higher mortgage interest rates.<sup>35</sup> Much of this loss can be attributed to residential segregation apart from direct discrimination by lending agents.<sup>36</sup>

*Reduced business opportunities.* Lack of access to credit is a major cause of low rates of black entrepreneurship.<sup>37</sup> Among all privately owned U.S. businesses, half were started by their owners; the other half were inherited or purchased.<sup>38</sup> By contrast, ninety-four percent of black-owned businesses are self-started (presumably due to the fact that centuries of discrimination and segregation have left blacks with little to inherit).<sup>39</sup> Business startups depend heavily on personal and family wealth, which is leveraged into lines of credit. Residential segregation, by depressing housing appreciation and re-

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<sup>31</sup> Reskin, *supra* note 26, at 35-36.

<sup>32</sup> LeDuff, *supra* note 19.

<sup>33</sup> Melvin L. Oliver & Thomas M. Shapiro, *Black Wealth/White Wealth: A New Perspective on Racial Inequality* 64 (1995).

<sup>34</sup> *Id.* at 150.

<sup>35</sup> *Id.* at 150-51.

<sup>36</sup> *Id.* at 150.

<sup>37</sup> Thomas D. Boston, *Affirmative Action and Black Entrepreneurship* 79 (1999).

<sup>38</sup> *Id.* at 76, 78 tbl.5.3.

<sup>39</sup> *Id.*

ducing access to credit, therefore depresses black business startups, upon which black communities disproportionately rely.<sup>40</sup>

*Lower access to professional services.* African Americans suffer from a far higher burden of disease and mortality than whites while having far less access to medical services. The physician/population ratio in black communities is substantially lower than the U.S. average.<sup>41</sup> This is not just an effect of class. Predominantly black communities are four times more likely to be underserved than communities with the same average income.<sup>42</sup> Professionals are less likely to locate in economically depressed and segregated areas, thereby reducing segregated residents' access to professional services.<sup>43</sup>

## 2. *Democratic Values and Equality of Voice*

Racial segregation undermines democratic values as well as equality of economic opportunity. Democracy is a form of governance in which a collective will is forged on the basis of open discussion among equals.<sup>44</sup> It requires a robust civil society in which citizens from all walks of life interact freely on terms of equality.<sup>45</sup> The legitimacy of political outcomes depends on their production through a process of discussion and responsiveness to the interests of all citizens, with no one's voice excluded or ignored because of race.<sup>46</sup> This condition is exceedingly difficult to achieve when the major spheres of civil society—public parks and streets, schools and workplaces—are racially segregated. Again, segregation works its antidemocratic effects through several mechanisms.

<sup>40</sup> Id. at 76-79.

<sup>41</sup> See Kevin Grumbach et al., *Physician Supply and Access to Care in Urban Communities*, *Health Aff.*, Jan.-Feb. 1997, at 71.

<sup>42</sup> See Miriam Komaromy et al., *The Role of Black and Hispanic Physicians in Providing Health Care for Underserved Populations*, 334 *New Eng. J. Med.* 1305, 1306-07 & tbl.1 (1996).

<sup>43</sup> Eli Ginzberg, *Improving Health Care for the Poor: Lessons from the 1980s*, 271 *JAMA* 464, 465 (1994).

<sup>44</sup> See John Dewey, *The Public and Its Problems* 149-51 (1927) (arguing that democracy is rooted in community concept of equality that expresses "effective regard for whatever is distinctive and unique in each, irrespective of physical and psychological inequalities"); Iris Marion Young, *Inclusion and Democracy* 22-24 (2000) ("[P]eople associate democracy with open discussion and the exchange of views leading to agreed-upon policies.").

<sup>45</sup> See Dewey, *supra* note 44; Young, *supra* note 44, at 154-80; cf. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* 305 (William Rehg trans., Polity Press 1996) (agreeing that one central characteristic of "procedure from which procedurally correct decisions draw their legitimacy" is freedom of deliberations from "any internal coercion that could detract from the equality of the participants" (emphasis added)).

<sup>46</sup> See Young, *supra* note 44, at 61, 144-45.

*Reduced discussion, enhanced mistrust.* Segregation reduces opportunities for cross-racial interaction and discussion. It both expresses and reinforces myriad racial antipathies—from hatred, contempt, resentment, and distrust, to discomfort born of unfamiliarity—that interfere with interaction when such opportunities arise.<sup>47</sup> It causes ignorance of the different life circumstances and interests of marginalized groups, enabling policy decisions to be made that disregard the impact on those not present.<sup>48</sup>

*Reduced opportunities for political cooperation and sharing of public goods.* When racial segregation tracks municipal and district lines, blacks do not have a chance to share in the public services that can be afforded by wealthier whites across district lines. This depresses black access to public goods,<sup>49</sup> which poorer black communities can obtain only at the cost of relatively higher tax burdens.<sup>50</sup> Even middle-class black neighborhoods tend to be in close proximity with poorer areas, so attaining a higher income does not necessarily create a proportional increase in services.<sup>51</sup> Meanwhile, the spatial isolation of black communities within cities makes it more difficult for

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<sup>47</sup> See Donald R. Kinder & Tali Mendelberg, *Cracks in American Apartheid: The Political Impact of Prejudice Among Desegregated Whites*, 57 J. Pol. 402, 418-22 & 418 tbl.6 (1995) (offering empirical evidence that level of whites' prejudice towards blacks increases with their isolation from them); see also Cathy J. Cohen & Michael C. Dawson, *Neighborhood Poverty and African American Politics*, 87 Am. Pol. Sci. Rev. 286, 293-95 (1993) (providing empirical evidence that blacks living in socially isolated high-poverty neighborhoods are more likely than other blacks to think that whites and middle class people have too much political influence).

<sup>48</sup> Young, *supra* note 44, at 208-10; see Ann Phillips, *The Politics of Presence* 40 (1995) ("It is only when people are more consistently present in the process of working out alternatives that they have much chance of challenging dominant conventions.").

<sup>49</sup> See Mark Schneider & John R. Logan, *Suburban Racial Segregation and Black Access to Local Public Resources*, 63 Soc. Sci. Q. 762, 766-69 (1982) (arguing that suburban black communities have weaker fiscal bases than their white counterparts); Mark Schneider & Thomas Phelan, *Black Suburbanization in the 1980s*, 30 Demography 269, 274-77 (1993) (finding that suburban blacks tend to reside in relatively poor communities with worse public finances than suburbs with smaller black populations); see also Ruth Hoogland DeHoog et al., *Metropolitan Fragmentation and Suburban Ghettos: Some Empirical Observations on Institutional Racism*, 13 J. Urb. Aff. 479, 488-90 (1991) (concluding that suburban blacks fared worse "both in objective numbers of services and the more subjective perceptions of services and government" when they lived in fragmented majority black town as compared to consolidated metropolitan government in which they were minority).

<sup>50</sup> See Thomas J. Phelan & Mark Schneider, *Race, Ethnicity, and Class in American Suburbs*, 31 Urb. Aff. Rev. 659, 673 (1996) (calculating that "black/multiethnic suburbs pay tax rates that are, on average, about sixty-five percent higher than those of white suburbs even after differences in affluence are taken into account"); Schneider & Logan, *supra* note 49, at 766-69 (observing that heavily black suburban communities have higher tax rates and public debt than their majority white counterparts).

<sup>51</sup> See Mary Pattillo-McCoy, *Black Picket Fences: Privilege and Peril Among the Black Middle Class* 28-30 (1999) (noting that proximity of black middle-class neighborhoods to

them to form coalitions with other groups seeking public services because the services provided to blacks need not reach the neighborhoods occupied by other groups.<sup>52</sup>

*Policing segregation of public forums.* Residential segregation also facilitates and may cause discriminatory policing. If neighborhoods were racially integrated, police could not seize upon someone's race as evidence that their presence is suspicious. Segregation therefore at least makes possible and may cause police to include racial markers in their profile of someone who has no legitimate business in a neighborhood populated by members of a different race.<sup>53</sup> Knowledge that one may be harassed by police for being in the "wrong" neighborhood on account of one's race is a further deterrent to the kind of free and open interracial discussion in civil society that is a prerequisite for realizing democratic ideals.<sup>54</sup>

### 3. *Understanding Discrimination, Segregation, and Integration*

Two lessons may be drawn from this brief review of some of the consequences of racial segregation. First, the causal impact of discrimination needs to be reconceived when it takes place in the context of segregation. In the standard discourse on affirmative action, discrimination is viewed as a discrete event, a one-time loss accruing to an individual victim, the effects of which seriously extend no further than her dependents.<sup>55</sup> If the victim is not part of a community segregated from the mainstream, this is a fair model of the causal impact of discrimination. It fits the experience of whites in the United States.

By contrast, when the victim of discrimination belongs to a segregated community, the effects of discrimination spread to other members of the community beyond her family and persist over time. If a

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poor neighborhoods means that "residential returns to being middle class for blacks are far smaller than for middle-class whites").

<sup>52</sup> See Massey & Denton, *supra* note 8, at 154-55.

<sup>53</sup> See *State v. Dean*, 543 P.2d 425, 427 (Ariz. 1975) (upholding police interrogation of Mexican man for being "out of place" in white neighborhood); Randall Kennedy, *Race, Crime, and the Law* 141-42 (1997).

<sup>54</sup> See Kennedy, *supra* note 53, at 153 (arguing that racial profiling by police discourages blacks from entering into neighborhoods with few black residents).

<sup>55</sup> This is the standard objection that affirmative action programs, in providing benefits to an entire racial class, are "overinclusive." See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 540-41 (1980) (Stevens, J., dissenting) (objecting to ten percent set-aside in federal contracts for minority businesses because it benefits minority business owners who were not victimized by discrimination); Terry Eastland, *Ending Affirmative Action: The Case for Colorblind Justice* 121 (1996) (complaining that affirmative action distributes benefits to people "regardless of whether or not they had actually experienced discrimination"); Richard A. Posner, *The DeFunis Case and Reverse Discrimination*, in *The Economics of Justice* 372 (1981) (same). The objection assumes that, to suffer the effects of discrimination, one must have personally experienced it.

firm denies one's neighbor a job due to discrimination, one loses a potential role model, a source of information about job openings at the firm, and a connection who could provide a credible job reference to the firm's owner. This loss is negligible for one who has plenty of other neighbors with connections to mainstream opportunities. But if segregation means one's social network is limited to mostly disadvantaged people like one's neighbor, their disadvantages become one's own. Once these disadvantages become shared, one's community becomes a site of concentrated and self-reinforcing disadvantage, perpetuating the effects of discrimination over time. For African Americans, discrimination is therefore not a discrete one-time loss, because segregation operates as a discrimination "multiplier."

The second lesson is that if racial segregation is part of the problem, then racial integration is part of the solution. Integration is vindicated for its *instrumental* value in dismantling the barriers to equal opportunity and a democratic civil society that are caused by segregation. Integration, in this model, does not mean assimilation. It means effective participation and interaction on terms of equality by members of different races in shared spaces of civil society: at work and school, in the public spaces of neighborhoods, and in the sites of political action and discussion. Here, consideration of the race of participants is not a mere proxy for race-neutral variables, such as being educationally disadvantaged, or even being the victim of discrimination. It is directly, causally relevant to achieving integration and is the most narrowly tailored way to bring about integration. This fact will have substantial implications for considering the constitutionality of race-based affirmative action.

### *B. Integration Versus Compensation in Title VII*

Let us now develop the implications of the integrative model of remediation for affirmative action in employment, contrasting it with the compensatory model. Both models emerged from a tension built into Title VII of the Civil Rights Act of 1964.<sup>56</sup> Title VII had two goals: the elimination of employment discrimination, and equal employment opportunity.<sup>57</sup> Its advocates identified the latter goal with "the integration of blacks into the mainstream of American society."<sup>58</sup>

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<sup>56</sup> Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to e-17 (2001)).

<sup>57</sup> See *Taxman v. Bd. of Educ.*, 91 F.3d 1547, 1557 (3d Cir. 1996) (distinguishing Title VII's antidiscrimination goal from its integrative goal).

<sup>58</sup> *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 202 (1979). In Senator Humphrey's opening speech defending the Civil Rights Act of 1964, he linked equal opportunity to job desegregation: "The crux of the problem is to open employment opportu-

The framers of Title VII expressly contemplated two means for achieving equal employment opportunity: prohibiting racial discrimination in employment,<sup>59</sup> and enabling its victims to sue discriminating employers for compensation.<sup>60</sup> This is the *compensatory* model of remediation: require those who engaged in racial discrimination to make their victims whole.

In 1964, when the Civil Rights Act was passed, it was easy for many—including the framers of the Act—to imagine that ending intentional employment discrimination and requiring compensation for identified victims, plus improving education for blacks, would be sufficient to achieve the Act's integrative goal.<sup>61</sup> But it quickly became evident that these means were grossly insufficient to meet this goal.<sup>62</sup> Centuries of legal discrimination and social subordination had left stubborn legacies, including de facto segregation, that continued to pose barriers to black opportunity. To remedy these problems, it was and still is not enough simply to stop discriminating and make up for past identified wrongs. "Affirmative action" must be taken to actively *integrate* blacks into mainstream institutions.

### 1. *Tensions of Practice and Principle in Title VII's Compensatory Model*

The path from compensatory to integrative affirmative action was paved by *Griggs v. Duke Power Company*.<sup>63</sup> *Griggs* held that Title VII prohibited not only intentional discrimination but also unnecessary hiring and employment policies that have a disparate racial im-

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nities for Negroes in occupations which have been traditionally closed to them." 110 Cong. Rec. 6548 (1964). He distinguished nondiscrimination from equal opportunity, stating, "The passage of Title VII will be a major step forward to the goal of eliminating discrimination in employment and promoting equal employment opportunity." *Id.* at 6551. Finally, he went on to reiterate the link between integration and equal opportunity: "What is needed is an opportunity to participate fully in all aspects of American life . . . . The only way to break the vicious circle of minority oppression is to break it at every point where injustice, inequality, and denial of opportunity exist." *Id.* at 6552. Compare the remarks of Senator Clark, linking equal opportunity to integration into the mainstream: "The Negro has been condemned to poverty because of lack of equal job opportunities. This . . . has kept the Negro out of the mainstream of American life." 110 Cong. Rec. 7204 (1964).

<sup>59</sup> See § 2000e-2.

<sup>60</sup> See § 2000e-5.

<sup>61</sup> See John David Skrentny, *The Ironies of Affirmative Action: Politics, Culture, and Justice in America* 34-35 (1996) (arguing that supporters and framers of Civil Rights Act accepted colorblind model of antidiscrimination law because they thought it would be sufficient to achieve integration).

<sup>62</sup> *Id.* at 113-16, 127-28 (explaining how antidiscrimination model failed to achieve its goals, leading enforcement agencies to practice affirmative action so as to achieve results).

<sup>63</sup> 401 U.S. 424 (1971).

pact.<sup>64</sup> It set the stage for race-conscious affirmative action in two ways. First, the requirement to remove arbitrary obstacles to equal employment can sometimes justify a race-conscious remedy. For example, the race-neutral practice of advertising job openings by word of mouth (to a network that happens to be predominantly white) perpetuates a racially exclusive workforce.<sup>65</sup> To break the resulting lock on job opportunities, a firm may need to actively recruit prospective employees from other racial groups. This is a race-conscious remedy, a paradigm of *integrative* affirmative action. It attempts not to compensate for past discrimination but to remove current barriers to opportunity for marginalized racial groups, even when those barriers are not intended to exclude these groups. Second, in holding that policies with disparate racial impact were actionable, *Griggs* articulated a race-conscious standard for a prima facie violation of Title VII.

*United Steelworkers of America v. Weber*,<sup>66</sup> the key case establishing the legality of voluntary race-conscious affirmative action programs under Title VII, did not resolve the tension between compensatory and integrative affirmative action. Rather, it fudged the distinction between the two. Justice Brennan, writing for the Court, adopted the integrative view. He rescued Congress from the mismatch between its means—an explicit categorical prohibition of racial discrimination—and one of its goals—the integration of blacks into mainstream society—by construing racial preferences for blacks pursuant to a bona fide affirmative action plan as not amounting to racial discrimination within the spirit of the Civil Rights Act of 1964.<sup>67</sup> Employers and unions may use racial preferences to integrate “traditionally segregated” jobs whether or not the segregation had been achieved by violations of the Act.<sup>68</sup>

Justice Blackmun articulated an alternative view that put the judgment in *Weber* more in line with the original antidiscrimination/compensatory conception.<sup>69</sup> A strictly compensatory model would require that practitioners of affirmative action have discriminated in the past and that the beneficiaries have suffered discrimination in the past. In practice, affirmative action programs do not follow these restraints.<sup>70</sup> Agents in the integrative model may be trying to overcome

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<sup>64</sup> See *id.* at 431-32.

<sup>65</sup> See *supra* notes 25-26 and accompanying text.

<sup>66</sup> 443 U.S. 193 (1979).

<sup>67</sup> See *id.* at 201, 208.

<sup>68</sup> *Id.* at 197-209.

<sup>69</sup> See *id.* at 209-15 (Blackmun, J., concurring).

<sup>70</sup> See *Firefighters v. Cleveland*, 478 U.S. 501, 516 (1986) (holding that Title VII does not prohibit employers from voluntarily adopting race-conscious remedies that benefit individuals against whom they had not discriminated); *Sheet Metal Workers v. EEOC*, 478

the effects of discrimination caused by other agents, or by legal pre-Title VII discrimination. Blackmun suggested that deviations from the compensatory model could be justified pragmatically, in the name of facilitating voluntary compliance with the law.<sup>71</sup> Voluntary compliance would be hindered if firms had to admit prior discrimination and identify their victims, for this would expose them to liability for back-pay.<sup>72</sup> It would also be hindered if whites could drag them into court for practicing affirmative action in the absence of a finding of discrimination against identified victims.

Essentially, Blackmun argued that the compensatory aims of the Act would be defeated if practitioners of affirmative action were required to *prove* that they were practicing compensatory, rather than integrative, affirmative action. The state's interest in voluntary compliance with the law meant that courts should not insist that private practitioners of affirmative action make their motives clear.<sup>73</sup> In line with this reasoning, subsequent decisions similarly have stressed the need to interpret Title VII in a way that promotes voluntary compliance.<sup>74</sup> This stresses Blackmun's pragmatism at the expense of clearly distinguishing and developing the integrative perspective.

The result has been a profound mismatch between the compensatory theory and the integrative practice of affirmative action that threatens the latter's moral legitimacy and its legal status. On the compensatory model, discriminating agents must make their victims whole, but any goods they award that exceed the extent of the original

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U.S. 421, 453 (1986) (ruling that Title VII does not prohibit courts from imposing on employers and unions race-conscious remedies that benefit those who have not been discriminated against by remediating agents). However, in equal protection contexts, courts have required agents to tailor the class of beneficiaries to the class of the victims of the agent's discrimination. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989) (rejecting Richmond's affirmative action program for "Spanish-speaking, Oriental, Indian, Eskimo, and Aleut persons," on ground that Richmond had no history of discrimination against these groups); *Podberesky v. Kirwan*, 38 F.3d 147, 158-59 (4th Cir. 1994) (striking down University of Maryland's scholarship program for blacks from any state as overinclusive remedy for Maryland's historic discrimination against Maryland blacks).

<sup>71</sup> See *Weber*, 443 U.S. at 209-15 (Blackmun, J., concurring).

<sup>72</sup> *Id.* at 214.

<sup>73</sup> See *id.* at 211 ("[E]mployers and unions who had committed 'arguable violations' of Title VII should be free to make reasonable responses without fear of liability to whites.").

<sup>74</sup> See *Firefighters*, 478 U.S. at 515 (1986) ("Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII . . ."); see also *Johnson v. Transp. Agency*, 480 U.S. 616, 630 (1987) ("[V]oluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and . . . Title VII should not be read to thwart such efforts."); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 290 (1986) (stressing "this Court's and Congress' consistent emphasis on 'the value of voluntary efforts to further the objectives of the law'" (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 364 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part))).



injury they inflicted are considered unfair to innocent third parties who are competing for the same goods.<sup>75</sup> Excess compensation amounts to reverse discrimination. Affirmative action as currently practiced inevitably engages in “excess” compensation in three ways. First, the agents practicing affirmative action may not have been guilty of any discrimination, and so supposedly have no valid ground for preferring a member of one group over a member of another. Second, the beneficiaries of affirmative action preferences may not have suffered discrimination, and so may not be entitled to compensation. Third, affirmative action policies generally award opportunities to the best qualified and most advantaged among the preferred class, distributing goods to those presumed to be least injured by discrimination. Such policies therefore fail to match the amount of compensation to the degree of individual injury and exclude those most entitled to it.

