The Constitutional Implications of Race-Neutral Affirmative Action

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INTRODUCTION

Efforts by public universities across the country to create racial diversity in their student populations have been placed in serious jeopardy by recent federal court decisions invalidating the use of race in admissions and financial aid. In addition to the cases decided by the Fifth Circuit, *Hopwood v. Texas*,¹ and the Fourth Circuit, *Podberesky v. Kirwan*,² federal lawsuits are currently pending against the Universities of Michigan and Washington³ challenging their race-based admission programs. Nor is pressure to abandon affirmative action limited to the federal courts; popular initiatives to amend state law have succeeded in banning race-based affirmative action in California and Washington, and similar movements are underway in other states.⁴ The question of whether to abolish affirmative action even reached a full vote in the United States House of Representatives, although the measure failed.⁵

Seeing the writing on the wall, but unwilling to return to student bodies lacking appreciable minority membership, many schools of higher education are resorting to “alternative action,”⁶ that is, policies designed to create racial diversity without relying on racial preferences. Schools in California, for example, are experimenting with “class-based” affirmative action in which weight is given in the admission process to the socioeconomic or educational background of applicants and their families. In addition, some schools consider “diversity” or “hardship” essays in which applicants describe challenging life experiences such as poverty, English as a second language, or growing up with a parent in a gang or in prison.⁷ In Texas, recent legislation enacted in response

¹. 78 F.3d 932 (5th Cir. 1996).
². 38 F.3d 147 (4th Cir. 1994).
⁴. See Adam Cohen, *When the Field Is Level; In California, Minority Students Are “Cascading” Out of Top Schools and into the Second Tier. Is This Good for Them?*, TIME, July 5, 1999, at 30 (noting that “[o]ther states are considering Prop. 209-style initiatives, among them Florida, where a drive is on to put an anti-affirmative action referendum on the 2000 ballot”); *Initiative 200: Another Blow to Affirmative Action*, STAR TRIBUNE (Minneapolis, MN), Nov. 7, 1998, at A18 (stating that “[p]roposals for additional ‘Spawn of 209’ legislation are under consideration in several states”).
⁵. The House of Representatives considered and defeated, by a 249-171 vote, a bill that would have prohibited federal aid to any public colleges or universities that use race, ethnicity or sex in the admissions process. See Editorial, *Why Colleges Need Affirmative Action*, GRAND RAPIDS PRESS, May 21, 1998, at A15. As originally drafted, the ban on affirmative action would have applied to private schools as well. See id.
⁶. See Michele Norris & Peter Jennings, *Colleges Seek Alternative to Affirmative Action Keeping Minority Enrollment Numbers Up*, WORLD NEWS TONIGHT (ABC television broadcast, May 20, 1998) (describing how school administrators in California and Texas, “[w]orried that higher education could slip back toward segregation, . . . are trying to find new ways to boost minority enrollment—not affirmative action, alternative action”).
⁷. See Michelle Locke, *In Post-Affirmative-Action Era, Essays Allow Students to Get ‘A’ for Adversity*, SEATTLE TIMES, May 24, 1998, at A6 (describing recent University of California “post-affirmative-action” admissions program by which applicants write “hardship essays” in which they explain difficult circumstances they have faced “such as poverty, having a parent in prison, speaking...
to the *Hopwood* decision entitles the top ten percent of the graduating class of every high school in the state to admission to the University of Texas or other state university.\(^8\) The University of California at Los Angeles has also taken advantage of residential location as a means of reaching minority students by targeting financial aid programs toward underprivileged neighborhoods.\(^9\) In an attempt to address the root causes of minority underrepresentation in higher education, other reformers advocate earlier intervention in the educational process by improving the quality of elementary and secondary schools, where they believe many minority children receive an inadequate education.\(^10\)