Because of its failure to meet the exacting standards of individualized remedies, it seems, from a compensatory point of view, that affirmative action somehow must reflect a crude model of group justice. On this view, society is permanently divided into racial groups who constitute the relevant units of moral agency and entitlement. A discriminatory act by one white constitutes whites as a debtor class, creating a group obligation to compensate that could be discharged by any other white. Similarly, a discriminatory injury to any black constitutes blacks as a creditor class, creating a group entitlement in which an injury to one black can be made up by a preference to any other. This way of thinking offends both the ideal of individual justice and the aspiration to create a nation united around a common American identity.<sup>76</sup> It seems to insist on the divisive idea that race ought to permanently supercede citizenship as a basis of identity.<sup>77</sup>

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<sup>75</sup> See Eastland, *supra* note 55, at 74-75; see also Barry Cross, *The Case Against Reverse Discrimination, in Morality in Practice* 255, 259 (James P. Sterba ed., 4th ed. 1994).

<sup>76</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (calling concept of “creditor or debtor race” “alien to the Constitution’s focus upon the individual” and maintaining that “[i]n the eyes of government, we are just one race . . . American”).

<sup>77</sup> Although my aim is not to advance a compensatory model of affirmative action, it is worth pointing out that such a model can, *contra* Scalia, justify group remedies within the terms of an individualistic conception of justice. Suppose it is known that the discrimination is so widespread and massive that virtually every member of the group has suffered from it, either directly or indirectly, and that the compensation offered falls short of remedying the injury. Suppose also that a requirement that individuals prove a linkage between particular injuries and particular acts of discrimination on a case-by-case basis would be so costly or difficult to meet that it would effectively deprive most members of the injured class from any chance at compensation. Then the injustice entailed by prohibiting group remedies, of depriving the *individual* victims of the compensation they deserve, would far outweigh the injustice entailed by enacting group remedies, of granting undeserved benefits to the few individuals who were never injured. Deborah C. Malamud makes the case

## 2. *Integrating the Perspective of Integration into Title VII*

Suppose, however, we viewed affirmative action not as a form of compensation for past discrimination, but as a tool for dismantling *current* barriers to access by blacks to mainstream opportunities. For blacks, de facto job and housing segregation constitute such barriers.<sup>78</sup> They isolate blacks from the social networks that regulate access to economic opportunities and confine them to geographical regions with declining economies and dysfunctional systems of public education.<sup>79</sup> The fundamental remedy for racial segregation is racial integration. This integrative model represents affirmative action as a forward-looking remedy for those barriers to equal opportunity that are difficult or costly to undo by race-neutral means. It recognizes that merely ending intentional discrimination and taking a consciously colorblind stance is not enough to overcome the systematic disadvantages that African Americans continue to suffer due to America's historic system of racial caste.

The integrative model of affirmative action differs from the compensatory model in the ways it identifies the agents eligible to implement it, the people targeted for its benefits, and the extent of benefits it offers. If segregation is the problem, the solution is in the hands of any agent in a position to reduce it. On this view, agents should therefore be eligible to practice affirmative action not because they were guilty of discrimination in the past, but because they are in a position to reduce current arbitrary barriers to black opportunity. The targets of affirmative action's benefits are those who are best able to perform a role as *agents* of integration. They are not seen as merely passive recipients of compensation delivered to them on account of their victim status, but as partners with the practitioners of affirmative action in breaking down the barriers that block black access to mainstream opportunities and benefits.

The beneficiaries of affirmative action play this active role in multiple ways, corresponding to the ways integration can be expected to break down the pathological effects of segregation identified above. First, although the benefit they receive situates them in an integrated,

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for the first supposition in regard to the black middle class in *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. Colo. L. Rev. 939, 967-96 (1997). Susan D. Clayton and Faye J. Crosby offer an unusual argument for the second supposition in *Justice, Gender, and Affirmative Action* 67-96 (1992) (presenting empirical evidence that cognitive biases prevent people from recognizing discrimination in their own case, even when they have access to substantial evidence of discrimination against their group). Remedies of this sort also need not rest on a conception of those paying their costs as a debtor class, for reasons discussed *infra* at Part II.B.

<sup>78</sup> See *supra* notes 7-54 and accompanying text.

<sup>79</sup> *Id.*

usually majority-white job or educational setting, they remain linked to social networks of family, neighborhood, and friendship that are largely black.<sup>80</sup> They therefore serve as sources of information about mainstream opportunities to more isolated communities, and they provide connections to the largely white social networks of acquaintance and trust that regulate access to these opportunities.<sup>81</sup> Second, they transmit skills and knowledge of how to operate successfully in integrated settings to those who have less experience in them.<sup>82</sup>

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<sup>80</sup> In particular, the black middle class is far more likely to remain linked by residence and kinship to poor blacks than middle class whites are to poor whites. See Pattillo-McCoy, *supra* note 51, at 28; see also Bart Landry, *The New Black Middle Class* 86 (1987) (observing that, because around eighty percent of black middle class is first generation, most of its members "continue to have roots stretching far down into the neighborhoods and homes of truck drivers, assembly line workers, and waiters"). Blacks who attend elite colleges, some of whom are beneficiaries of affirmative action in higher education, also participate and have leadership positions in community, neighborhood, social service, and youth organizations at relatively high rates, compared to similarly educated whites. See William G. Bowen & Derek Bok, *The Shape of the River: Long-term Consequences of Considering Race in College and University Admissions* 158-64 (1998).

<sup>81</sup> See Katherine M. O'Regan & John M. Quigley, *Labor Market Access and Labor Market Outcomes for Urban Youth*, 21 *Regional Sci. and Urb. Econ.* 277, 291 (1991) (identifying access to social networks as crucial determinant of black youth-employment prospects). Affirmative action set-asides in public contracting integrate blacks into the economy by another route, connecting blacks to white customers through black employers. See Bates, *supra* note 16, 9-12, 90 (showing that black business owners play disproportionate role in employing minorities, due to social networking effects, and that greatest areas of employment growth among black-owned firms are among those that serve racially diverse clientele); Thomas D. Boston, *Affirmative Action and Black Entrepreneurship* 1-4, 75 (1999) (arguing that affirmative action in government contracting plays crucial role in expanding black employment and enabling black entrepreneurs to acquire diverse customer base). Affirmative action in admission to business schools plays a crucial role in this process. By training black entrepreneurs and linking them to broader social networks, it enables them to help move black business to a more cosmopolitan footing. See *id.* at 2.

<sup>82</sup> This transmission of human and social capital works by at least two paths: kinship and neighborhood effects. On intergenerational kinship transmission, see Malamud, *supra* note 77, at 984-86 (implying that affirmative action is crucial means for enabling parents to transmit middle-class status to their children). Michael Hout has illuminated one path to kinship transmission in *Status, Autonomy, and Training in Occupational Mobility*, 89 *Am. J. Soc.* 1379, 1402-04 (1984) (identifying father's status as self-employed professional as one of key determinants of son's upward occupational mobility). Affirmative action in higher education plays a pivotal role in setting blacks on this path, because one of its most important effects is to enhance blacks' attainment of advanced, professional degrees. See Bowen & Bok, *supra* note 80, at 96-100, 110-11, 392 (showing that affirmative action, in enabling blacks to attend more selective undergraduate institutions, enhances their access to degrees in law, medicine, business, and academia); 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, 22 *tbl.5* (1997) (estimating that abolition of affirmative action in law schools would cut black admission to law school by half or more). On neighborhood effects, see George J. Borjas, *Ethnic Capital and Intergenerational Mobility*, 107 *Q. J. Econ.* 123, 147 (1992) (showing that skills, income, and occupational status of present generation of blacks depends not only on their parents' skills, but on average skills of blacks in their parents' generation); William Darity,

Through demonstrably successful functioning in their roles, they help break down lingering antipathies and stereotypes that operate as continuing causes of discrimination. Integration of a critical mass (beyond tokenism) of workers from underrepresented groups reduces the salience of social-group membership in how workers are viewed.<sup>83</sup> It enables others to view them as individuals and facilitates meritocratic evaluation. Finally, it advances the democratic project of integrating civil society in a central site—the workplace.<sup>84</sup> Through integrating the workplace, people are exposed to the situations and perspectives of others. The transmission of knowledge enables citizens collectively to assess political policies and practices, this time taking blacks' interests into account.

Because the integrative model of affirmative action represents its beneficiaries as agents of integration rather than victims, it targets for its benefits those who are best able to perform this role. It selects, from among the disadvantaged class, those who are likely to be better skilled and more highly educated, who have suffered less from the racial caste system than their peers. The integrative model is based on a recognition of the fact that sometimes an effective way to help the disadvantaged is to give opportunities to their more privileged peers, who will then be better situated to help them.<sup>85</sup> Such help need not be direct or intended. A beneficiary of affirmative action need not accept the responsibilities of being a role model to perform successfully

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Jr. et al., *Persistent Advantage or Disadvantage?: Evidence in Support of the Intergenerational Drag Hypothesis*, 60 *Am. J. Econ. & Soc.* 435 (2001) (replicating Borjas's findings).

<sup>83</sup> Integrating beyond mere token numbers appears to be a general strategy for reducing stereotypes, applicable to gender as well, where the effect is more extensively documented. See Paul R. Sackett et al., *Tokenism in Performance Evaluation: The Effects of Work Group Representation on Male-Female and White-Black Differences in Performance Ratings*, 76 *J. Applied Psychol.* 263, 265-66 (1991); see also Virginia Valian, *Why So Slow?: The Advancement of Women* 309 (1998) (observing that "a job held by both males and females in reasonable numbers appears [to evaluators] to be a human job rather than a male or female job" and so reduces operation of gender stereotypes in biasing evaluations); Curt Hoffman & Nancy Hurst, *Gender Stereotypes: Perception or Rationalization?*, 58 *J. Personality & Soc. Psychol.* 197, 206 (1990) (showing that unequal role distribution generates gender stereotypes); Rosabeth Moss Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 *Am. J. Soc.* 965 (1977) (presenting results of field study on interaction in presence of token women in Fortune 500 firm).

<sup>84</sup> Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 *Geo. L.J.* 1, 6 (2000) (advocating affirmative action in workplace for purpose of integrating civil society).

<sup>85</sup> See Bates, *supra* note 16, at 13-14 (arguing that affirmative action in government contracting would have greater impact on black employment if it targeted college-educated, financially well-off black business owners, because they are better able to generate economic development in ghettos).

other integrative functions, such as breaking down racial stereotypes or getting others to see blacks as individuals.

Integrative affirmative action imposes an inherent limit on the permissible degree of racial preference. Because its point is to empower agents of integration, it will fail if it recruits people who cannot perform in that role. They cannot succeed in their integrative role without succeeding in the job, contract, or educational program to which they are given access. This means that affirmative action programs can compromise valid meritocratic standards only at the margins. There cannot be double standards of ultimate performance on the job without undermining the authority that the beneficiaries of affirmative action need to succeed in their integrative mission. At the same time, success in the integrative mission counts as a criterion of merit, so integrative affirmative action—unlike the compensatory model—alters meritocratic standards as it upholds them.

Current Title VII doctrine does not permit full-blown implementation of an integrative model of affirmative action. It imposes significant constraints drawn from the compensatory model—for example, in the requirement that an employer may aim to “attain” but not to “maintain” a racial balance in the workforce.<sup>86</sup> Nevertheless, the development of Title VII doctrine has introduced substantial slack between what could be justified strictly on compensatory terms and what is permitted in practice. This has opened a space within which employers have experimented actively with affirmative action programs having a more integrative bent. Under Title VII firms may adopt an affirmative action plan only if their workforce is sufficiently unrepresentative to amount to a *prima facie* violation of the law. This reflects the compensatory idea that firms may practice affirmative action only to compensate for their own past sins.

But a *prima facie* violation is not an actual violation, and the cause of a firm’s lack of representativeness may be discrimination in society at large. The Santa Clara County Transportation Agency exploited this slack between *prima facie* and actual violations of Title VII to devise an integrative affirmative action program explicitly designed to counteract the effects of societal stereotypes discouraging the entry of members of underrepresented groups into occupations traditionally closed to them<sup>87</sup>—and got the Supreme Court to uphold its program.

This fact is of enormous consequence for envisioning how Title VII doctrine could be developed in the future, in response to changing

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<sup>86</sup> See *Johnson v. Transp. Agency*, 480 U.S. 616, 639 (1987).

<sup>87</sup> *Id.* at 621.

social understandings of the significance of race, integration, and the meanings and values of antidiscrimination, democratic, and equal opportunity principles.<sup>88</sup> For example, Title VII precludes a bona fide occupational qualification (BFOQ) defense for race.<sup>89</sup> This was not because its framers denied that race sometimes is a legitimate occupational qualification,<sup>90</sup> but because they believed that employers, if allowed this exception, would use it as a pretext for defeating the goals of the Act.<sup>91</sup> In 1964, no one imagined that U.S. firms would come to regard “diversity” as an important feature of a competitive workforce, a kind of racial BFOQ applied to the workforce as a whole. This new understanding of the instrumental value of racial integration—now orthodox in elite corporate circles—could evolve only in the space for experimentation opened by the Court’s willingness to allow substantial slack between compensatory theory and practice.

It is but a short step from here to recognizing the instrumental value of racial integration for advancing the goals of equal opportunity and a democratic civil society. Doing so would put affirmative action on a more secure footing. Basing integration on its instrumental value for nonmoral goals is a double-edged sword: What if segregation were instrumental to corporate goals? What if the purported causal connection between diversity and other goals cannot be sustained? By contrast, integration is so intimately related to the goals of equal opportunity and a democratic civil society that it is nearly constitutive of them. In *Weber* and *Johnson*, the Supreme Court was willing to learn from the social experiments with race that it permitted and to accommodate the new understandings they generated, albeit in a strained way. It could open up more doctrinal space for integrative affirmative action in employment, if it were willing to learn some more.

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<sup>88</sup> The following argument draws inspiration from Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 Cal. L. Rev. 1, 18-30 (2000).

<sup>89</sup> 42 U.S.C. § 2000e-2(e)(1) (2001) provides for a BFOQ defense for religion, sex, and national origin but not for race or skin color.

<sup>90</sup> See 110 Cong. Rec. 7217 (1964) (statements of Sen. Clark and Sen. Case) (acknowledging that director making movie about Africa has legitimate interest in casting actors “with the physical appearance of a Negro,” notwithstanding fact that Title VII omits both race and skin color from its BFOQ exemptions).

<sup>91</sup> See William R. Bryant, Note, *Justifiable Discrimination: The Need for a Statutory Bona Fide Occupational Qualification Defense for Race Discrimination*, 33 Ga. L. Rev. 211, 215-18 (1998) (detailing legislative history of rejection of proposed BFOQ exemption for race).

*C. Integration Versus Compensation and Diversity  
in Educational Contexts*

In employment contexts, the slack between affirmative action theory and practice enjoys judicial protection in view of the state's interest in encouraging voluntary compliance with Title VII.<sup>92</sup> In educational contexts, whether public or private but federally supported,<sup>93</sup> all uses of racial classifications are subject to strict scrutiny.<sup>94</sup> A school's use of race, therefore, must be narrowly tailored to its purported aims. This means that any slack between affirmative action theory and practice is forbidden.

Despite this fact, the practice of affirmative action in educational contexts only loosely fits its official rationale. Here the slack is supplied by Justice Powell's recognition of diversity as a compelling educational interest in *Regents of the University of California v. Bakke*.<sup>95</sup> In the post-*Bakke* era, schools have adopted the diversity theory with gusto, while continuing in practice to use racial preferences for the purpose of advancing racial justice.

This practice ignores the ominous implications of Powell's reasoning, which sharply separated social justice from educational aims.<sup>96</sup> To satisfy the narrow tailoring requirements, schools must show that both the weight and scope they assign to race in their admissions programs, and the relationship of racial preferences to their other criteria of admission, closely track constitutional aims. But in the bizarrely bifurcated conceptual space of *Bakke*, there are only two constitutionally permitted aims: Schools either may be compensating for their own past racial discrimination, or they may be promoting diversity. Each aim justifies affirmative action programs with different weight and scope. Courts, meanwhile, have interpreted both goals in such a cramped way that it is virtually impossible for schools to show that their programs are narrowly tailored.

In this Part, I show why the rationales of compensation and diversity set up affirmative action programs to fail. I will then argue that the integrative model of affirmative action offers a way out of this conundrum. It can unite social justice and educational aims in a way

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<sup>92</sup> See *supra* notes 66-74 and accompanying text.

<sup>93</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978). Private recipients of federal funds are subject to the requirements of Title VI, 42 U.S.C. § 2000d (2001), which are identical to those of the Equal Protection Clause, U.S. Const. amend. XIV, § 1, cl. 3.

<sup>94</sup> See *infra* note 134 and accompanying text.

<sup>95</sup> 438 U.S. at 314.

<sup>96</sup> See *id.* at 307-15.

that supports the weight and scope assigned to race in educational affirmative action programs.

### 1. *Compensatory Rationales for Educational Affirmative Action*

Consider first compensation. To prove that schools are compensating for their own past discrimination, the court in *Podberesky v. Kirwan* required them to supply: (1) evidence that the school practiced racial discrimination in the past; (2) evidence that the school's discrimination has present effects on the target group; (3) a measure of the extent to which the school's own discrimination has damaged its targets' interests, distinguishing the effects of the school's actions from other causes; and (4) proof that the school's affirmative action program is narrowly tailored to remedy its discrimination, meaning (a) that it targets only the class of people discriminated against, and (b) that it benefits them only to the degree that they were harmed by the school.<sup>97</sup> These stringent requirements are virtually impossible to meet, for the following reasons:

(1) While some universities, especially in the South, can prove that they have engaged in illegal discrimination recently, most will be able to prove at best that they discriminated before the 1960s. Given that most selective schools have enthusiastically practiced affirmative action since then, it will be hard to prove that what they claim to be remedying are the lingering effects of their own pre-1960s discrimination. *Hopwood v. Texas*<sup>98</sup> further narrowed the scope for remedial justifications by refusing to treat state education as a unified system. It ruled that the University of Texas (UT) is not entitled to compensate for discrimination in K-12 education, nor is the UT School of Law entitled to compensate for discrimination in UT's undergraduate college.<sup>99</sup>

(2) Even when lingering effects that specifically can be traced to an institution's prior discrimination have been shown, the courts have refused to uphold compensatory affirmative action programs on this basis. In *Podberesky*, the University of Maryland defended its reservation of scholarships for blacks as a remedy for the depressed black enrollments caused by its bad reputation among blacks due to its past discrimination. The court rejected this claim, arguing that because it would always be possible to find out about an institution's historic discrimination, knowledge of such discrimination could not be consid-

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<sup>97</sup> See *Podberesky v. Kirwan*, 38 F.3d 147, 151 (4th Cir. 1994); *id.* at 160 ("[T]he reference pool must factor out . . . all nontrivial, non-race-based disparities in order to permit an inference that such, if any, racial considerations contributed to the remaining disparity.").

<sup>98</sup> 78 F.3d 932, 951 (5th Cir. 1996).

<sup>99</sup> *Id.*



ered the “kind of present effect that can justify a race-exclusive remedy.”<sup>100</sup>

(3) Most effects of an institution’s prior discrimination are hard to distinguish from the effects of other agents’ discrimination. A college’s practice of denying admission to blacks limits their educational attainments and hence their income and ability to afford a decent education for their children, as well as their ability to help their children with homework in college-preparatory classes. These factors reduce their children’s chances of admission to college. But housing and employment discrimination, plus a myriad of factors that affect families of all racial groups, such as family illness and a lack of books in the home, also depress children’s chances of admission to college. Even the most sophisticated quantitative studies would be unable to isolate the specific effects of one school’s discriminatory actions from all of the other causes of racial educational disadvantage. And if they could do so, those effects would be very small relative to all of the other causes of disadvantage—far too small to justify any racial preference large enough to significantly influence black enrollments.

(4) (a) The main state schools that practice affirmative action—flagship state universities—have assumed only in the past several decades a nationwide mission, giving them an interest in recruiting the best black students nationwide. They have geared their affirmative action programs toward this end.<sup>101</sup> But if their history of discrimination is rooted in a more parochial era, the class of beneficiaries will be judged overbroad relative to the class against which they discriminated.<sup>102</sup> To conform to the requirements of compensatory affirmative action, such institutions either would have to confine their recruitment of blacks to a regionally limited class—forcing them to

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<sup>100</sup> *Podberesky*, 38 F.3d at 154; cf. *Hopwood*, 78 F.3d at 952 (rejecting UT’s reputational defense of its affirmative action program). The *Podberesky* court also rejected the University of Maryland’s claim that it needed to remedy the effects of its own currently hostile environment, produced by white students who expressed antipathies toward blacks. The court claimed that the white students’ behavior was a form of “societal discrimination,” hence beyond remediation by the University. *Podberesky*, 38 F.3d at 154; see also *Bakke*, 438 U.S. at 307-10. The *Hopwood* court followed suit. 78 F.3d at 952-53. This reasoning conflicts with the law on sexual harassment, which recognizes that educational institutions can be held responsible for sexually hostile environments created by their students. See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999). It is perverse to hold educational institutions responsible for their sexually hostile environments but not for their racially hostile environments.

<sup>101</sup> See Sam Issacharoff, *Can Affirmative Action Be Defended?*, 59 Ohio St. L.J. 669, 682 (1998) (arguing that race-conscious admissions is only way universities can pursue their dual mission of achieving national excellence and integrating all groups into nation’s elite).

<sup>102</sup> See *Podberesky*, 38 F.3d at 158-59 (rejecting scholarship open to all black students as not narrowly tailored to remedy University of Maryland’s historic discrimination against black students from Maryland).

further compromise meritocratic standards to achieve a critical mass of black students—or revert to a parochial recruitment base for all students—undermining their aspirations to national excellence and a nationally important mission.

(4) (b) The schools that practice affirmative action are selective.<sup>103</sup> Students are unlikely to succeed at such schools without much better than average academic preparation. Indeed, the black beneficiaries of race-conscious affirmative action have much better academic credentials than the average college student.<sup>104</sup> Yet the people most injured by past discrimination are the ones least likely to be able to position their children to compete effectively for admission to selective schools. It follows that compensatory affirmative action programs are also underinclusive, failing to reach those most harmed by a school's past discrimination.<sup>105</sup>

One could object to the ways in which courts have restricted the scope of compensatory affirmative action by educational institutions. In particular, the requirement to limit compensation to that school's own past discrimination and the refusal to allow schools to adopt race-conscious remedies for racially hostile campus environments make little sense either legally or morally. It cannot be that a proper affirmative action program is *constitutionally required* to ignore the systematic links between higher and lower levels of education in state-funded systems and on-campus discrimination by private parties.

But eliminating these arbitrary restrictions would not change a fundamental point noticed by the courts: Whatever purpose is animating affirmative action programs in education, it is not strictly a *compensatory* one. Schools implement such programs whether or not they have a history of discrimination that has current effects; they have never determined the weight they should give to race in relation to the degree of damage they have inflicted in the past; and they use affirmative action to recruit the students *best* prepared for the rigors of elite education—that is, those *least* injured by past discrimination.

## 2. *The Diversity Rationale*

Should schools therefore try to justify their affirmative action programs on “diversity” grounds? On this defense, schools need racial diversity in the student body to achieve a “robust exchange of

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<sup>103</sup> Bowen and Bok, *supra* note 80, at 15 (noting that “the vast majority of undergraduate institutions accept all qualified candidates and thus do not award special status to any group of applicants”).

<sup>104</sup> *Id.* at 18-19.

<sup>105</sup> See *Podberesky*, 38 F.3d at 158 (rejecting University of Maryland's scholarship program for blacks for focusing on high-achieving blacks who did not suffer discrimination).

ideas.”<sup>106</sup> Considered as a purely cognitive end, divorced from the values of democracy and social justice, the “robust exchange of ideas” cannot support the *scope* of racial preferences in college admissions. While it is plausible that the racial diversity of a classroom would enhance discussion of social, political, and cultural subjects by enriching the variety of perspectives voiced, it is hard to see the cognitive relevance of racial diversity to investigations in mathematics, engineering, or the “hard” sciences. Yet schools extend racial preferences in admission to graduate programs in the latter fields.<sup>107</sup> A narrowly academic representation of a school’s educational interests undercuts the case for diversity even in the social sciences and humanities. If all that matters is that the whole range of ideas worth considering should be heard, why care about the racial identities of those who voice them? Why can’t instructors and reading assignments represent all the diversity of information and opinion students need?<sup>108</sup> If the true educational interest is to ensure that a diversity of opinions be heard in the classroom, schools should select students directly for the ideological diversity they can be expected to bring to the classroom, rather than use race as a crude proxy for this.<sup>109</sup>

When schools’ interest in diversity is divorced from concerns with democracy and justice, it is also difficult to justify the *weight* they assign to race in the admissions process. In *Wessmann v. Gittens*, the First Circuit rejected the Boston Latin School’s system of allocating half of its places by proportional racial and ethnic representation among those scoring in the top half of its admissions test and not already admitted on the basis of test scores alone.<sup>110</sup> It observed that race-neutral admissions by test score alone would yield a student body that was fifteen to twenty percent black and Hispanic.<sup>111</sup> Why isn’t that enough to satisfy the school’s diversity objectives?

It might seem easier for colleges and universities to answer this question, given that ending racial preferences would lead to precipitous drops in black and Hispanic enrollment, down to barely token

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<sup>106</sup> *Bakke*, 438 U.S. at 313 (Powell, J.) (permitting race-conscious admissions to advance university’s compelling interest in “robust exchange of ideas,” promoted by diversity in student body).

<sup>107</sup> Sanford Levinson, *Diversity*, 2 U. Pa. J. Const. L. 573, 593 & n.88 (2000).

<sup>108</sup> See Brief of National Association of Scholars as Amicus Curiae in support of Plaintiffs’ Motion for Partial Summary Judgment, at 8, *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-75928), [http://www.nas.org/reports/grutter\\_amicus/grutter.pdf](http://www.nas.org/reports/grutter_amicus/grutter.pdf).

<sup>109</sup> Cf. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 621 (1990) (O’Connor, J., dissenting) (attacking use of race as proxy for possession of independently identified diverse viewpoints).

<sup>110</sup> 160 F.3d 790, 793 (1st Cir. 1998).

<sup>111</sup> *Id.* at 798.

levels at the most elite institutions.<sup>112</sup> Yet schools' other diversity interests, reflected in the kind of favor an admissions office might give to an applicant who had traveled extensively abroad, started a jazz band, or grew up on a farm, seem easily satisfied with mere tokenism. (Athletics is an exception. But there the need for numbers is justified not by diversity but by the need to have enough athletes in each sport to field a viable team.) What makes racial diversity so educationally important that it must be represented in substantial numbers? Indeed, what makes it educationally relevant at all? What makes racial diversity more important than having a diversity of blood types represented among the students?<sup>113</sup>

There are answers to these questions, but not within the terms of a conception of educational aims that is detached from an interest in promoting democracy and racial justice. Neither compensation nor narrowly construed diversity can vindicate both the wide scope and the substantial weight that colleges and universities currently give to race in admissions. Because the courts have limited compensatory claims to remedying a school's own discrimination, schools practicing compensatory affirmative action may extend small racial preferences only to a parochial class of prospective students. Schools' narrow academic interest in diversity permits racial preferences to be offered to a wider range of applicants, but not in every educational program, and not with any substantial weight.

### 3. *Reconfiguring the Mission of Education and Integration*

The integrative model of affirmative action offers an alternative rationale for race-sensitive admissions that unites educational with democratic and social justice concerns. It begins with a recognition that Americans live in a profoundly segregated society, a condition inconsistent with a fully democratic society and with equal opportunity. To achieve the latter goals, we need to desegregate—to integrate, that is—to live together as one body of equal citizens. Civil society is the special site where we are supposed do this living together as equals, working out together the terms of our interaction.<sup>114</sup> It is a site still under construction. This construction is hampered by

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<sup>112</sup> Bowen & Bok, *supra* note 80, at 41.

<sup>113</sup> See *Hopwood v. Texas*, 78 F.3d 932, 945 (5th Cir. 1996) (arguing that selection of students by race "is no more rational . . . than would be choices based upon the . . . blood type of applicants").

<sup>114</sup> See Robert Post, Introduction: After *Bakke*, in *Race and Representation: Affirmative Action 13, 22-24* (Robert Post & Michael Rogin eds., 1998) (arguing that race-based affirmative action admissions are justified to advance university's mission of promoting democratic culture).

two types of ignorance: Citizens of different races by and large do not know one another and do not know how to live together as equals. Public schools, along with cosmopolitan private colleges and universities, are crucial sites in civil society for citizens of different walks of life to *learn* how to live together on terms of equality. In the United States, they do a remarkably good job teaching citizens of different religions to live together on terms of equality. They have not been able to serve a similar educational function for citizens of different races at the K-12 level, because the schools are racially segregated.<sup>115</sup> Colleges and universities provide a nearly unique opportunity for many middle-class Americans to learn how to live in integrated settings. It is a lesson they carry with them later in life, and one rarely learned by whites who attend racially homogeneous colleges. Both blacks and whites tend to continue the patterns of interracial interaction they learned in college.<sup>116</sup> In particular, whites who grew up in predominantly white neighborhoods, but attended colleges with relatively high proportions of minority students, are much more likely to have friends, neighbors, and co-workers of diverse racial backgrounds than their white neighbors who attended colleges with low racial diversity.<sup>117</sup> Without race-conscious admissions, selective colleges cannot achieve integration and thereby teach this lesson to American elites, consistent with their mission of achieving academic excellence on a national or international scale.<sup>118</sup>

The goal of integration on this account is simultaneously educational, democratic, and a matter of social justice. Consider, in this light, *one* of the forward-looking claims made on behalf of race-conscious admissions: that racial diversity in the student body helps break down racial stereotypes.<sup>119</sup> Our interest in doing so is a matter of justice, of ending societal discrimination. But it is not about compensating for past wrongs. It is about constructing a better future. Members of underrepresented racial groups are admitted under in-

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<sup>115</sup> See *supra* notes 22-24 and accompanying text.

<sup>116</sup> Bowen & Bok, *supra* note 80, at 238-40.

<sup>117</sup> J.H. Braddock & J.M. McPartland, *The Social and Academic Consequences of School Desegregation*, 4 *Equity and Choice* 5 (1988); J.H. Braddock, M.P. Dawkins & W. Trent, *Why Desegregate? The Effect of School Desegregation on Adult Occupational Desegregation of African Americans, Whites, and Hispanics*, 31 *Int'l J. Contemp. Soc.* 273, 281 (1994).

<sup>118</sup> See Issacharoff, *supra* note 101, at 682 (defending affirmative action as necessary to enable universities to advance their missions 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").

<sup>119</sup> Integration, of course, cannot be reduced to this aim. It is about forging interracial cooperation, mutual engagement, friendship and acquaintance, stimulating critical reflection on matters of identity and difference, and much more.

tegrative affirmative action programs, not as victims of discrimination, but as agents of integration, contributing to the education of their fellow students.

Our interest in breaking down racial stereotypes is also educational. But it is not a narrowly academic achievement of the sort that could be tested in a recitation of facts or measured in a final exam. Still less is it a matter of adopting politically correct opinions.<sup>120</sup> The stereotypes in question are forms of *practical* incompetence, embodied in clumsy and disrespectful habits that typically inform our behavior in an unconscious way.<sup>121</sup> Breaking them down is a matter of acquiring *practical* knowledge, a skill of engaging with people of different races in a manner that is sensitive to and respectful of their individual differences and social circumstances. This is why this knowledge cannot be obtained solely from curricular materials or from a racially homogeneous faculty. It requires actually interacting with people of different races. Nor can it be obtained from the token numbers of blacks, Latinos, and Native Americans who would populate selective college campuses in the absence of affirmative action. Token numbers are too small to ensure a significant probability that white students will encounter them.<sup>122</sup> Moreover, when members of underrepresented racial groups are present in only token numbers, this heightens the salience of their racial identities and primes racial stereotypes. A critical mass of students of a given racial group needs to be present to help people learn to see internal heterogeneity in that group.<sup>123</sup> This explains why the educational interest in racial diversity needs to pay "attention to numbers."<sup>124</sup>

The aim in breaking down racial stereotypes is also a democratic interest. We cannot truly hear what others are saying in democratic dialogue if we process and thereby homogenize what they say through racial stereotypes. Far wider aims are at stake once we recognize that the college campus and classroom are located in civil society, and that they are therefore critical sites for a democratic culture. The central value of democratic culture is not that all the opinions worth consider-

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<sup>120</sup> See John F. Dovidio & Samuel L. Gaertner, On the Nature of Contemporary Prejudice: The Causes, Consequences, and Challenges of Aversive Racism, in *Confronting Racism: The Problem and the Response* 3, 3-8 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998) (showing how those who profess adherence to colorblind principle treat blacks less favorably than whites when their behavior is not monitored).

<sup>121</sup> See Linda H. Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 *Stan. L. Rev.* 1161 (1995) (documenting unconscious cognitive biases and stereotypes that cause racial discrimination).

<sup>122</sup> Bowen & Bok, *supra* note 80, at 234-36.

<sup>123</sup> See *supra* note 83 and accompanying text.

<sup>124</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 323 (1978).

ing are heard, but that everyone gets a chance to speak. We cannot identify in advance the opinions that ought to be heard, and then try to select speakers on the ground that they will express those opinions. The authority of conversations about the core contested ideas in our culture—over the contested meanings of cultural practices, historical events, research findings in the human sciences, laws, and public policies—depends on their responsiveness to the input of people from all walks of life who stand in different relations to these phenomena.<sup>125</sup> The realities of segregation and discrimination in America today mean that members of different races come from different walks of life. This is why it matters not just what is said, but who says it. This is what makes the racial inclusiveness of classroom discussion so important.

The integrative model presented here does not reject the diversity defense of affirmative action. It reconfigures that defense so as to join it to the core social justice and democratic concerns that motivate the advocates of affirmative action. “Diversity” should be thought of as another way of talking about integration. The rhetoric of diversity has some advantages. Talk of diversity avoids any insulting suggestion that integration requires assimilation into white-majority ways or pretending, in colorblind mode, that people do not have different racial identities. At the same time, however, tying diversity back to integration reminds us of the realities of segregation and its attendant injustices and hence of what makes racial identities morally relevant in the first place. Moreover, it signals a transformative process of coming together, where both the school and the students are *agents* of social change—in contrast with the connotations of static difference and accommodation that surround the idea of diversity.

The integrative model has several legal advantages over the diversity and compensation models of affirmative action. It makes sense of the scope and weight that educational institutions actually give to race in the admissions process. It thus closes the gap between theory and practice that makes affirmative action programs so vulnerable under strict scrutiny. It also shows how race can be directly relevant to a compelling state interest, rather than a mere proxy for something else, such as diversity of opinions. This makes integration superior to the standard diversity model in its ability to withstand strict scrutiny. It can justify educational affirmative action programs that focus exclusively on integrating marginalized racial groups, without having to adopt an elaborate system considering a myriad of other

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<sup>125</sup> See Post, *supra* note 114, at 23; Young, *supra* note 44, at 23.

groups or diversity factors.<sup>126</sup> It avoids the burdensome evidentiary requirements that the *Podberesky* court used to effectively preclude compensatory affirmative action in higher education.

Finally, the integrative model enables a unified reading of the holding of *Bakke*. Courts hostile to affirmative action have exploited the seemingly unbridgeable gap between Powell's *educational* "diversity" rationale and the Brennan plurality's *remedial* justice rationale for racial preferences in admissions to undermine universities' defenses of their programs.<sup>127</sup> The gap can be closed by recognizing three points: that the Brennan plurality held that racial *integration* is a compelling interest,<sup>128</sup> recognized that schools' compelling interest in integration may be specifically *educational*,<sup>129</sup> and treated "integration" and "diversity" as virtually synonymous.<sup>130</sup> What the Brennan plurality saw that Powell did not was that some educational goals are

<sup>126</sup> The diversity rationale fails to protect such programs. See *Wessmann v. Gittens*, 160 F.3d 790, 798 (1st Cir. 1998) (rejecting Boston Latin School's affirmative action plan for only considering race and not other dimensions of diversity); *Hopwood v. Texas*, 78 F.3d 932, 966 (5th Cir. 1996) (Weiner, J., concurring) (holding that admissions plan considering only blacks and Mexican Americans, and not other racial groups or nonracial dimensions of diversity, fails narrow tailoring).

<sup>127</sup> See *Hopwood*, 78 F.3d at 944 (rejecting diversity as a compelling interest, on grounds that, because no other justice joined Powell's opinion, it is not binding precedent); *Johnson v. Regents of Univ. of Ga.*, 106 F. Supp. 2d 1362, 1369 (S.D. Ga. 2000) (same), *aff'd*, 263 F.3d 1234 (11th Cir. 2001); see also *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 847 (E.D. Mich. 2001) (rejecting the diversity defense because there is "no overlap" between Powell's lone opinion accepting diversity as compelling interest and Brennan group's view that remedying discrimination is compelling interest).

<sup>128</sup> In his concurring opinion joined by Justices White, Marshall, and Blackmun, Justice Brennan contended that, even without a history of discrimination, schools should be able to adopt plans "with the end of creating racial pluralism." *Bakke*, 438 U.S. at 363 (Brennan, J., concurring in judgment and dissenting in part) (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)).

<sup>129</sup> What the Brennan plurality cites as *Swann's* "end of creating racial pluralism" is specifically educational:

School authorities . . . might well conclude . . . that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an *educational* policy is within the broad discretionary powers of school authorities[.]

*Swann*, 402 U.S. at 16 (emphasis added).

<sup>130</sup> See *Bakke*, 438 U.S. at 326 n.1 (Brennan, J., concurring in judgment and dissenting in part) (representing aim of Harvard admissions plan, cited by Powell as exemplar of the compelling purpose of diversity, as aiming "to achieve an *integrated* student body" (emphasis added)). In this usage, the Brennan group was following the practice of Justice Tobriner of the California Supreme Court, dissenting in *Bakke v. Regents of the University of California*, 18 Cal. 3d 34 (1976). Justice Tobriner identified the defendant's purpose as "the attainment of a racially *integrated, diverse* medical school student body." *Id.* at 66 (emphasis added). He commented on the "sad irony" that "the first admission program aimed at promoting *diversity* ever to be struck down under the Fourteenth Amendment is the program most consonant with the underlying purposes of the Fourteenth Amendment," one of



remedial, and some remedies educational. One educational remedy for race-based disadvantage involves educating students of *all* races to learn about one another's circumstances, so they can act with greater sensitivity to variations in people's circumstances that are due to their race—in particular, so they can learn how to avoid acting in racially negligent ways that have an unjustified negative differential impact on disadvantaged racial groups. This was precisely the *remedial* “diversity” defense that the University of California, Davis Medical School made on behalf of its admissions policy in *Bakke*<sup>131</sup>—a point utterly lost in post-*Bakke* judicial discussions of “diversity.”

What, then, is the holding of *Bakke*? When no single opinion is in the majority, the holding is “the most conservative reason” that explains the finding and that is “subsumed within the grounds articulated by the other justices who concurred in the judgment”<sup>132</sup>—that is, the overlap of the opinions of the justices concurring in the judgment. In *Bakke*, this is the view that schools may practice integration (“diversity”) for educational purposes, as long as the education serves the wider remedial goal of undoing unjust race-based disadvantage. The Brennan plurality says as much.<sup>133</sup> This is subsumed within Powell's view that schools may practice integration for *any* educational purposes, whether or not they are also remedial.

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which he just identified, in the previous sentence, as “the promotion of *integration*.” *Id.* (emphasis added).

<sup>131</sup> Thus, Justice Tobriner endorsed the University of California's “diversity” defense of its medical school admissions policy under *Swann*'s educational rationale for integration as follows:

The special admission process at issue here, of course, was in fact implemented for just such an educational purpose [as endorsed by *Swann*], to provide a diverse, integrated student body in which all medical students might learn to interact with and appreciate the problems of all races so as to adequately prepare them for medical practice in a pluralistic society.

*Bakke*, 18 Cal. 3d at 85.