A serious problem facing these ostensibly race-neutral efforts to increase minority representation in higher education, a problem largely unnoticed even by opponents of existing affirmative action programs, is that such efforts are themselves race-conscious state action that may violate the Equal Protection Clause.\(^11\) Briefly, the argument proceeds as follows: strict scrutiny under the Equal Protection Clause is triggered by a law motivated by a racially discriminatory purpose, regardless of whether the law employs an express racial classification or is race-neutral on its face. As the Supreme Court's affirmative action cases establish, the purpose to benefit racial minorities is a discriminatory purpose. Thus, when a state school intentionally seeks to admit minority students through the use of race-neutral criteria, such as economic disadvantage,
it has acted with a discriminatory purpose. Such efforts, therefore, should trigger the same strict, and usually fatal, scrutiny applicable to policies that directly rely on race as a criterion for admission.

The implications of the Court's affirmative action cases, moreover, go well beyond the particular context of higher education. Proposals to improve the quality of all elementary and secondary schools (and not just predominantly minority schools), if motivated in any part by a desire to improve the dismal educational achievement of minority schoolchildren, represent race-conscious state action that may be invalid. Indeed, taken to its logical end, the Equal Protection Clause presumptively forbids all governmental efforts to address the stark social and economic disparities that persist between racial groups, even through race-neutral means that would benefit disadvantaged whites as well. Accordingly, attempts to address the dearth of minority students in higher education, or any other disadvantages disproportionately suffered by racial minorities, however well-intentioned, may be unconstitutional. The Court's reaction to affirmative action as essentially reverse discrimination thus may require the abandonment of all efforts in whatever form to remedy the effects of historical discrimination.

Curiously, both sides of the affirmative action debate in the political arena have generally failed to recognize the constitutional difficulties inherent in race-neutral affirmative action and, moreover, so have the courts. Thus, the Supreme Court in City of Richmond v. J.A. Croson Co., the first case in which a majority of the Court held that strict scrutiny applies to all racial classifications by state or local governments regardless of the race burdened by the classification, suggested in dicta that states could increase minority participation in the construction industry through race-neutral remedies without meeting the requirements of strict scrutiny. Even Justice Scalia, who concurred in the judgment in order to emphasize his stringent opposition to any racial classifications even for remedial purposes, suggested that states could remedy the underrepresentation of racial minorities by addressing the disadvantages, defined in a race-neutral fashion, that racial minorities disproportionately face. Similarly, federal Courts of Appeals for the Fourth and District of Columbia Circuits, in cases striking down race-based affirmative action, tactically assumed or explicitly suggested that the underrepresentation of racial minorities could be addressed through race-neutral means.

This Article explores the implications of the Court's decision to apply strict

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13. See id. at 509-10.
14. See id. at 528 (Scalia, J., concurring in the judgment).
15. See Podberesky v. Kirwan, 38 F.3d 147, 158 (4th Cir. 1994).
16. See Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 351-52 (D.C. Cir. 1998) (invalidating FCC policy that exerted pressure on broadcasters to hire racial minorities and suggesting that the FCC could mandate "racially neutral" recruiting practices in order to enhance racial diversity).
17. See infra notes 78-80 and accompanying text.
scrutiny to “benign” racial classifications, those that benefit racial minorities, for any governmental efforts to ameliorate the conditions disproportionately experienced by racial minorities. More specifically, this Article will analyze to what extent the government may engage in race-neutral affirmative action, that is, the pursuit of affirmative action objectives, such as remedying past discrimination or promoting racial diversity, through policies that rely on race-neutral means, such as need-based preferences or services.