He characterized the Medical School's “integration” defense in exactly the same way, observing that “a segregated medical profession might well remain largely oblivious to the realities of life of disadvantaged minorities and the nature and scope of their medical problems.” *Id.* at 86. He thereby implied that one function of integrating the medical profession is to make it aware of facts of which it would otherwise be ignorant.

<sup>132</sup> *Grutter*, 137 F. Supp. 2d at 847. The court in *Grutter* explained and relied on the rule in *Marks v. United States*, 430 U.S. 188 (1977), where the Supreme Court articulated: “[W]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’” *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

<sup>133</sup> *Bakke*, 438 U.S. at 326 n.1 (Brennan, J., concurring in judgment and dissenting in part) (agreeing with Justice Powell “that a plan like the ‘Harvard’ plan . . . is constitutional under our approach, at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination”).

Yet a serious question of constitutionality remains. Integrative affirmative action addresses discrimination by private actors. It is widely believed that the Supreme Court's ban on affirmative action to remedy "societal discrimination" entails that states are not permitted to practice affirmative action for the purpose of remedying private discrimination. Moreover, the Supreme Court has not been able to arrive at a consistent interpretation of the function and hence the application of strict scrutiny, under which all race-conscious state action must be evaluated. The constitutionality of any state-run or federally-funded, race-conscious affirmative action policy thus remains in doubt. In the next Part, I shall offer an account of the purposes of strict scrutiny and articulate a systematic approach to its application. I shall then argue that, under this approach, equal protection doctrine should pose no significant obstacles to integrative affirmative action programs. In particular, I shall argue that there is no coherent basis for forbidding states from using racial preferences to combat continuing private discrimination and its effects.

## II

### APPLYING STRICT SCRUTINY TO AFFIRMATIVE ACTION

To survive equal protection review, race-conscious state policies must pass strict scrutiny.<sup>134</sup> This requires that state uses of racial means (1) serve a compelling state interest and (2) be narrowly tailored to advance that interest.<sup>135</sup> To apply strict scrutiny, we need to understand its rationale. In Section A of this Part, I argue that the Court has offered three contradictory rationales for strict scrutiny. In the "skeptical" account, strict scrutiny is a tool for detecting when the state is acting on invidious purposes and beliefs. In the "balancing" account, strict scrutiny articulates standards of distributive justice that figure in an empirically sensitive cost-benefit analysis of the law under challenge. In the "colorblind" account, strict scrutiny is a tool for enforcing a nearly exceptionless principle of race neutrality, based on an assumption that racial preferences are per se injurious. I shall argue that the colorblind account is incoherent because it can offer no explanation, consistent with other equal protection doctrine, of what the

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<sup>134</sup> See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (holding that strict scrutiny applies to all racial classifications by states). Cf. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (extending strict scrutiny review to racial classifications by federal government).

<sup>135</sup> E.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986).

per se injury is supposed to be. By contrast, the skeptical account is essential to any disciplined equal protection analysis.<sup>136</sup>

In Section B, I apply the second prong of the strict scrutiny test to affirmative action. I show how to interpret the narrow-tailoring tests attached to affirmative action programs in accordance with the skeptical and balancing accounts. I argue that, once the application of the tests is disciplined by a coherent account of their rationale, they need not be fatal to properly conceived affirmative action programs. In Section C, I apply the first prong of the strict scrutiny test to integrative affirmative action, arguing that it serves compelling interests. Arguments to the contrary are based on the belief that there is a constitutional ban on state uses of racial means to remedy private-sector discrimination. I argue that this belief is based on a misreading of the Supreme Court's discussions of "societal discrimination." Thus, strict scrutiny is far less fatal to affirmative action programs than is widely believed.

#### A. *Interpreting Strict Scrutiny*<sup>137</sup>

To apply strict scrutiny to state uses of racial classifications, one must understand its objectives. The Court has variously located this objective in an examination of the *purposes*, the *effects*, or the *form* of the law under challenge. Here is the *purposive* view, articulated by Justice O'Connor:

Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifi-

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<sup>136</sup> The balancing account, this Part argues, plays a supplementary role in equal protection doctrine, augmenting the core purposive analysis with limited considerations of distributive justice.

<sup>137</sup> This Section draws upon the analyses of theories of strict scrutiny advanced by Jed Rubenfeld, *Affirmative Action*, 107 *Yale L.J.* 427 (1997), and Peter Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 *U. Pa. L. Rev.* 1 (2000). Rubenfeld discusses two accounts of strict scrutiny—what I call the skeptical account and an alternative cost-benefit account that does not distinguish, as I do here, balancing from colorblindness. He vigorously argues that only the skeptical account is consistent with the rest of equal protection doctrine. Rubenfeld, *supra*, at 428. Although initially persuaded by his argument, I now believe that there is room for the courts to apply balancing (equitable) constraints on affirmative action programs and that the crucial point is to distinguish this from colorblindness. The skeptical account remains indispensable.

I develop Rubenfeld's skeptical approach (itself indebted to John Hart Ely's *Democracy and Distrust* (1980)) by providing a substantive account of invidious discriminatory purposes and by showing how the skeptical approach makes sense of the narrow-tailoring constraints applied to affirmative action. Rubin takes a balancing approach, a chief contribution of which is to catalog the variety of constitutional harms potentially implicated by race-based state action. Rubin, *supra*, at 9. I accept most (not all) of his catalog, but I argue that a disciplined treatment of these harms should fold most of them into an enriched purposive analysis, rather than a cost-benefit analysis.

cations 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.<sup>138</sup>

On this view, strict scrutiny is the Court’s way of operationalizing “skepticism”<sup>139</sup> about the state’s purposes. It offers a way of telling whether the state’s purported legitimate purpose in using a racial classification is a pretext for an invidious purpose. If the state’s means fit the purported legitimate purpose closely enough to defeat the suspicion that the state’s true purpose is invidious, then the state’s use of racial means is vindicated by that purpose.

At times, the Court has viewed strict scrutiny as a tool for examining the *effects* of race-based laws. In *Fullilove v. Klutznik*,<sup>140</sup> Justice Powell wrote a concurring opinion offering an effects-based approach to resolving the case under strict scrutiny:

Congress’ choice of a remedy should be upheld . . . if the means selected are *equitable* and reasonably necessary to the redress of identified discrimination. . . . [In this case] any marginal *unfairness* to innocent nonminority contractors is not sufficiently significant . . . to *outweigh* the governmental interest served by § 103(f)(2) [the race-based set-aside].<sup>141</sup>

On this view, the Court’s task in applying strict scrutiny is to balance the benefits and burdens of affirmative action programs in a way that is fair to all sides. This approach supposes that determining those benefits and harms is an empirical matter that must be sensitive to the details of how these programs operate.

A third account of strict scrutiny, focusing on the racial *form* of the law, has been articulated by O’Connor:

[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection. . . . The application of strict scrutiny, in turn, determines whether a compelling governmental interest justifies the infliction of that injury.<sup>142</sup>

<sup>138</sup> *Croson*, 488 U.S. at 493.

<sup>139</sup> *Adarand*, 515 U.S. at 223.

<sup>140</sup> 448 U.S. 448 (1980).

<sup>141</sup> *Fullilove*, 448 U.S. at 510, 515 (emphasis added).

<sup>142</sup> *Adarand*, 515 U.S. at 229-30.

On this view, racial preferences *inherently* inflict a colossal constitutional injury on the parties being treated unequally, *regardless of their purpose*. The injury is so serious that only a compelling state interest could outweigh it. This justifies a nearly insurmountable presumption that racial preferences are unconstitutional. The purpose of strict scrutiny is therefore to enforce vigorously the formal principle of colorblindness except in those rare cases where the state's interest is overwhelming.

These three views of strict scrutiny differ in where they locate the potential harm of race-sensitive policies. On the purposive or "skeptical" view, whether a constitutional injury has been inflicted on innocent third parties depends on whether the state has acted with an invidious purpose. On the effects or "balancing" view, it depends on empirical facts about the effects of the policies. On the formal or "colorblind" view, it is inherent in all policies that embody a racial preference, regardless of their purpose or how they are administered. The colorblind view is inconsistent with the first two views. But one could combine skepticism and balancing by holding that, under strict scrutiny, the Court should examine closely both the purposes and the effects of preferential policies.

To decide which account of strict scrutiny is valid, we must identify the purported constitutional harms of racial preferences. At the outset, we must assess the colorblind account by considering whether there is any constitutional injury *inherent* in racially preferential policies. I shall argue that an examination of possibilities finds nothing that fits this bill. Some claims of allegedly weighty and inherent harm are not legally cognizable within the terms of equal protection doctrine. Others are based on confusion about the concept of race and its uses in affirmative action policies. Every other claim involves only possible (not inherent) harms of variable (not necessarily large) size. Colorblind strict scrutiny therefore serves no legitimate constitutional purpose.

### *1. Colorblindness and the Alleged Harms of Race-Based Programs*

In what aspect of preferential policies could the vast constitutional harm alleged by colorblind theorists inhere? The following list appears to exhaust the options. It could inhere in (a) the differential racial impact of these policies; (b) some globally harmful effects of these policies; (c) the ways these policies conceive of the groups they favor or disfavor; (d) an inherently objectionable purpose expressed by racial preferences as such; or (e) the very fact that these policies classify citizens by race. Let us consider each possibility.

(a) Policies that allocate benefits by race inherently have a differential racial impact, in that they result in certain races getting more of the benefit being distributed than others. But this cannot be the source of the especially abhorrent constitutional injury of racial preferences. If it were, then race-neutral policies that have a differential racial impact would also raise a claim of constitutional injury. The Court explicitly rejected this position in *Washington v. Davis*.<sup>143</sup> Moreover, if the injury consisted simply in the deprivation of the benefit being distributed, its gravity would vary depending on the value of the benefit, and could not be counted on to be so severe that only a compelling purpose could outweigh it.

(b) The Court has frequently worried about various global effects of racial preferences, beyond their impact on the parties directly affected: They “carry a danger of stigmatic harm,” and they may “promote notions of racial inferiority,” “lead to a politics of racial hostility,”<sup>144</sup> or “serve to stimulate our society’s latent race consciousness”<sup>145</sup> in a way that encourages others to engage in invidious discrimination. Even if these effects invariably occurred, they could not constitute the alleged inherent constitutional injury of preferential policies, given that the same effects raise no claim of an equal protection violation when they arise in race-neutral state policies.<sup>146</sup> The use of standardized college admissions tests in which blacks perform poorly relative to whites and Asians carries a danger of stigma and promotes notions of racial inferiority.<sup>147</sup> Colorblind college-admissions policies that yield only token numbers of blacks in flagship state universities stimulate latent race consciousness by making the few remaining blacks look unusual. Class-exclusionary zoning leads to a politics of racial hostility between wealthy white suburbs and majority black cities. Yet *Washington v. Davis* held that as long as these effects are unintended, they raise no constitutional claim.<sup>148</sup> In any event, these effects are speculative, not inherent in preferential policies. They are merely risks of harms that may vary in size, depending on how citizens at large interpret and react to them.

(c) Race-based policies might be thought to embody offensive *ideas* about people. Justice Kennedy has asserted categorically that

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<sup>143</sup> 426 U.S. 229, 238-39 (1976).

<sup>144</sup> *Croson*, 488 U.S. at 493.

<sup>145</sup> *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (quoting *United Jewish Orgs. v. Carey*, 430 U.S. 144, 173 (1977) (Brennan, J., concurring)).

<sup>146</sup> These effects are not the same as “expressive harms,” which are properly treated under a purposive analysis. See *infra* Part II.B.

<sup>147</sup> Rubinfeld, *supra* note 137, at 449.

<sup>148</sup> *Washington v. Davis*, 426 U.S. 229 (1976).

“[r]ace-based assignments ‘embody stereotypes that treat individuals as the product of their race.’”<sup>149</sup> His objection is that racial assignments inherently deny people’s individuality by assuming that all members of the same race are alike in some intrinsic characteristic.<sup>150</sup> This is a dignitary harm.<sup>151</sup> This objection has some basis when the policies in question treat race as a proxy for some specific race-neutral trait identified as an independently relevant basis for differential treatment. It certainly would offend the individuality of white student athletes if a public school coach systematically steered them away from basketball in the belief that “white men can’t jump,” or even if he preferred them for swimming in the belief that whites are superior swimmers. Thus, the stereotype may offend individuality whether it is stigmatizing or flattering. But Justice Kennedy errs in assuming that all race-based preferences rely on racial stereotypes.

Diversity defenses of affirmative action do not assume within-race homogeneity, but rather both between-race *and* within-race heterogeneity. In a country saturated with race-conscious beliefs, feelings, and practices, people will have different experiences on account of the ways they are differently racially classified, and these experiences will influence their other beliefs and attitudes. People of the same race will also have different experiences of how they are racially classified and draw different lessons from those experiences. A racially diverse classroom will therefore bring a richer range of experiences to inform classroom discussion, so long as the diversity rises above tokenism. This thought neither stigmatizes nor offends the ideal of individuality. Thus, whether a policy conceives of people in an objectionable way cannot be inferred from the mere fact that it involves a racial preference. This is a contingent matter, not inherent in race-sensitive policies.

(d) Racial preferences might be thought to embody an inherently objectionable purpose. Certainly, many such preferences do: They intend to harm others on account of race. But integrative affirmative action preferences intend to benefit all citizens by promoting coopera-

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<sup>149</sup> *Miller v. Johnson*, 515 U.S. 900, 912 (1995) (quoting Justice O’Connor in *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 604 (1990), but omitting her qualification that this “may” be what race-based assignments do).

<sup>150</sup> Kennedy here follows O’Connor in *Metro Broadcasting*, where she defined “what is objectionable about a stereotype” as follows: “The racial generalization inevitably does not apply to certain individuals, and those persons may legitimately claim that they have been judged according to their race rather than upon a relevant criterion.” 497 U.S. at 619-20.

<sup>151</sup> *Korematsu v. United States*, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting) (arguing that upholding treatment of individual based on inference from race is “to destroy the dignity of the individual”).

tive interracial interaction in civil society. Their aim is to *defeat* racial divisiveness. While racial preferences inherently do prefer some people over others on account of their race in the allocation of some benefits, affirmative action policies only employ racial preferences as means to some further end, such as advancing democracy or equal opportunity, not as ends in themselves. Therefore, whether a racial preference embodies an objectionable purpose is a contingent matter.

(e) We seem to be left with only one possible ground for the allegedly vast constitutional injury inherent in racial preferences: the bare fact that racially preferential policies classify people by race. This seems a strange basis on which to ground the core violation of equal protection, for it occurs even in trivial contexts where the state classifies people without allocating benefits differently. It implies, absurdly, that there is an equivalent constitutional injury in being racially classified by the U.S. Census and in being subjected to Jim Crow laws. It is also inconsistent with the meager case law on racial classification in the collection of vital statistics.<sup>152</sup> Yet there is precedent for the idea that racial classification is wrong in itself.<sup>153</sup>

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<sup>152</sup> The Court seems satisfied with a mere rational-basis review of the state's collection of vital statistics about race. In *Tancil v. Woolls*, the Court, by affirming a Virginia district court decision, upheld the practice of identifying the races of the parties on divorce decrees. 379 U.S. 19 (1964) (per curiam), aff'g *Hamm v. Va. State Bd. of Elections*, 230 F. Supp. 156 (E.D. Va. 1964). To justify that practice, the state only had to assert its interest in collecting vital statistics, but the practice of maintaining racially segregated tax and voting records was invalidated for lack of any rational basis. *Id.*; see also *Caulfield v. Bd. of Educ.*, 583 F.2d 605, 611 (2d Cir. 1978) ("The Constitution itself does not condemn the collection of [racial] data."); *Doe v. State*, 479 So. 2d 369, 374 (La. Ct. App. 1985) (permitting Louisiana to designate plaintiff's race on her birth certificate), writ denied 485 So. 2d 60 (La. 1986), appeal dismissed, 107 S. Ct. 638 (1986).

<sup>153</sup> This idea appears to animate recent voting rights case law. See *Shaw v. Reno*, 509 U.S. 630, 642 (1993) ("Laws that explicitly distinguish between individuals on racial grounds fall within the core of [the Fourteenth Amendment's] prohibition."). Voting rights go beyond the scope of this Article, but a few comments are in order. Justice O'Connor's principal concern in *Shaw* is that race-based assignments of voters to districts conceive of voters in an objectionably divisive way, endorsing "the conception of a Nation divided into racial blocs," *Metro Broad.*, 497 U.S. at 603, by racially separating voters into districts in a way that resembles "political apartheid," *Shaw*, 509 U.S. at 647. But it is also possible to implement race-based assignments of voters to districts on an integrative basis. The point of such policies can be viewed, not primarily to give blacks a chance to send "their own" representative to Congress, but rather to create a district in which both blacks and whites are numerous enough that political action cannot proceed without mutual engagement. In such a district, whites, long used to being able to ignore black voters, now must learn how to justify policies in ways responsive to blacks as well. See Brief of Amici Curiae of Congresswoman Corrine Brown et al. at 9-10, *Hunt v. Cromartie*, 526 U.S. 541 (1999) (No. 98-85), rev'g 34 F. Supp. 2d 1029 (E.D.N.C. 1998). The brief argued that districts designed to enhance minority voting power without creating a minority majority "defy the very stereotypes *Shaw* sought to combat" by "convey[ing] a message of racial cooperation." *Id.*



tages, which are easily diffused among innocent third parties. Finally, the cases of global and local effects can be distinguished legally by the fact that neither the race-neutral laws nor affirmative action intend the global effects, but affirmative action policies do choose racial means for their local differential racial impacts. It is not irrational for the Court to say that, while the state may constitutionally prefer one race to another for a compelling purpose, it can only go so far.<sup>169</sup>

The account of strict scrutiny I develop here, in which skepticism is supplemented by equity requirements, should be acceptable to all sides of the affirmative action debates. Opponents of affirmative action should be receptive to this interpretation of strict scrutiny because, as I shall show below, it acknowledges the imperative of avoiding all of the constitutional harms of race-conscious policies they worry about. Moreover, its purposive treatment of most of these harms is stricter than a balancing treatment, since it does not permit the purported benefits of using racial means to outweigh constitutionally objectionable racial purposes or ideas. This account of strict scrutiny imposes greater discipline on judges than a pure balancing approach: It prevents them from imputing whatever weights to the unmeasured, unmeasurable, and speculative costs and benefits of affirmative action as needed to generate the judges' subjectively preferred conclusions about the merits of these programs. I show below how the narrow-tailoring considerations provide a disciplined way of testing race-conscious programs for unconstitutional purposes and ideas.<sup>170</sup>

The only concession that opponents of affirmative action must make in adopting a skepticism-cum-equity approach to strict scrutiny is to allow that it is a *contingent* matter whether such programs are constitutionally harmful. The harm is dependent on the underlying purposes and local impacts of these policies, not purely and automatically in virtue of the fact that they have a racial form. This concession must be made because I have already shown that the colorblind account of constitutional harms in race-based policies is incoherent.<sup>171</sup>

It turns out, however, that once this concession is made, considerable space for race-based affirmative action programs is opened up under strict scrutiny. To vindicate this view, I will show in detail how to apply strict scrutiny to these programs. In the next Section, I shall demonstrate how narrow-tailoring tests work under both skepticism

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<sup>169</sup> However, this is in tension with *Personnel Administrator v. Feeney*, 442 U.S. 256, 277 (1979), which held that if a preference is constitutional, the degree of the preference makes no constitutional difference.

<sup>170</sup> See *infra* notes 173-215 and accompanying text.

<sup>171</sup> See *supra* notes 143-62 and accompanying text.

and balancing. In Section C, I shall argue that affirmative action for the sake of remedying private-sector discrimination is, contrary to widespread belief, constitutionally permissible.

*B. Applying Narrow-Tailoring Tests  
to Affirmative Action Programs*

Strict scrutiny requires that all state uses of racial means be “narrowly tailored” to fit compelling state purposes.<sup>172</sup> On the balancing view, the narrow-tailoring tests constitute substantive equity constraints on the shape of an otherwise constitutionally permissible affirmative action program. On the skeptical view, the tests are used to “smoke out” invidious state purposes that are masked by the state’s assertion of a compelling purpose. “Purpose” here is understood broadly to include not just the end the state wishes to achieve, but also how the state conceives of racial means as contributing toward that end and how it conceives of the parties affected by its policies.

The function of skeptical strict scrutiny is to detect both invidious ends and invidious uses of racial means toward otherwise legitimate ends. It works by testing a series of suspicions. Presented with a racial classification justified by some purportedly legitimate end, the Court entertains various suspicions about what illegitimate purposes may actually animate the state policy, and what illegitimate conceptions of persons may be expressed in its choice of means. It then searches for evidence to lay each suspicion to rest—evidence that the state’s means “fit” its purported compelling goal “so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”<sup>173</sup>

The state’s satisfaction of various narrow-tailoring tests provides evidence to rebut these suspicions and thereby prove that the state really is engaged in the legitimate purpose it professes, using means that do not express invidious conceptions of individuals. Failure to pass the tests is evidence that the state’s purpose is invidious. Narrow-tailoring tests constitute a powerful tool for “smoking out” invidious discriminatory purposes. Skeptical strict scrutiny reveals a deep logic to the narrow-tailoring tests applied to affirmative action programs.

On the skeptical view, application of the narrow-tailoring tests is relative to the purposes for the sake of which the state claims to be using racial classifications. The point of the tests is to *compare* the relative fit of the state’s means to its purported and suspected purposes. In this Section, I assume for the sake of illustrating how the

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<sup>172</sup> *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986).

<sup>173</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

Racial classifications, we are told, are morally objectionable because “[d]istinctions between citizens solely because of their ancestry” are “odious to a free people whose institutions are founded upon the doctrine of equality.”<sup>154</sup> Or they are objectionable because skin color and the other biological markers of race “bear no relation” to any “characteristics of constitutionally permissible interest to government.”<sup>155</sup>

If affirmative action programs regarded ancestry or skin color as inherently significant, the objectors might have a point. But these programs do not distinguish among citizens “because of their ancestry” or skin color. They distinguish among citizens based on whether they are subject to systematic social disadvantage because of the ways others racially classify them. Being subject to systematic race-based disadvantage is certainly a “characteristic of constitutionally permissible interest to government.” Because many of the mechanisms of disadvantage—particularly, invidious racial stereotypes and antipathies—target their victims by race, these victims are properly identified by race. Thus, affirmative action programs need not be embarrassed by Justice Stevens’s charge that their implementation requires Nazi-like racial definitions by ancestry or “blood.”<sup>156</sup> Racial disadvantage, not ancestry or biology, is the basis of the racial classifications relevant for affirmative action.

Peter Rubin claims that all uses of racial classifications harm by “inevitably . . . reinforcing the belief in inherent racial differences.”<sup>157</sup> An “inherent” difference refers to an essential difference in intrinsic properties—a difference that people of different races carry with them, regardless of social context. If race were conceived of by affirmative action programs as essentially a matter of intrinsic biological difference, Rubin’s claim would be true. But if race is conceived as essentially a mode of social inequality based on *myths* of biological or other intrinsic difference, then it is an *extrinsic relation* of individuals, one that would disappear if the mechanisms that generate systematic race-based inequality were dismantled.

Perhaps the latter mechanisms cannot be understood as “race-based” without referring to some conception of race as an intrinsic characteristic prior to the mechanisms themselves. But to refer to the presence of such a conception in the minds of people who act on it is not to endorse the truth of that conception or reinforce belief in it,

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<sup>154</sup> *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

<sup>155</sup> *Fullilove v. Klutznick*, 448 U.S. 448, 525 (1980) (Stewart, J., dissenting).

<sup>156</sup> *Id.* at 534 n.5 (Stevens, J., dissenting).

<sup>157</sup> Rubin, *supra* note 137, at 23.

since one can refer to it precisely as mythical or imaginary.<sup>158</sup> This is obvious when we refer to the conceptual bases of social inequality in other societies. We refer to the caste system as one of India's ways of constituting social hierarchy, without thereby believing or reinforcing the belief that members of different castes really differ intrinsically in their purity or capacity to pollute by touch. Similarly, referring to race need not express or reinforce the belief that there are any intrinsic racial differences.

This survey has not found any credible basis for the claim that race-conscious policies *inherently* inflict a vast constitutional injury on anyone. The colorblind view of strict scrutiny must therefore be rejected. Is there any other way to understand the Court's concerns with the racial form of a law as such? There is, but the remaining concerns are about racial *appearances*. When states consider race, the Court does not want them to be too obtrusive about it. This concern is most evident in racial redistricting cases. Bizarrely shaped majority-minority districts advertise too blatantly the state's racial concerns.<sup>159</sup> The Court prefers that, when states consider race, their actions are ambiguous enough to be explained in other ways.<sup>160</sup> Race may be *a* factor, just not a *predominant* factor, in state deliberations.<sup>161</sup> This parallels the treatment of race in educational affirmative action cases, where race may be just one factor among others in determining college admissions.<sup>162</sup> Whatever the ground of these concerns about racial appearances, it is not captured by the stark colorblind principle, since it

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<sup>158</sup> See Sally Haslanger, *Gender and Race: (What) Are They? (What) Do We Want Them To Be?*, 34 *Nous* 31 (2000) (defining gender and race to show explicitly how these concepts refer to unequal social relations, not biological essences). Rubin also claims that merely identifying someone by their race always causes a dignitary harm. Rubin, *supra* note 137, at 23. But his argument for this only shows that it "may" cause such harm, and depends on a conception of race (as skin color) that is substantively irrelevant for nearly any purpose. *Id.* at 19-20.

<sup>159</sup> See *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (rejecting bizarrely shaped majority-minority district while asserting that "reapportionment is one area in which appearances do matter").

<sup>160</sup> See *Shaw*, 509 U.S. at 644 (holding that court will not strike down district unless result is "unexplainable on grounds other than race" (quoting *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977))); see also *Easley v. Cromartie*, 532 U.S. 234, 257 (2001) (upholding disproportionately black district on grounds that it is not evident that race, rather than desire to create safe Democratic seat, determined its boundary lines).

<sup>161</sup> *Miller v. Johnson*, 515 U.S. 900 (1995) (forbidding race from being predominant factor in districting); see also *Cromartie*, 532 U.S. at 241 (citing *Miller* while holding that "race must not simply have been *a* motivation for the drawing of a majority-minority district, but the *predominant* factor" (internal quotations and citations omitted)).

<sup>162</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978) (Powell, J.) ("Ethnic diversity . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.").

finds no constitutional injury when race is used in moderate and subtle ways.

I conclude that, while advocates of the colorblind principle express justifiable concerns about potential harms, they err in locating these harms in the bare racial form of the law. That a law embodies a racial preference is not significant in itself, but only for what it suggests about the underlying purpose, conception, or effects of the law. *All* of the genuine constitutional concerns of colorblind theorists can therefore be accommodated within a purpose or effects test (although, as we shall see, “purpose” must be given a rich and expansive reading). Colorblind strict scrutiny thus dissolves into either skepticism or balancing.

## 2. *Scrutiny, Skepticism, and Balancing*

The skeptical view of strict scrutiny focuses on whether race-conscious policies embody purposes, attitudes, or conceptions of persons that violate equal protection. It is an indispensable form of strict scrutiny, because the Court cannot simply take at face value a state’s assertion of a compelling purpose in enacting a racial preference. Skeptical strict scrutiny must be applied to test whether or not the state’s assertion of a compelling purpose is just a pretext for an invidious purpose. This application has solid grounding in the Constitution, because it is settled law that the Equal Protection Clause<sup>163</sup> forbids certain invidious purposes, such as hatred and contempt for racial groups, from animating the law.

The balancing view of strict scrutiny requires that the differential racial impact of an affirmative action policy on the parties directly affected by it not be unfair. It does not attempt to weigh the speculative global, atmospheric effects of racial classifications—that is, the risk of increased divisiveness, stigmatization, stereotyping, and race consciousness thought to be increased in society at large by people’s reactions to affirmative action policies.

There are three good reasons for setting these global effects aside. First, neither the Court nor anyone else is competent to measure them, and no one has a coherent account of how to weigh them against material benefits.<sup>164</sup> Second, concerns about the expressive harms of racial preferences are more coherently focused on the purposes and conception of affirmative action programs rather than how

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<sup>163</sup> U.S. Const. amend. XIV, § 2.

<sup>164</sup> It is possible, however, to measure the effects of affirmative action on the lives of the parties affected by the policy. It is relevant to the assessment of an integrative affirmative action policy that the experience of integration in college leads students to live more integrated lives after college. See *supra* notes 119-24 and accompanying text.

people in society at large react to these programs.<sup>165</sup> Skeptical strict scrutiny already considers these expressive harms.

Third, the Court has no consistent way to consider global effects without rewriting the core of equal protection doctrine. In practice the Court has invoked these speculative effects only to object to racial preferences. Following *Davis*, it ignores them for race-neutral state policies that lead to segregation, even though these policies arguably have the same effects.<sup>166</sup> This asymmetry of treatment puts the Court on a collision course with itself when evaluating integrative affirmative action policies. To consider only the possibility that they increase stigmatization, stereotypes, and racial divisiveness, without considering how they might *decrease* these global harms by undoing segregation, could mean that the Court commits itself to overturning policies that, on net, reduce the very harms in the name of which it objects to those policies. This is perverse. Suppose, in the alternative, that the Court did compare the global effects of integration using racial means with the de facto segregation that would prevail otherwise, and decided that the integrative program was constitutionally objectionable solely on the ground of its harmful global effects. Then it would be perverse for it not to overturn race-neutral state policies having the same effects. But that would require overruling *Davis*.

Jed Rubinfeld has argued that the same reasoning should undermine balancing, which weighs the differential racial impacts on the parties affected by affirmative action policies.<sup>167</sup> There is certainly a principled case for this view. But there are several reasons for advocates of affirmative action not to press it. It is certainly a reasonable moral requirement to place on any affirmative action policy that it not place excessive burdens on innocent third parties. One should not underestimate the legitimization effect of a court testing an affirmative action program for equity and finding that it passes. And, as I shall argue below,<sup>168</sup> the equity constraints in balancing do not impose substantively more onerous narrow-tailoring requirements on affirmative action programs than those already required by skepticism for other reasons. Balancing rejects the idea that one has suffered a vast constitutional harm simply by virtue of being the disadvantaged party in a racially preferential system. Balancing counts only material disadvan-

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<sup>165</sup> See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law*, 148 U. Pa. L. Rev. 1503, 1542-45 (2000) (arguing that expressive harms are located in public meaning of acts, not in subjective reaction to them).

<sup>166</sup> See *Washington v. Davis*, 426 U.S. 229 (1976); *supra* notes 145-65 and accompanying text.

<sup>167</sup> See Rubinfeld, *supra* note 137, at 441.

<sup>168</sup> See *infra* notes 173-215 and accompanying text.

tests work that integrative, diversity, or compensatory purposes can all count as compelling interests. Application of the narrow-tailoring tests is also relative to the illegitimate purposes that the Court suspects could be animating the state policy under challenge. The skeptical view therefore requires an account of the invidious discriminatory purposes that violate equal protection.

Justice O'Connor, in *Croson*, mentions "racial prejudice or stereotype," "illegitimate notions of racial inferiority," and "simple racial politics" as the invidious purposes and conceptions that might underlie an affirmative action program.<sup>174</sup> It is a neat summary, which may be recast as follows: The state may not act out of *hostility* ("prejudice") or *contempt* ("illegitimate notions of inferiority") toward individuals, nor in a way that *offends their individuality* ("stereotype"), nor out of a *divisive* conception of citizens ("simple racial politics").<sup>175</sup> Affirmative action policies allocate particular goods—mainly educational opportunities, employment, and contracts—on the basis of race. Thus, we begin the process of strict scrutiny by listing the hostile, contemptuous, offensive, and divisive purposes or conceptions that a suspicious person might think animates such racial preferences.

(1) One might think the state is practicing discrimination for its own sake out of *hostility* toward whites,<sup>176</sup> or (2) trying to turn the tables against whites out of vengeance (a *hostile* motive).<sup>177</sup> (3) The state might be trying to settle accounts between the races, thereby expressing a *divisive* conception of them as creditor and debtor classes.<sup>178</sup> (4) It might be practicing a racial spoils system, *divisively* allocating goods to different races in accordance with their relative

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<sup>174</sup> *Id.*

<sup>175</sup> There may be other unconstitutional purposes, but these are the main ones that have occupied equal protection analysis. The general conception of invidious purposes in equal protection doctrine is expressive: It prohibits the state from expressing inappropriate negative attitudes toward, or invidious conceptions of, individuals. See Anderson & Pildes, *supra* note 165, at 1540-45.

<sup>176</sup> See, for example, opinions in *Fullilove v. Klutznick*, 448 U.S. 448, 529 (1980) (Stewart, J., dissenting) (complaining that Congress's racial set-aside constitutes "'discrimination for its own sake'" (quoting *Bakke*, 438 U.S. at 307)), and *Croson*, 488 U.S. at 516 (Stevens, J., concurring) (protesting that Richmond's set-aside invidiously stereotypes all white contractors as guilty of discrimination).

<sup>177</sup> See, e.g., *Croson*, 488 U.S. at 527-28 (Scalia, J., concurring) ("[T]hose who believe that racial preferences can help 'even the score' display, and reinforce, a manner of thinking by race that was the source of injustice . . .").

<sup>178</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (complaining that Congress's racial set-aside creates creditor and debtor races); *Fullilove*, 448 U.S. at 530 n.12 (Stewart, J., dissenting) (protesting that Congress's set-aside holds innocent whites responsible for sins of others of their race).

political power or numbers.<sup>179</sup> (5) It might be engaged in *offensive* racial stereotyping, using race as a proxy for relevant characteristics that have no intrinsic connection to race.<sup>180</sup> Finally, (6) the state might be practicing a form of racial paternalism, *contemptuously* assuming that the favored racial groups are innately inferior, unable to achieve on their own, and so granting them access to goods on easier terms.<sup>181</sup>

Under the skeptical approach, each of the narrow-tailoring criteria applied by the Supreme Court in its affirmative action cases functions as a test of whether the state's means fit its purported compelling purpose so closely as to defeat the suspicion that the state is acting on one of these impermissible attitudes toward, or conceptions of, the racial groups it selects for differential treatment. This interpretation contrasts with that of the balancing conception of strict scrutiny, which instead treats the narrow tailoring criteria as equity requirements.

Three questions must be answered affirmatively for an affirmative action program to satisfy narrow tailoring. First, does the state's purpose justify any sort of racial preference at all? Second, does the purpose support a preference for all of and only the racially defined groups actually targeted by the program? Third, does the purpose justify the form, weight, and timing of the racial preference? In the following discussion, I shall argue that the requirement to consider race-neutral alternatives functions in conjunction with the over- and under-inclusiveness tests to answer the first question; the over- and under-inclusiveness tests function, in cases where some racial preference is permitted, to answer the second; and the remaining narrow-tailoring tests function to answer the third question.

*Seeking race-neutral alternatives.* The Court requires the state to consider race-neutral alternatives before resorting to race-conscious ones.<sup>182</sup> Immediately we confront a sharp contrast among the ways balancing, colorblindness, and skepticism interpret this requirement. Balancing offers no clear rationale for this requirement, since the in-

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<sup>179</sup> See, e.g., *Fullilove*, 448 U.S. at 539, 542 (Stevens, J., dissenting) (warning that, in long run, awarding public businesses on racial basis would be as objectionable as awarding it on purely partisan basis); see also *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 614-17 (1990) (O'Connor, J., dissenting) (opposing FCC's "viewpoint diversity" policy of awarding set-aside licenses to minorities); *Crososn*, 488 U.S. at 510 (rejecting Richmond's awards of public contracts on racial basis).

<sup>180</sup> See *Metro Broad.*, 497 U.S. at 619-20 (O'Connor, J., dissenting) (objecting to assumption that race is correlated with possession of particular perspectives).

<sup>181</sup> See *Adarand*, 515 U.S. at 240-41 (Thomas, J., concurring) (railing against racial preferences for "stamp[ing] minorities with a badge of inferiority").

<sup>182</sup> *United States v. Paradise*, 480 U.S. 149, 171 (1987) (citing "the efficacy of alternative remedies" as one factor to be considered in determining whether affirmative action policy is narrowly tailored).



terests it balances are material rather than expressive, and whatever injuries the racial form of a preference inflicts as such are expressive. Colorblind strict scrutiny interprets this as a free-standing requirement to implement race-neutral alternatives for whatever compelling interests the state may have, unless only a race-based policy will do. On this view, race-neutral alternatives are always constitutionally preferable because they avoid the vast unjust “injury” to the less preferred race that supposedly occurs “whenever the government treats any person unequally because of his or her race.”<sup>183</sup> Once we dispense with this canard, there is no rationale for requiring the *implementation* of race-neutral alternatives across the board. Instead, as skepticism holds, we are required to *consider* race-neutral alternatives as an exercise in *testing* the racial form of a policy for narrow tailoring: We are to see whether any race-neutral alternative is more narrowly tailored to the state’s purported legitimate purpose than the race-based means are.

This test yields fundamentally different results for race-neutral and race-conscious compelling state interests. When the state avows a purpose to which race is not evidently germane, and there is a readily available race-neutral means to this end, its use of racial means is gratuitous. This rightly raises the suspicion that its choice of racial means is either really in service of an ulterior illegitimate race-conscious motive, or based upon an invidious racial stereotype where race is being used as an illegitimate proxy for the characteristic of real relevance to the state’s proffered purpose. For example, a police scheme of racial profiling, in which an entire racial group or a sweeping subset of it, such as young black men, is treated as a criminal class, would be unconstitutional for its use of derogatory stereotypes. The consideration of a race-neutral alternative would function to expose the racial classification as both grossly overinclusive, in targeting for arrest innocent members of the racial group, and underinclusive, in failing to target criminals of other racial groups.<sup>184</sup>

By contrast, when the state’s purpose is explicitly race-conscious—for example, when it aims to remedy the disadvantages that black businesses suffer due to the continuing legacies of white

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<sup>183</sup> *Adarand*, 515 U.S. at 229-30.

<sup>184</sup> This is not to imply that whenever a suspect classification is contained in a police profile its use is unconstitutional. If it were known that Al Qaeda terrorists were trying to smuggle a nuclear bomb into the United States, no court would rule that police must ignore the fact that Al Qaeda members are all Muslim and mostly Arab. Such a case of emergency, in which a particular, ethno-religiously restricted crime ring is known to be planning specific crimes of catastrophic magnitude, is quite different from a generalized contemptuous suspicion that all members of a particular racial group are more likely than others to be engaged in some crime or other.

supremacy—its use of racial means is not only clearly relevant to its purpose, *but more narrowly tailored to that purpose than race-neutral means could be*. Race-neutral proxies for race—for example, giving aid to all businesses with low capitalization—will, relative to the race-conscious purpose, be grossly overinclusive, in helping whites who do not suffer from the legacies of white supremacy, and underinclusive, in excluding some nonwhites who do.<sup>185</sup> The demand that the state pursue race-neutral alternatives to remedy race-based disadvantages therefore will not only reduce the effectiveness of the remedy, it will also vastly magnify its costs, perhaps to the point of making the remedy infeasible, or possible only at the sacrifice of other compelling interests.<sup>186</sup> The skeptical interpretation of strict scrutiny does not demand the adoption of a race-neutral alternative in such a case, because the availability of a race-neutral alternative is evidence of an unconstitutional purpose only when the state's avowed purpose is race-neutral. The test has no probative value when the state's purportedly legitimate purpose is race-conscious. It follows that, when the state has a compelling race-conscious purpose, *courts must permit the use of racial means to pursue it*. Numerous courts have erroneously rejected affirmative action plans for race-conscious ends because, following the incoherent colorblind view, they have treated race-neutral alternatives as a free-standing requirement, rather than as a narrow-tailoring test of the closeness of fit of means to ends.<sup>187</sup>

*Avoiding overinclusiveness.* The Court has sometimes struck down affirmative action plans because their use of race to identify

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<sup>185</sup> Ian Ayres, *Narrow Tailoring*, 43 *UCLA L. Rev.* 1781, 1787 (1996).

<sup>186</sup> See Issacharoff, *supra* note 101 (arguing that no race-neutral admissions policy permits universities to pursue both of their compelling interests in integration and high academic achievement).

<sup>187</sup> See *Bakke v. Regents of the Univ. of Cal.*, 18 Cal. 3d 34, 53-55 (1976) (assuming arguendo that University of California's goal of integrating its medical school is compelling, yet rejecting its race-based admissions policy because racial integration can be achieved through race-neutral means); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (finding that Richmond's contracting set-aside failed narrow tailoring because it did not consider "the use of race-neutral means to increase minority business participation in city contracting"); *Johnson v. Regents of the Univ. of Ga.*, 263 F.3d 1234, 1259-60 (11th Cir. 2001) (rejecting University of Georgia's affirmative action plan for failing to consider race-neutral means to achieve racially diverse student body); *Podberesky v. Kirwan*, 38 F.3d 147, 161 (4th Cir. 1994) (finding that University of Maryland's race-based scholarship program fails narrow tailoring because University did not seek race-neutral means to end of increasing black retention rates); *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 852-53 (E.D. Mich. 2001) (rejecting University of Michigan Law School's admissions policy for failure to seek race-neutral means to goal of increasing minority enrollment).

beneficiaries is overinclusive.<sup>188</sup> From a balancing perspective, the point of prohibiting overinclusiveness is to ensure that members of the preferred racial groups do not get more than they deserve. Likewise, prohibiting underinclusiveness ensures that members of the disfavored groups do not get less. But desert is relative to merit, which is relative to the institution's mission.<sup>189</sup> Institutions practicing integrative affirmative action properly tend to select more advantaged members of racially disadvantaged groups, because they are in a better position to function successfully as agents of integration.<sup>190</sup> Such a pattern is not overinclusive, given the integrative purposes of the plan.<sup>191</sup>

On the skeptical view, the overinclusiveness test works differently, depending on whether the institution avows a race-neutral or race-based purpose. We have seen that when it avows a race-neutral purpose, the prohibitions against over- and underinclusiveness work in tandem with the test of race-neutral alternatives to uncover invidious purposes or stereotypes: If what really matters is some race-neutral quality in beneficiaries, why doesn't the program select directly for that? When it avows a race-based purpose, such as compensating for race-based disadvantages, the over- and underinclusiveness tests work to test whether the preference for the particular racial groups targeted for benefits closely serves the state's avowed end. Overinclusiveness of individuals not subject to race-based disadvantage is evidence that the state does not have a genuine remedial purpose, but is simply practicing a racial spoils system.<sup>192</sup>

*Avoiding underinclusiveness.* Underinclusiveness of groups subject to race-based disadvantage is evidence of an unconstitutional preference for some racial groups over others. Judgments of underinclusiveness are relative to the type of remedial purpose asserted by the defendant. Three remedial purposes must therefore be distinguished: reparations, compensation for current disadvantage, and integration. On the reparations model, past acts of discrimination generate a permanent claim to compensation, even by the descendants of those wronged. Relative to the reparations model, then, an

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<sup>188</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989) (rejecting Richmond's affirmative action program for "Spanish-speaking, Oriental, Indian, Eskimo, and Aleutian persons," on ground that Richmond had no history of discrimination against these groups).

<sup>189</sup> See supra notes 85-91 and accompanying text.

<sup>190</sup> *Id.*

<sup>191</sup> Thus, an integrative defense of the University of Maryland's scholarship program for blacks would not have fallen prey to the *Podberesky* court's objection that it was overinclusive in targeting high-achieving blacks. See *Podberesky*, 38 F.3d at 158.

<sup>192</sup> *Croson*, 488 U.S. at 506 ("The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation.").

affirmative action plan that excluded Irish Americans, whose ancestors suffered discrimination in the early twentieth century, would be underinclusive. On the current compensation model, only those groups that *continue* to suffer from disadvantage relative to the average because of the lingering effects of past racial discrimination are entitled to affirmative action.<sup>193</sup> A plan following this model would not be underinclusive for failing to include any white American group, because it is not clear that any *currently* suffer disadvantage due to ethnic discrimination against their ancestors. But it would be underinclusive if it excluded Mexican Americans. On the integrative model, those groups that suffer systematic disadvantage due to widespread segregation from mainstream opportunities are the direct targets of affirmative action. African Americans are, of course, the central case, but other groups suffer in the same way—notably, Latinos and Native Americans.<sup>194</sup> Failure to include these groups in an integrative plan would be unconstitutional. But failure to include relatively advantaged insular groups, such as the Amish, would not.<sup>195</sup>

Because judgments of underinclusiveness are relative to the defendant's purpose, courts are not entitled to invalidate an affirmative action policy by plucking a *different* compelling but voluntary purpose out of the air, and arguing that it is underinclusive relative to *that* purpose. There is nothing constitutionally suspect about remedying one type of disadvantage at a time.<sup>196</sup> Careful specification of the defendant's purpose—for example, remedying segregation—can therefore serve as protection against a court's objection that an affirmative

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<sup>193</sup> The Brennan plurality in *Bakke* consistently followed a current compensation model. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 369 (1978) (“A state government may adopt race conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have, and if there is reason to believe that the disparate impact is itself the product of past discrimination . . .”).

<sup>194</sup> See generally *The Compelling Need for Diversity in Higher Education*, *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-75928) (expert testimony of Camarillo) (documenting systematic disadvantage of Latinos due to segregation), <http://www.umich.edu/~urel/admissions/legal/expert/toc.html>.

<sup>195</sup> To the extent that integration is being practiced for democratic as well as equal opportunity purposes, the analysis must proceed differently. From a democratic point of view, there is reason to seek out members of all insular groups. This is a genuine diversity interest. However, the weight given to membership in one or another group still would vary relative to the equal opportunity aim. In particular, colleges may well have a legitimate democratic diversity interest in seeking Amish students, but not one weighty enough to justify setting a numerical goal for them.

<sup>196</sup> *Fullilove v. Klutznick*, 448 U.S. 448, 485 (1980).

action plan does not remedy some other disadvantage, such as poverty, suffered by individuals outside the preferred class.<sup>197</sup>

*Limiting the weight given to race, relative to traditional and meritocratic criteria of access.* According to Justice Powell's opinion in *Bakke*, race should be allowed to operate only as a "plus" factor, on a par with traditional admissions criteria but not overriding them.<sup>198</sup> From a balancing perspective, this represents a compromise of affirmative action goals with equity concerns, in the form of a demand that nonwhites not get much more than they deserve. But on the skeptical view of strict scrutiny, violation of this criterion is evidence that an institution is either operating a racial spoils system, divisively conceiving of race as a characteristic that supercedes all others, or practicing racial paternalism. If race compromises meritocratic criteria only marginally, this is evidence that the state is legitimately practicing integrative affirmative action, since this goal requires that affirmative action beneficiaries be capable of successful functioning in their roles.

Justice Thomas appears to believe that *any* compromise of meritocratic criteria, however tiny, and at whatever stage in a program's execution, is sufficient to prove unconstitutional racial paternalism.<sup>199</sup> Other provisions in an affirmative action program can defeat this suspicion, however. For example, the federal contracting set-aside in *Fullilove* provided a procedure for challenging minority subcontractors who had not suffered from external disadvantages, and it allowed minority subcontractors to bid only so much more for a job as could be explained as a result of these disadvantages.<sup>200</sup> The program thus went out of its way to stress that it was only counteracting the externally imposed disadvantages of minority businesses, and not presuming their innate inferiority.

On the diversity and integrative conceptions of affirmative action, the targets of affirmative action are conceived as adding value to the institution's democratic and educational missions, rather than lacking in a merit for which paternalistic compensation is required. The use of race in these contexts therefore does not inherently compromise meritocratic standards. But how can the court *tell* whether a school's declaration of race as a merit is not just a cover for racial paternalism? It cannot simply accept the school's declaration at face value. A

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<sup>197</sup> Thus, Justice Stewart erred in rejecting the *Fullilove* set-aside for failing to remedy the disadvantages of all groups, given that its purpose was to remedy race-based disadvantages. See *id.* at 529-30.

<sup>198</sup> See *Bakke*, 438 U.S. at 317.

<sup>199</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring).

<sup>200</sup> See *Fullilove*, 448 U.S. at 487-88; see also *Adarand*, 515 U.S. at 208.

school can defeat this suspicion in two ways. First, it can show that it actively *uses* racial diversity in its educational programs—in promoting interracial engagement, classroom reflection on the contested meanings of race, and so forth. Second, it can show that it holds all students to the same race-neutral standards of performance once they enter. This would demonstrate the program's confidence in its targets' abilities. By contrast, if a school gave easier final examinations to its affirmative action admittees or allowed them to graduate with fewer credits or a lower minimum GPA, this would be evidence that it regarded them as innately inferior. An affirmative action program with these elements would be unconstitutional.

*Limiting the form of racial preferences.* Except as a remedy for an institution's egregious and obstinate refusal to end discrimination,<sup>201</sup> fixed quotas are not allowed in affirmative action programs.<sup>202</sup> Goals must be waived if qualified members of the targeted group cannot be found and must be set in relation to the availability of qualified members within the group.<sup>203</sup> In educational contexts, all applicants for admission must be able to compete for all openings and be reviewed according to common standards by the same admissions committee.<sup>204</sup> On the balancing view, these demands reflect a concern that undeserving nonwhites not get access to benefits and that deserving whites not be unfairly prevented from competing for these benefits. On the skeptical view, failure to meet these criteria is evidence that the program is simply playing racial politics rather than implementing a bona fide affirmative action program. Such failures, especially the reservation of fixed places to particular groups, express a divisive conception of those seeking access to opportunities in which members of different races do not compete in a common market. By contrast, satisfying these criteria is evidence that the institution is practicing integrative affirmative action—a project that cannot succeed with unqualified participants and that requires attention to how classmates might fruitfully interact across racial lines. This assessment is impossible to undertake if examination of racial groups is undertaken by separate admissions committees.

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<sup>201</sup> See, e.g., *United States v. Paradise*, 480 U.S. 149, 185-86 (1987) (permitting quotas to remedy unrelenting discrimination in state trooper promotions).

<sup>202</sup> See *Bakke*, 438 U.S. at 315 (rejecting quotas in education).

<sup>203</sup> See *Fullilove*, 448 U.S. at 487-88 (citing waiver process as significant element of permissible set-aside); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501-02 (1989) (rejecting Richmond's thirty-percent minority set-aside for its failure to demonstrate any relation to size of pool of qualified minority businesses).

<sup>204</sup> See *Bakke*, 438 U.S. at 315-18 (requiring common admissions standards).

*Requiring findings of discrimination or its effects.* The Court requires practitioners of remedial affirmative action to have evidence of the nature and scope of the race-based disadvantages suffered by the groups they want to benefit and to tailor their programs to the problems identified.<sup>205</sup> On the balancing view, this is to ensure that the beneficiaries of affirmative action programs get no more than they deserve (no more than would remedy the discrimination). On the skeptical view, such fact finding and program tailoring are evidence of a genuine remedial intent. If an institution were operating a racial spoils system, or venting hostility against disfavored groups, it would not bother to gather evidence about the disadvantages suffered by the favored group or to adjust program details in response to such evidence. The evidence required of compensatory and integrative programs differs, however. To prove that they are practicing compensation, schools must provide evidence of the extent of past discrimination and show that they are compensating the victims, or members of the relevant class of victims, in proportion to the degree of past injury.<sup>206</sup>

What about integrative affirmative action? This defense has not been expressly litigated. However, I would suggest that to prove that they are practicing integration for equal opportunity purposes, schools must provide evidence (a) of current mechanisms of race-based disadvantage (segregation and discrimination), (b) that integration helps break down these mechanisms, and (c) that they are targeting the groups disadvantaged by these mechanisms.<sup>207</sup> To prove that they are practicing integration for diversity and democratic purposes, schools must provide evidence that their programs actively promote interracial engagement and that racial diversity matters for valued educational and democratic outcomes.<sup>208</sup>

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<sup>205</sup> See *Croson*, 488 U.S. at 498-504 (faulting Richmond's plan for not identifying discrimination with specificity).

<sup>206</sup> See *supra* notes 92-105 and accompanying text.

<sup>207</sup> The Compelling Need for Diversity in Higher Education, *supra* note 194, provides much of the evidence required for an integrative defense of affirmative action. The expert reports of Thomas Sugrue, Eric Foner, and Albert Camarillo document the causes and continuing extent of segregation of African Americans and Hispanics, while the report of Patricia Gurin documents the positive effects of integration at the University of Michigan. *Id.*

<sup>208</sup> The University of Michigan has produced extensive evidence of the latter in defending its undergraduate and law school affirmative action programs on diversity grounds. See the expert reports, *id.*, of Gurin (showing positive impact of racial diversity on numerous educational and democratic outcomes), as well as Bowen, Bok, Syverud, and Webster (testifying to ways interracial engagement in education helps develop important skills and knowledge, especially relevant to legal practice).

*Limiting the burdens on innocent members of the disfavored groups.* The Court requires that affirmative action programs not concentrate their costs on a few identifiable whites, especially if they have a legitimate expectation to the opportunity in question.<sup>209</sup> This makes sense as an equity requirement under balancing, but it also has a function under skeptical strict scrutiny: Satisfaction of this test is evidence that the state's purpose is not to express hostility, resentment, or vengeance against the disfavored groups. The lust for vengeance can hardly be satisfied by highly diffuse burdens imposed on unidentified targets. In addition, this suspicion can arise seriously only when the agents practicing affirmative action are favoring their own group. This was the case in *Croson*, where the black-majority city council of Richmond awarded thirty percent of city contracting dollars to minority firms.<sup>210</sup> Such cases do require closer scrutiny and heighten the probative value of burdens placed on innocent parties.

Another reason to examine the distribution of the costs of affirmative action programs is to test whether they illegitimately conceive of the races as creditor and debtor classes. To conceive of the races this way implies that one cares not only that disadvantaged racial groups receive certain benefits, but that whites be the ones who pay for them. Justice Scalia seems to think that this conception is inherent in remedial race-based affirmative action policies.<sup>211</sup> The fact that educational institutions practice integrative rather than compensatory affirmative action supplies decisive evidence against Scalia's suspicion. The costs of affirmative action programs are not confined to those who miss out on opportunities in order to make room for the targets of affirmative action. The task of integrating disadvantaged racial groups into universities typically entails costly administrative support—an office of minority affairs, myriad diversity programs, mentoring services, and so forth. If program administrators really thought it important that whites, conceived as a debtor class, pay these costs, they would charge white students alone an extra “diversity fee” on top of the standard tuition. Such a policy would be unconstitutional, precisely because of the divisive way it conceives of the relations of racial groups.

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<sup>209</sup> *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282-83 (1986) (rejecting race-based layoffs for purpose of maintaining progress toward affirmative action goals because they impose excessive burden on some individuals).

<sup>210</sup> *Croson*, 488 U.S. at 495-96.

<sup>211</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (“[U]nder our Constitution there can be no such thing as either a creditor or a debtor race.”).



In fact, the administrative costs of affirmative action are borne by all students and the greater community through their tuition and tax payments. Indeed, the beneficiaries of affirmative action typically bear a disproportionate share of these costs, because they are more often called upon to serve on college diversity committees, to participate in diversity workshops, to mentor younger affirmative action admittees, and the like. This is what one would expect if an institution conceives of the beneficiaries of affirmative action as agents of integration rather than as a passive creditor class entitled to principal and interest payments from debtor whites.<sup>212</sup> Institutions that practice integration also go out of their way to offer programs celebrating diversity and promoting integration, to which whites are of course welcome. This is evidence that they conceive of their programs as benefiting whites, not just imposing burdens on them.

*Limiting the duration of affirmative action programs.* The Court requires that remedial racial preferences not go on forever.<sup>213</sup> On the skeptical view, limited duration is evidence of a remedial motive: A racial spoils system continues forever, but a genuinely remedial program ends once the problem is solved. It follows that the requirement of limited duration is not applicable if the legitimate purpose for using race is not remedial—for instance, if “diversity,” understood as a nonremedial educational objective, is constitutionally permissible. Moreover, given the depth and intractability of the problems addressed by integrative affirmative action, the requirement that remedial programs be temporary cannot reasonably be interpreted as a requirement that they contain a specific expiration date. As long as the problem continues, so does the justification for operating an affirmative action program. However, a requirement of periodic review of affirmative action programs could be justified both to ensure that the programs are actually doing their jobs and to prevent these programs from degenerating into a racial spoils system.

This survey of the narrow-tailoring tests has important implications for constitutional critics of affirmative action who are attracted to the colorblind principle. I have argued that whenever we try to identify what it is about the very form of laws that contain racial pref-

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<sup>212</sup> To defeat the worry that the targets of affirmative action are being admitted under a conception of their institutional duties and expected roles that is not required of whites, I observe that integration is a two-way street. African American, Latino, and Native American students are not the only ones expected to reach out. But for whites and Asian Americans to play that role, they need people to whom they can reach out.

<sup>213</sup> See *Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980) (Powell, J., concurring) (noting temporary nature of program ensures it will not outlast discriminatory effects it is designed to eliminate); see also *Wygant*, 476 U.S. at 276 (expressing concern that remedies to past discrimination could be “timeless in their ability to affect the future”).

erences that makes them constitutionally objectionable, the objection shifts ground from racial form to either *possible* unjust costs or *possible* invidious purposes and conceptions of persons.<sup>214</sup> This survey shows that the narrow-tailoring tests, interpreted in light of balancing and skeptical strict scrutiny, are capable of putting these worries to rest. The skeptical view of strict scrutiny can distinguish legitimate affirmative action programs from racial spoils systems, racial paternalism, hostile or vengeful “reverse discrimination,” and divisive conceptions of the races as standing in debtor and creditor relationships. It can therefore serve as a powerful legitimating tool for affirmative action programs.

But it can do so only if the Court lets it do its work—upholding its view that strict scrutiny is not “fatal in fact.”<sup>215</sup> And this is the view it must uphold. For once the Court allows that the state can have a compelling interest in implementing an affirmative action program, it cannot in good faith construe the narrow-tailoring tests so as to make it impossible for the state to prove that it is pursuing that interest. Skepticism about whether the state is pursuing a compelling interest must not be confused with a dogmatic refusal to distinguish compelling purposes from invidious ones. In practice, I believe that most affirmative action plans in higher education and employment today would pass the narrow-tailoring tests, or could do so with minor modification. If they are to fail strict scrutiny, therefore, this must be for lack of a compelling interest. So let us turn to the first prong of strict scrutiny.

### C. Applying the “Compelling Interest” Test to Integrative Affirmative Action: Remediating Private Discrimination

States may not practice race-based affirmative action for the purpose of remedying “societal discrimination.”<sup>216</sup> But what is “societal discrimination”? Some courts think this refers to discrimination by private parties. They have drawn on this interpretation to strike down educational affirmative action policies in Maryland, Texas, and Michigan.<sup>217</sup> Indeed, the *Hopwood* court insisted that a government body

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<sup>214</sup> See *supra* Part II.A.

<sup>215</sup> *Adarand*, 515 U.S. at 237 (“[W]e wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’” (quoting *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring))).

<sup>216</sup> See *infra* notes 230-32, 250-52.

<sup>217</sup> In front of the Fourth Circuit, the University of Maryland claimed that its affirmative action plan was designed to remedy a campus environment that was hostile to blacks. *Podberesky v. Kirwan*, 38 F.3d 147, 154-55 (4th Cir. 1994). The court rejected this argument, commenting that any such hostile environment must be attributed to society rather than the University. The Fifth Circuit cited *Podberesky* in *Hopwood v. Texas*, 78 F.3d 932, 952-53 (5th Cir. 1996), where the court rejected a similar hostile-environment argument by

may not even use racial means to remedy discrimination by other *state* bodies.<sup>218</sup> If this were true, then integrative affirmative action for equal opportunity purposes would be in trouble, because it seeks to remedy not just discrimination by the state body practicing it, but also the broader public *and* private sector causes of racial disadvantage. I argue in this Section that the Constitution does not support any such ban because “societal discrimination” does not refer to the identity of the discriminator. It refers to the quality of the state’s evidence about the discrimination it intends to remedy.

Let us test whether there is a sound legal basis for the proposition that a government body may use racial means only to remedy its own discrimination, not the discrimination of private parties or other government bodies. Consider (1) whether it follows from strict scrutiny; (2) whether the Supreme Court has ever declared this an official doctrine; and (3) whether it is supported by precedent.

### 1. *The Compelling Interest in Ending Private Discrimination*

Remedying private discrimination would fail strict scrutiny only if this aim fails to amount to a “compelling” state interest. No one doubts that the state has a *legitimate* interest in ending private racial discrimination by businesses, institutions receiving federal funds, and providers of housing. If it did not, then core antidiscrimination laws, such as Title VII,<sup>219</sup> Title VI,<sup>220</sup> and the Fair Housing Act<sup>221</sup> would be unconstitutional. So the objection must be that the state’s interest in ending private racial discrimination is less than “compelling.” This suggestion is absurd. Antidiscrimination laws constitute the most im-

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the University of Texas. Law students of the University of Michigan intervened in *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001), but the court invalidated their argument that the program would remedy “discrimination on the part of society at large.” *Id.* at 868-69. The Sixth Circuit vacated the district court’s injunction, which had prohibited the law school from considering race and ethnicity in admissions decisions. *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002). The circuit court did not, however, address the remedial contention made by the student intervenors; it instead upheld the affirmative action program based upon the University’s “compelling interest in achieving a diverse student body.” *Id.* at 739 n.4.

<sup>218</sup> *Hopwood*, 78 F.3d at 951-52 & n.43 (holding that University of Texas School of Law may only remedy its own past discrimination, not that of other governmental units).

<sup>219</sup> 42 U.S.C. § 2000e (2001) (prohibiting private employers, employment agencies, and labor organizations from discriminating against workers on account of race).

<sup>220</sup> § 2000d (prohibiting operators of programs receiving federal assistance from excluding anyone from participating in or receiving benefit of these programs on account of race).

<sup>221</sup> The Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3631 (2001)); see § 3604 (prohibiting property owners from discriminating by race in sale or rental of housing); § 3605 (prohibiting real estate agents from discriminating by race in real estate transactions).

portant pieces of social legislation passed in the postwar era. No decision could properly rest on a wholly subjective judgment that this interest is merely “important” but not “compelling.”<sup>222</sup> Could one argue that, while the state has a compelling interest in prohibiting private racial discrimination, it has no compelling interest in remedying its effects? Justices Powell and O’Connor, the chief architects of strict scrutiny in affirmative action contexts, have repeatedly rejected this claim. There is a “compelling governmental interest in eradicating the continuing effects of past discrimination.”<sup>223</sup> In any event, racial integration is a remedy not just for the effects, but also for the causes of current discrimination and exclusion.<sup>224</sup>

## 2. *Doctrinal Distinctions: Indefinite “Societal” Discrimination Versus Identifiable Private Discrimination*

There are three sources of doctrinal evidence—found in *Bakke*, *Wygant*, and *Croson*—for the view that the state may not use racial means to remedy societal discrimination. In *Bakke*, Justice Powell rejected the claim that the University of California, Davis Medical School could justify its race-based admissions system as a remedy for “societal discrimination.”<sup>225</sup> In *Wygant*, Powell appeared to restrict the permissible grounds of race-based remedial action even further:

This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination *by the governmental unit involved* before allowing limited use of racial classifications in order to remedy such discrimination.<sup>226</sup>

If read out of context, Powell’s use of the phrase “societal discrimination” would naturally be interpreted as referring to discrimination by private parties, in contrast with discrimination “by the

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<sup>222</sup> See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O’Connor, J., concurring in part and concurring in judgment) (“[A]s regards certain state interests commonly relied upon in formulating affirmative action programs, the distinction between a ‘compelling’ and an ‘important’ governmental purpose may be a negligible one.”).

<sup>223</sup> *Fullilove v. Klutznick*, 448 U.S. 448, 496 (1980) (Powell, J., concurring); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (O’Connor, J.) (“The unhappy persistence of both the practice and the lingering effects of racial discrimination . . . is an unfortunate reality, and government is not disqualified from acting in response to it.”); *Missouri v. Jenkins*, 515 U.S. 70, 112 (1995) (O’Connor, J., concurring) (acknowledging “compelling governmental interest in redressing the effects of past discrimination”); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 611 (1990) (O’Connor, J., dissenting) (“[W]e have repeatedly recognized that the Government possesses a compelling interest in remedying the effects of identified race discrimination.”).

<sup>224</sup> See *supra* notes 3-7 and accompanying text.

<sup>225</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978).

<sup>226</sup> *Wygant*, 476 U.S. at 274 (emphasis added).

governmental unit involved.” Reading his use of this phrase in context, however, reveals that Powell contrasted “societal discrimination” with *clearly identified discrimination*, without regard to the public or private status of the agents practicing discrimination. In *Bakke*, Powell wrote:

The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of *identified* discrimination. . . . That goal was far more focused than the remedying of the effects of “societal discrimination,” an *amorphous concept of injury* that may be *ageless in its reach into the past*.<sup>227</sup>

Powell’s reason for rejecting “societal discrimination” as a justification for state-sponsored race-based remedies is that it is “amorphous” and hence could serve as a ground for the permanent use of racial classifications by the state. There is nothing about discrimination by private parties that makes it more “amorphous” than discrimination by the state. Specific instances and patterns of private discrimination are perfectly capable of being identified, and finite remedies fashioned, as called for in Title VII and other antidiscrimination statutes.<sup>228</sup> What is amorphous is the raw assertion that discrimination has happened in the past “*in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations*.”<sup>229</sup> It will always be true that discrimination has happened in the past. If this fact were sufficient to justify a race-based remedy, the state could establish a system of permanent racial preferences.<sup>230</sup>

Continuing his insistence on the need to identify the discrimination for which the state was designing a remedy, Powell wrote:

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<sup>227</sup> *Bakke*, 438 U.S. at 307 (emphasis added). Powell repeated this objection in *Wygant*:

No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and overexpansive. 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.

476 U.S. at 276.

<sup>228</sup> See 42 U.S.C. § 2000e-5 to e-6, e-17 (2001) (providing enforcement provisions and allowance of civil actions by Attorney General as remedies for violations of Title VII); see also § 2000d-1, d-7 (providing for refusal to grant or continue financial assistance and civil actions as remedies for violations of Title VI); §§ 3610-3614 (providing for administrative proceedings and civil actions as remedies for violations of Fair Housing Act).

<sup>229</sup> *Bakke*, 438 U.S. at 307 (emphasis added).

<sup>230</sup> It need not always be true that systematic discrimination and segregation are happening in the present. Since integrative affirmative action aims to remedy present-day barriers to mainstream opportunities faced by disadvantaged racial groups, Powell’s objection that compensatory remedies for past societal discrimination could justify permanent racial preferences does not apply to integrative remedies.

After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined.<sup>231</sup>

Without specific findings, the state will never be able to determine how much compensation is enough. With them, it may proceed because it will know when to stop. Nothing in Powell's *Bakke* opinion suggests that a state body's "substantial" interest in remedying identified "constitutional and statutory violations" is limited to that body's own acts of discrimination, or even to state violations generally.

In *Wygant*, Powell continued to reject vague appeals to "societal discrimination" by stressing the need for particularized findings. The Jackson Board of Education attempted to justify its race-based teacher layoff program, designed to preserve progress toward its goal of attaining a ratio of black teachers equal to the ratio of black students, by appealing to a "role-model theory."<sup>232</sup> It claimed that black teachers, serving as role models to black students, could help remedy the societal discrimination suffered by the students. Against the role-model theory, which the district court opinion described in but three conclusory sentences,<sup>233</sup> Powell objected that the school board had failed to demonstrate any causal connection between the ratio of black teachers and the ratio of black students: "Societal discrimination, *without more*, is too amorphous a basis for imposing a racially classified remedy. The role model theory announced by the district court and the resultant holding typify this *indefiniteness*."<sup>234</sup> His phrasing implies that *with* more specification and evidence of how black role models could help remediate identified effects of discrimination suffered by black children, the School Board might have a case for wanting more black teachers.<sup>235</sup> Powell rejected the proffered

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<sup>231</sup> *Bakke*, 438 U.S. at 307-08.

<sup>232</sup> *Wygant*, 476 U.S. at 274.

<sup>233</sup> See *Wygant v. Jackson Bd. of Educ.*, 546 F. Supp. 1195, 1201 (E.D. Mich. 1982).

<sup>234</sup> *Wygant*, 476 U.S. at 276 (emphasis added).

<sup>235</sup> What was only speculative in *Wygant* is now supported by evidence: The single most important factor reducing disparate treatment of black and white students in U.S. schools is the proportion of black teachers in the school. Kenneth J. Meier, Joseph Stewart, Jr. & Robert E. England, *Race, Class and Education: The Politics of Second-Generation Discrimination* 31-39 (1989). The belief that Powell rejected the need to deliver medical services to minority communities as a ground for favoring the admission of black medical students is based on the same confusion of evidentiary with substantive requirements. Powell allowed that the need to deliver medical services to its citizens was a state interest "sufficiently compelling to support the use of a suspect classification." *Bakke*, 438 U.S. at 310. This was not enough to vindicate the Davis Medical School's race-based admissions

“role model theory” as “not proven.” He did not find it substantively incapable of justifying a race-based remedy, were it to be spelled out and supported by evidence.<sup>236</sup>

What, then, of Powell’s statement that “the Court has insisted upon some showing of prior discrimination by the government unit involved”<sup>237</sup> before allowing remedial uses of racial classifications? Does this not exclude state uses of race to remedy even identified private-sector discrimination? No. This question was never put before the *Wygant* court. Powell’s contrast between “societal discrimination” and discrimination by the state simply reflects the fact that these were the alternative defenses the Jackson School Board happened to offer for its race-based teacher layoff policy.<sup>238</sup> It was not an exhaustive list of possible remedial defenses. *Wygant* never considered the possibility that the state may use racial preferences to remedy identified private-sector discrimination. Powell never articulated any reason in *Wygant* or in any other opinion for thinking that government units could only remedy their own discrimination, or that the

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only because “petitioner has not shown that its preferential classification is likely to have any significant effect on the problem.” *Id.* at 311. Here again, what was only speculative in *Bakke* is now strongly supported by evidence. See Joel C. Cantor et al., *Physician Service to the Underserved: Implications for Affirmative Action in Medical Education*, 33 *Inquiry* 167, 168 (1996) (summarizing studies finding that between 60% and 87% of patients of black physicians are members of minority groups, compared to between 7% and 24% of patients of nonblack physicians). See Miriam Komaromy et al., *supra* note 42, at 1307-09 (showing that in California black physicians practice in areas with almost five times percentage of black residents as other physicians, and they serve far more black, Hispanic, and Medicaid patients than average, even when controlling for the proportion of such patients in physicians’ practice areas); Vera B. Thurmond & Darrell G. Kirch, *Impact of Minority Physicians on Health Care*, 91 *S. Med. J.* 1009, 1009-10 (1998) (surveying studies that show black and other minority physicians play disproportionately large role in providing medical services to underserved minority communities).

<sup>236</sup> Powell also objected that the role-model theory, if based on the general *nonremedial* claim that students need role models of their own race, would put a constitutionally impermissible ceiling on the number of black teachers in a school. *Wygant*, 476 U.S. at 276. But this says nothing against the *remedial* argument for black role models evidenced *supra* note 230, an argument that does not suggest that children can only learn from same-race role models. Powell also suggested that race-neutral alternatives exist for increasing physician service to underserved minority populations and that affirmative action for this purpose relies on an impermissible racial stereotype of blacks as altruistic and whites as acquisitive. *Bakke*, 438 U.S. at 310-11. In fact, it relies only on the assumptions that minority and white physicians alike will seek their best practice opportunities, that most white physicians will find more advantageous practice opportunities among well-served, mostly white populations than among underserved minority populations, and that whites are reluctant to accept minority physicians. It is naïve to suppose that the past behavior and declarations of medical school applicants of a desire to serve underserved populations alone are better predictors of future professional behavior than these factors in conjunction with race, given the ways market incentives generate different prospects for physicians of different races.

<sup>237</sup> *Wygant*, 476 U.S. at 274 (emphasis added).

<sup>238</sup> *Id.* at 274-78.

source of discrimination made a difference in the means the state was entitled to use in combating it.

Those who think Powell meant "private discrimination" by "societal discrimination" must contend with Powell's concurring opinion in *Fullilove*, in which he upheld the constitutionality, under strict scrutiny, of a federal contracting set-aside for minority businesses. Here, he explicitly endorsed the view that Congress may enact a race-based set-aside as a remedy for discrimination practiced by private contractors as well as by other government units:

In my view, the legislative history of § 103(f)(2) demonstrates that Congress reasonably concluded that *private* and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors.<sup>239</sup>

He continued:

Refusals to subcontract work to minority contractors may, *depending upon the identity of the discriminating party*, violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, or 42 U.S.C. § 1981, or the Fourteenth Amendment.<sup>240</sup>

In Powell's view, these findings provided a sufficient factual predicate for Congress to adopt a race-based set-aside as "a reasonably necessary means of furthering the compelling governmental interest in redressing the discrimination that affects minority contractors."<sup>241</sup> Therefore, according to Powell, the state has a compelling interest in remedying discrimination from any source, public or private, and may use race-based means to effect the remedy. Indeed, Powell even held that there is a "compelling . . . interest in eradicating the continuing effects of past discrimination."<sup>242</sup> The contrary position is based on a flat misreading of Powell's words. For it is inconceivable that Powell forgot, when he wrote in *Wygant* that "[t]his Court never has held that societal discrimination alone is sufficient to justify a racial classification,"<sup>243</sup> that the Court *had* held that *private* discrimination was sufficient to justify a racial classification in *Fullilove*: He cited *Fullilove* six times in *Wygant*.<sup>244</sup>

<sup>239</sup> *Fullilove v. Klutznick*, 448 U.S. 448, 503 (1980) (Powell, J., concurring) (emphasis added).

<sup>240</sup> *Id.* at 506 (emphasis added).

<sup>241</sup> *Id.* at 515.

<sup>242</sup> *Id.* at 496; see *supra* note 223 and accompanying text.

<sup>243</sup> *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986).

<sup>244</sup> *Id.* at 274, 279, 280, 281-82. It might be argued that, at most, Powell's strict scrutiny analysis in *Fullilove* stands for the proposition that the state may remedy private discrimination only when it is somehow entangled in it. This claim will be considered *infra* notes 279-82 and accompanying text.



The Court's holding in *Croson* makes the now ritualistic incantation against using racial classification to remedy "societal discrimination":

To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid 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 and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.<sup>245</sup>

Here again, everything depends on whether "societal discrimination" refers to *private-sector discrimination* or simply *unidentified* discrimination. Private-sector discrimination is, of course, not "inherently unmeasurable," but unidentified discrimination is. The fundamental point of the Court's majority opinion in *Croson* is that Richmond failed to supply sufficient evidence of the existence and scope of discrimination by the construction industry. If *Croson* had held that remedying private-sector discrimination could not be a compelling purpose, then its lengthy discussion of Richmond's failure to prove and measure discrimination by private parties in the construction industry would make no sense.<sup>246</sup> It simply would have dismissed all such evidence as irrelevant to any compelling state interest.

Instead, the Court objected that "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."<sup>247</sup> Lacking this, the state could be practicing a racial spoils system under the guise of a legitimate remedial purpose.<sup>248</sup> But the majority opinion suggests that if the state had "a prima facie case of a constitutional or statutory violation" in the Richmond construction industry, it *could* adopt a race-based remedy, at least to avoid state entanglement in private-sector discrimination through its award of contracts to discriminating agents.<sup>249</sup>

Indeed, six members of the *Croson* Court were willing to go much further in upholding the power of government bodies to take race-based action against private-sector discrimination. Marshall, Brennan and Blackmun held that states have a sweeping power to

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<sup>245</sup> City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505-06 (1989).

<sup>246</sup> Id.

<sup>247</sup> Id. at 498.

<sup>248</sup> Id. ("Relief for such an ill-defined wrong could extend until the percentage of public contracts awarded to [Minority Business Enterprises] in Richmond mirrored the percentage of minorities in the population as a whole.")

<sup>249</sup> Id. at 500, 503-04.

redress private-sector discrimination and its effects.<sup>250</sup> O'Connor, Rehnquist, and White limited this authority to remedying private-sector discrimination occurring within the jurisdiction of the state body. They specifically rejected the view that *Wygant* limits states' compelling interests to remedying only their own discrimination.<sup>251</sup> They invoked the states' interest in avoiding "passive participation" in private-sector discrimination as a mere illustration of the more general interest in "eradicat[ing] the effects of private discrimination within its own legislative jurisdiction."<sup>252</sup>

### 3. *Do States Have a Duty to Perpetuate Injustice?*

The above Section shows that Supreme Court precedent does not support a ban on state uses of racial means to remedy private-sector discrimination. Lower courts have offered conflicting judgments on this point. However, the courts that have upheld such a ban have invariably relied on the language in *Wygant* without noticing that *Wygant* never considered the question of whether states may use racial means to remedy *identified* private-sector discrimination.<sup>253</sup> These lower court rulings rely on a misreading of what they take to be controlling Supreme Court precedent and ignore *Croson's* correction of this error. There is no sound legal argument for the claim that state bodies may adopt race-based remedies only for their own discrimination and not for the discrimination of private parties or other government units.

Might there be a moral argument for this claim, however? Although the Constitution does not require states always to act justly, we should at least try to interpret constitutional requirements so that they neither prohibit the state from doing what justice demands, nor require the state to perpetuate injustice. Let us test the proposed constraints on the state use of racial means to remedy discrimination against this desideratum.

The *Hopwood* court insisted that state bodies leave intact the effects of discrimination caused by other agents, because to change these effects amounts to "racial social engineering."<sup>254</sup> This echoes the white supremacist myth that racial segregation is a "natural" out-

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<sup>250</sup> *Id.* at 536-39 (Marshall, J., dissenting).

<sup>251</sup> *Id.* at 491-92.

<sup>252</sup> *Id.*

<sup>253</sup> See Ian Ayers & Fredrick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 *Colum. L. Rev.* 1577, 1582 n.17 (1998) (surveying twelve cases in which courts relied on *Wygant* to reject state race-based remedies for private discrimination and seven cases in which courts recognized that *Croson* permits states to use racial classifications to remedy private discrimination).

<sup>254</sup> *Hopwood v. Texas*, 78 F.3d 932, 951 (5th Cir. 1996).

come of benign private sentiments rather than itself a product of state "racial social engineering."<sup>255</sup> Of course, integrative affirmative action is also a form of social engineering. Its goal is to create a civil society that actually includes all its citizens. No state lacking such a civil society can claim to be fully democratic. If democracy is a compelling moral goal, then so is integration.

Justice Scalia, of all current Supreme Court Justices, represents the view of the *Hopwood* court most closely: "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."<sup>256</sup> The core case of such remedial action is the state assignment of students to public schools according to race, as a necessary means to undo its operation of a segregated school system. Justice Scalia acknowledges that the state is permitted, even required, to use racial means in such circumstances.<sup>257</sup> Nevertheless, he insists that "[w]hile 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."<sup>258</sup> If a state may use racial means only to remedy its own constitutional violations, it may not use racial means to undo the discrimination of other government units or private actors.

Consider first the limitation of race-based remedies to "the governmental unit involved."<sup>259</sup> What if the government that practices racial discrimination produces injuries that it is not in a position to remedy, but that other governmental bodies can remedy? If a state-run elementary school allocates educational opportunities on a discriminatory basis, it is in no position to remedy the deficit once its victims are of middle-school age or beyond. To forbid the middle schools, high schools, or colleges from remedying the deficit is to require them to perpetuate the effects of the elementary school's discrimination. This is clearly unjust.

Against this, it might be argued that there will always be race-neutral remedies available—for example, providing remedial education for all students, regardless of race, who score poorly on achievement tests. But it might not be so easy to devise race-neutral means to

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<sup>255</sup> See C. v.ann Woodward, *The Strange Career of Jim Crow* (1955) (classic history describing and demolishing the myth of segregation as natural).

<sup>256</sup> *Croson*, 488 U.S. at 524 (Scalia, J., concurring).

<sup>257</sup> See *id.* at 525.

<sup>258</sup> *Id.*

<sup>259</sup> *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986).

remedy racial discrimination. Suppose the elementary school depressed black and Latino children's achievement by promulgating demeaning racist stereotypes, which the children internalized. To undo the effects of such pernicious discrimination may require special kinds of instruction directed specifically at black and Latino students. Race-neutral remedial instruction might not address the specific race-based obstacles they face in succeeding at school.

This example is not hypothetical. In *Hunter v. Regents of the University of California*, the Ninth Circuit upheld, under strict scrutiny, an admissions program that gave a preference to minority students in an elementary school run by the UCLA Graduate School of Education and Information Studies.<sup>260</sup> The school was set up as a site for research and to train teachers to cope with the educational needs of California's diverse student population. Students were therefore selected on the basis of their suitability for research interests.<sup>261</sup> UCLA submitted extensive evidence that a racially and ethnically diverse student population was necessary to advance its goal because such diversity was needed to capture educationally relevant differences in students' cultures, language proficiency, and learning styles, as well as important data on intergroup interaction and conflict.<sup>262</sup> Some of these educationally relevant factors, such as problems of intergroup conflict and linguistic differences of racially segregated blacks,<sup>263</sup> can be traced to the history of state-sponsored and private racial discrimination.

The school was therefore attempting to remedy the effects of racial discrimination practiced by other government units and by private actors, as well as attempting to devise effective teaching techniques adapted to racial and ethnic differences of nondiscriminatory origins, such as the linguistic backgrounds of recent immigrants.<sup>264</sup> The state is not required to allow the pernicious effects of racial discrimination to stand just because the most effective remedies require the implementation of racial means by other government units. To hold otherwise is like holding that a victim of a knife wound may not receive surgical treatment, except at the hands of the assailant.

Consider next Scalia's claim that the state's "remedial power extends no further than the scope of the continuing constitutional viola-

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<sup>260</sup> 190 F.3d 1061, 1062-63 (9th Cir. 1999), cert. denied, 531 U.S. 877 (2000).

<sup>261</sup> See *id.* at 1066-67.

<sup>262</sup> *Id.* at 1064.

<sup>263</sup> See Massey & Denton, *supra* note 8, at 163 ("Because of segregation, the languages spoken by blacks and whites are moving toward mutual unintelligibility.").

<sup>264</sup> See *Hunter*, 190 F.3d at 1064.

tion.”<sup>265</sup> It is a longstanding rule in school desegregation cases that federal courts may not order remedies that exceed the scope of the state’s constitutional violation.<sup>266</sup> Scalia seems to think it follows that legislatures and administrative bodies have no greater power to remedy their own discrimination or its effects than the federal courts have to order them to do this. This thought fails to appreciate not only the separation of powers in general, but the specific way that this separation is embodied in *Washington v. Davis*.<sup>267</sup> According to *Davis*, a policy’s differential impact on a racial group, no matter how great or inequitable, does not violate equal protection so long as the difference is not intended.<sup>268</sup> In essence, the Court holds that states may not act with hostility or contempt toward any racial group, but have *carte blanche* to act with indifference to their interests. This is a harsh doctrine. It permits gross injustices to be perpetrated by a state indifferent to the impact of its actions on disadvantaged groups. The Court refrained from applying the “more probing” Title VII antidiscrimination standard, which prohibits unjustified racially differential impacts, out of deference to the independent powers and judgment of legislative and executive bodies.<sup>269</sup>

Suppose various governmental units act with indifference toward disadvantaged racial groups in enacting race-neutral policies with grossly differential racial impact. They might, for example, enact laws that promote the fragmentation of local governments, finance public schools primarily out of local property taxes, and enact zoning regulations that effectively prevent blacks with modest assets from obtaining housing within the limits of cities that are rich in taxable property. This combination of policies has, in fact, consigned blacks to inferior schools by perpetuating and magnifying the effects of prior state-sponsored and private housing segregation.<sup>270</sup>

*Davis* grants states the discretion to enact policies that magnify the differential racial impact of prior racist state action by other government units, so long as it does not intend those effects.<sup>271</sup> Since this

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<sup>265</sup> *City of Richmond v. J.A. Croson*, 488 U.S. 469, 525 (1989) (Scalia, J., concurring).

<sup>266</sup> See *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977) (“[T]he nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation.”); see also *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 415 (1977) (finding desegregation remedy excessive in light of, or unjustified in absence of, constitutional violation); *Austin Indep. Sch. Dist. v. United States*, 429 U.S. 990, 991-92 (1976) (Powell, J., concurring) (same); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (“[J]udicial powers [of remedy] may be exercised only on the basis of a constitutional violation.”).

<sup>267</sup> 426 U.S. 229 (1976).

<sup>268</sup> *Id.* at 239.

<sup>269</sup> See *id.* at 246-48.

<sup>270</sup> See *supra* notes 20-24 and accompanying text.

<sup>271</sup> See *Davis*, 426 U.S. at 239.

is no constitutional violation, Scalia would hold that states have no power to remedy it via race-conscious means. But if granting legislative and administrative discretion was the rationale for giving states such leeway to unintentionally magnify the damaging effects of prior state-sponsored racism, it would be contradictory and unjust to invoke the same constitutional standard to limit states' discretion to remedy their own differential impact, or the differential impact created by the actions of other government units. Scalia's position effectively requires the state, once it has undertaken action indifferent to the interests of a racial group, to perpetuate and magnify the effects of its indifference—as well as the effects of other state units' active racial discrimination—if it cannot feasibly implement, at manageable cost, race-neutral means to counter these effects.

Supreme Court precedent explicitly rejects Scalia's position by recognizing the difference between the narrow remedial power of federal courts—which is limited to the scope of a constitutional violation—and the broader remedial power of legislative and administrative bodies. In *Swann*, Justice Burger, writing for a unanimous Court, argued:

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.<sup>272</sup>

The same distinction between the limited remedial powers of courts and the broader remedial powers of other state bodies figures in *Keyes v. School District No. 1*.<sup>273</sup>

Consider, finally, the supposed prohibition on race-based state action to remedy private discrimination. After actively promoting private racial hostility and contempt for 200 years, it is far too late for the state to disavow responsibility for its effects. I am not speaking simply of slavery and Jim Crow, but of the continuing nationwide legacies of

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<sup>272</sup> *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

<sup>273</sup> 413 U.S. 189, 242 (1973) (Powell, J., concurring) (“Nothing in this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience.”)

white supremacy: widespread racist stereotypes and resentments,<sup>274</sup> and profound racial segregation in housing<sup>275</sup> and schools.<sup>276</sup>

If residential segregation had been maintained through the erection of brick walls built jointly by state and private actors, the principle that the state could remedy only its own discrimination would amount to the view that the state is permitted only to remove the bricks it placed in the wall, leaving intact the bricks placed there by private parties at its instigation. Defenders of the principle would object that brick removal can be effected by race-neutral means. This misses the point that if the state has instigated or cooperated with private racial discrimination, it has just as compelling an interest in remedying it as in remedying its own discrimination.

This point has not been lost on the Supreme Court. In *Swann*, the Court observed that schools often maintain racial segregation indirectly by encouraging segregated residential patterns through the closing of integrated schools at the boundaries between black and white neighborhoods and by opening schools in the middle of neighborhoods that developers market exclusively to one race.<sup>277</sup> It ruled that school districts that have practiced de jure segregation may be obligated to effect a desegregation remedy that encompasses the effects of race-conscious private housing choices encouraged by the school district's actions.<sup>278</sup>

In *Keyes*, the Court extended this obligation to cover a whole school district, even though it was shown to have practiced discrimination in only a portion of its schools.<sup>279</sup> As Powell observed, both *Swann* and *Keyes* mandated race-conscious desegregation remedies that "went well beyond the mere remedying of that portion of school segregation for which former state segregation laws were ever responsible."<sup>280</sup> The remedies encompassed school segregation caused by race-conscious private residential choices that had been encouraged by the state.<sup>281</sup>

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<sup>274</sup> See supra note 44-48 and accompanying text.

<sup>275</sup> See Massey & Denton, supra note 8, at 17-57 (telling of systemic collaboration between white property owners, realtors, and state that resulted in relatively recent phenomenon of housing segregation); see also supra notes 20-24 and accompanying text.

<sup>276</sup> See Meier, Stewart & England, supra note 235, at 40-58 (reciting history of segregated education).

<sup>277</sup> *Swann*, 402 U.S. at 20-21.

<sup>278</sup> *Id.* at 21.

<sup>279</sup> *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 200-05 (1973).

<sup>280</sup> *Id.* at 225 (Powell, J., concurring).

<sup>281</sup> *Id.* Powell made this observation in the context of arguing that the Court's distinction between de jure and de facto segregation—i.e., between segregation caused by public and private agents—is of no constitutional significance. *Id.* at 224-32.

It might be objected that the Court has never approved a state use of racial classifications to remedy private discrimination in the absence of some evidence of active or passive state participation in that discrimination. To this there are three replies. First, the limits of this supposed requirement have not been tested and may be extremely attenuated. Why shouldn't the state's systematic failure to enforce antidiscrimination law be enough to justify remedial action by another state body? Why shouldn't it count as "passive participation" to perpetuate and magnify the effects of private discrimination? Second, the need for affirmative action arises only when a group suffers *systematic* disadvantage—patterns of cumulative and reinforcing discrimination and segregation from multiple sources. In the United States, such patterns have always arisen with at least some state involvement.

Finally, the Court needs to confront the question of what point such a requirement could have.<sup>282</sup> An interest in disentangling the effects of one agent's unjust actions from another's arises only in involuntary remedial contexts, where courts are imposing liability on recalcitrant wrongdoers. The extent of an agent's own wrongdoing then sets a ceiling on how far they can be *forced* to undertake remedial action. But there is no moral or legal interest in turning this into a ceiling on *voluntary* remedial action. The only interest at stake is to ensure that what the state is passing off as remedial action for private wrongs is not just a pretext for invidious discrimination. Strict scrutiny, on the skeptical interpretation, is sufficient to ensure this without imposing a gratuitous limit on the extent of permissible state remedial action, or the means it uses to this end.

### III

#### THE MORAL INCOHERENCE OF THE COLORBLIND PRINCIPLE

I believe that people of good will who oppose affirmative action do so because they cannot believe that racial segregation and discrimination continue to be powerful, independent, entrenched, and enduring bases of systematic disadvantage in the United States, and because

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<sup>282</sup> It might be suggested that the point of the distinction is epistemological rather than moral: Only the agent who committed the wrong, or a state body officially authorized to investigate illegal acts, is in a position to identify the illegal discrimination that requires remediation. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 309 (1978) (arguing that public universities are not in position to make findings of discrimination by other agents); *Hopwood v. Texas*, 78 F.3d 933, 951 (5th Cir. 1996) (same). In the case of colleges and universities, however, the suggestion is particularly inapt since most of the knowledge we have about the shape, scope, and causes of the disadvantages faced by various racial groups has been gathered by researchers at the schools that practice affirmative action. For example, see the expert reports in *The Compelling Need for Diversity in Higher Education*, *supra* note 194.



they believe that the principle of colorblindness expresses a moral imperative. People of good will who resist affirmative action on the first ground have changed their minds once they have seriously examined the evidence.<sup>283</sup> What about the colorblind principle? I have argued that this principle does not express a constitutional imperative.<sup>284</sup>

But the Constitution does not encompass all morally relevant considerations, and thus, for all I have said so far, colorblindness could still be a moral imperative. I shall argue here that the key problem for the colorblind principle is that it must give an account of what makes the distribution of goods on a race-conscious basis wrong. No account, however, can show that such action is *always* objectionable.

Recall that the coherent objections to racial preferences can be divided into allegations of (a) invidious purposes, (b) invidious conceptions of racial groups (derogatory or offensive stereotypes), (c) violations of principles of distributive justice (unjust disparate racial impacts on the parties directly affected), and (d) negative global effects.<sup>285</sup> Constitutional considerations include (a), (b), and some aspects of (c). I argued above, against (a), that there are legitimate purposes for affirmative action programs. Deep down, even judicial opponents of affirmative action recognize this fact.<sup>286</sup> This is why they stress the supposed availability of race-neutral alternatives. If they really thought the aims of affirmative action policies were inherently invidious, they could hardly recommend any means, race-neutral or not, to these ends. I also argued, against (b), that integrative affirmative action does not involve invidious stereotypes or conceptions of

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<sup>283</sup> Compare, e.g., Nathan Glazer, *Affirmative Discrimination: Ethnic Inequality and Public Policy* 196-221 (1975) (arguing that affirmative action unnecessarily compromises colorblind principle because antidiscrimination laws and more racially tolerant attitudes will permit blacks to rapidly assume equality on pattern of white ethnic immigrants), with Nathan Glazer, *We Are All Multiculturalists Now* 151-61 (1997) (arguing that affirmative action is necessary because persistent segregation and discrimination continue to prevent blacks from realizing equal opportunity).

<sup>284</sup> See *supra* notes 143-62 and accompanying text.

<sup>285</sup> See *supra* Part II.A.

<sup>286</sup> See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520, 526 (1989) (Scalia, J., concurring) (acknowledging that "compensating for social disadvantages" is "benign" purpose, but stressing that states can pursue this legitimate aim through race-neutral means); *Wessmann v. Gittens*, 160 F.3d 790, 810 (1st Cir. 1998) (Boudin, J., concurring) (conceding that Boston Latin School's race-conscious admissions is "a thoughtful effort to assist minorities historically disadvantaged"); *Hopwood*, 78 F.3d at 934 (acknowledging that University of Texas acted "[w]ith the best of intentions" in employing race-conscious admissions). Even Justice Thomas acknowledges the legitimacy of special efforts to serve blacks as such. See *United States v. Fordice*, 505 U.S. 717, 748 (1992) (Thomas, J., concurring) (recognizing "'sound educational justification' for maintaining historically black colleges *as such*"). This implies the legitimacy of special efforts for blacks, since it is inconceivable that he would approve the continuation of historically white colleges "*as such*."

racial groups. Against (c), I argued that racial means to integration in education for equal opportunity and democratic purposes are both directly relevant to these goals and the most narrowly tailored means to them, and that the use of race in settings that call for integrative affirmative action does not violate meritocratic principles.

Thus, if the colorblind principle has any moral basis, it must be on the basis of extraconstitutional considerations. I can think of only two. First, there is a residual distributive justice claim: that racial preferences as such impose unjust burdens on innocent parties. Second, racial preferences may have bad global effects in heightening racial resentment, divisiveness, and stereotyping. Let us consider whether these thoughts can ground the colorblind principle.

*Impositions of unjust burdens on innocent parties.* The allocation of benefits by race is thought unjust because the whites and Asian Americans who bear the burdens of affirmative action are innocent of the wrong being remedied. Against this, there is no need to try to prove that these parties unjustly benefit from the disadvantages imposed on other racial groups. Both claims are irrelevant to the justice of imposing burdens for the sake of correcting systemic social injustices. As long as segregation and discrimination persist, there will be innocent victims suffering unjust burdens. The only question is whether these burdens should be borne exclusively by disadvantaged racial groups, or shared by all Americans. There can be no general objection that sharing the costs of widespread injustice is unjust. One of the main points of government is to share the costs of injustice by sharing the costs of protection from and punishment of crime. That one has never committed nor benefited from any crime constitutes no claim against paying the taxes required to protect others against criminal violations, fund crime-prevention programs, or even to help crime victims overcome the effects of crime.

*Unintended global harms.* The allocation of benefits by race is said to have unintended evil effects: It is divisive and stigmatizing.<sup>287</sup> These claims on behalf of the colorblind principle are plausible. But they do not have the implications advocates of the colorblind principle suppose. Consider first divisiveness. Let us grant that affirmative action is divisive. But historically, all efforts to gain justice for excluded racial groups have been divisive. The struggle against slavery required a civil war, the most divisive event in U.S. history. *Brown v. Board of Education* was divisive. The Civil Rights Act of 1964 was divisive.

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<sup>287</sup> See Paul M. Sniderman and Thomas Piazza, *The Scar of Race* 109 (1993) (arguing that affirmative action has led some whites to dislike blacks); Shelby Steele, *The Content of Our Character: A New Vision of Race in America* 120-21 (1990) (arguing that affirmative action causes stigma).

The Voting Rights Act was divisive. The mere fact that efforts to undo injustice arouse hostility toward the victims of that injustice cannot justify giving up on the attempt. In any event, the divisive effects of undoing the injustice must be weighed against the divisive effects of leaving it intact.<sup>288</sup> Racial segregation is divisive. Although racial integration often triggers racial hostility at first, this effect tends to decline as racial groups learn to live, learn, and work together.<sup>289</sup>

Affirmative action is also thought to be stigmatizing because many view it as compensating for innate deficiencies in the abilities or characters of its beneficiaries.<sup>290</sup> If affirmative action does reinforce contempt for disadvantaged racial groups by this route, this is true only given a background disposition of people to attribute their relatively poor achievement to their internal traits rather than their circumstantial disadvantages. Given this disposition, the abolition of racial preferences would not reduce prejudice, but merely shift its focus. Instead of targeting the beneficiaries of affirmative action for contempt, ill-disposed people will infer from the general underrepresentation of disadvantaged racial groups in higher positions that members of these groups are generally incapable of functioning successfully in those positions. This is also stigmatizing.

Given ill will, affirmative action will be divisive and stigmatizing. But given ill will, racial stigma and divisiveness will exist in any event. The only question, then, is whether to pander to this ill will by letting the legacies of white supremacy continue to exclude blacks, Latinos, and Native Americans from mainstream opportunities, and continue to rend civil society, or whether to take steps to undo those legacies. It might be objected that the divisive and stigmatizing responses to affirmative action are motivated not by antipathy toward disadvantaged racial groups but by simple ignorance of the capabilities and disadvantages of group members. But if people are really willing to learn how to cooperate on equal terms with members of these groups, and to let them develop and demonstrate their capacities, then affirmative action gives them the chance. With time, it will then undo its own unintended effects.

Our search for some reason to think that an injury or wrong is *always* inflicted whenever benefits are allocated by race has failed. Without some reason for thinking that the allocation of benefits by

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<sup>288</sup> Rubinfeld, *supra* note 137, at 446-47 (arguing that relevant question is "whether affirmative action fosters *more* racial hostility and stereotyping than would exist without it").

<sup>289</sup> See Rupert Brown, *Prejudice: Its Social Psychology* 236-69 (1995) (surveying empirical literature on effects of interracial contact in reducing prejudice).

<sup>290</sup> See Steele, *supra* note 287, at 116-17.

race *always* inflicts an injury or injustice, the colorblind principle is left without any rationale. It fails to tell us why racial classification is wrong. What, then, explains the seemingly powerful appeal of the colorblind principle? Leaving aside invidious motives for embracing it, I have two explanations. The first is that it represents a crude empirical generalization from a biased sample of cases of racial classification. Advocates leap from consideration of the uses of race to ground slavery and Jim Crow to the conclusion that all uses of race are invidious. The second explanation is that the colorblind principle reflects a confusion of ideals with causes. The ideal of a colorblind society, in which one's ancestry or skin color has no causal impact on one's life chances, is an attractive one. But the thought that we can achieve this by ending the *conscious* use of race is naïve. One may as well suppose that one can stop looking out of one's left eye by refusing consciously to do so.

American culture is saturated with racial imagery and stereotypes. People internalize these stereotypes and act accordingly, out of unconscious habit if not conscious antipathy.<sup>291</sup> Invidious racial stereotypes will be widespread as long as segregation and unconscious stereotype-based discrimination perpetuates the apparent evidential basis for them, which is the noticeable underrepresentation of blacks in mainstream institutions, especially in higher positions.<sup>292</sup> Prohibiting race-conscious action to counteract unconscious stereotypes simply gives free rein for the latter to operate. There is no contradiction, as Justice Scalia seems to think,<sup>293</sup> in using race-conscious means to eradicate the causes of race-based disadvantages. Surgery is often needed to repair knife wounds.

### CONCLUSION

Current affirmative action debates have lost sight of the ideal of integration as a compelling moral and political goal. Unless disadvantaged racial groups are integrated into mainstream social institutions, they will continue to suffer from segregation and discrimination. But the loss is not only theirs. It is a loss suffered by the American public

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<sup>291</sup> See Krieger, *supra* note 121, at 1199-1200 (discussing how unconscious stereotypes lead to discrimination); Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 *Psychol. Rev.* 4, 19 (1995), (offering theoretical support for affirmative action measures to counteract discriminatory effects of unconscious stereotyping).

<sup>292</sup> Glenn C. Loury, *The Anatomy of Racial Inequality* 23-29 (2002).

<sup>293</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520-21 (1989) (Scalia, J., concurring) (claiming that tendency to engage in racial classification aggravates racial discrimination and therefore cannot be undone by further racial classifications).

at large in its failure fully to realize civil society—extensive social spaces in which citizens from all origins exchange ideas and cooperate on terms of equality—which is the indispensable social condition of democracy itself. It is high time that institutions of higher education—the most ardent practitioners of integration today—forthrightly defend this ideal in its own right, and that the Supreme Court recognize integration as a compelling interest legitimately addressed through race-conscious means.