Part I explains the potential for the Court's affirmative action cases to render invalid any governmental attempts to redress disadvantages disproportionately suffered by racial minorities, regardless of the means used. Section I.A examines the demands of strict scrutiny as applied to benign racial classifications or laws which are otherwise race-operative, concluding that the doctrine as developing would invalidate any use of such classifications in higher education and elsewhere. Section I.B considers the emerging trend, especially among schools of higher education, toward the use of policies that employ race-neutral classifications to benefit racial minorities. This section suggests that under the Court's decision to subject benign racial classifications to strict scrutiny, combined with the principle that legislative motivation is what counts for equal

18. For convenience, the shorthand term "racial classification" denotes a law or governmental policy that employs an express racial classification, as opposed to a law which is race-neutral on its face but may have been motivated by a racially discriminatory purpose. While this terminology is generally consistent with that of the Court's, see, e.g., Washington v. Seattle Sch. Dist. Number 1, 458 U.S. 457, 484-85 (1982) (explaining that a challenge to "facially neutral legislation" requires an inquiry into intent whereas "[a] racial classification, regardless of purported motivation, is presumptively invalid" (quoting Personnel Adm'r v. Feeney, 442 U.S. 256, 272 (1979))), the Court has on occasion referred to a race-neutral law motivated by a discriminatory purpose as an implicit racial classification, and has said that such laws trigger strict scrutiny just as express racial classifications trigger strict scrutiny. Since a principal objective of this project is to distinguish on doctrinal grounds between express racial classifications and laws that are race-neutral on their face, it is imperative that this Article does not misleadingly imply a distinction based on the choice of terms. The author has endeavored to avoid this risk and believes further that, on balance, the convenience and clarity of explication afforded by the shorthand justifies its use. See also infra note 19 for definitions of "race-operative" and "race-neutral" classifications.

19. "Race-operative" laws mean laws or governmental policies whose administration involves treating individuals on the basis of their race. These include express racial classifications and also laws which, though race-neutral on their face, are administered in a racially discriminatory manner. Examples of the latter include discretionary decisionmaking pursuant to race-neutral policies exercised in a racially discriminatory manner, such as racially motivated peremptory challenges, police arrests, and university admission decisions made without explicit authorization to consider race. "Race-based" laws or "racial preferences" are also race-operative. Unless the context clearly indicates otherwise, "race-neutral" classifications, laws, means, or policies refer to laws or policies that rely completely on race-neutral criteria in both their terms and operation but which may have been motivated by a discriminatory purpose in their formulation or adoption. This Article assumes there is no meaningful distinction between race-operative laws that employ express racial classifications and those that are race-neutral in content but are administered on a racially discriminatory basis. It does distinguish, however, between racial classifications and other race-operative laws, on the one hand, and race-neutral classifications (operated on a race-neutral basis) potentially motivated in their formulation or adoption by a discriminatory purpose, on the other.

20. See supra note 19 for a definition of "race-neutral classifications."
protection purposes regardless of a law's explicit terms, race-neutral affirmative action may be just as constitutionally vulnerable as race-operative programs. As such, the Court's treatment of affirmative action may have far-reaching effects for government-sponsored efforts to remedy the condition of racial minorities. It may invalidate a wide range of governmental programs, including public school improvement, job training, health education, urban development, and other anti-poverty and equal opportunity programs to the extent they have been motivated in any part by a concern for racial minorities. This Part closes by noting the apparent ambivalence on the part of political conservatives and, more intriguingly, courts that have invalidated racial preferences, about the logical implications of their colorblind position. While purporting to believe that helping racial minorities is morally and legally equivalent to discriminating against them, these actors generally have accepted and even endorsed the trend toward race-neutral affirmative action. The challenge suggested by this ambivalence is how such programs could be upheld in a judicial environment increasingly hostile to affirmative action.

Parts II and III take up this challenge by offering doctrinal defenses of race-neutral affirmative action. Despite the surface plausibility of arguments against all race-conscious remedial action, including by race-neutral means, the doctrinal landscape is considerably more complicated. Existing doctrine does not in fact foreclose race-conscious governmental decisionmaking nor even subject all such policies to strict scrutiny. As Part II argues, race-neutral affirmative action can satisfy strict scrutiny even when the ultimate objective is to remedy societal discrimination, an objective the Court has held insufficient to justify racial classifications. The Court's reluctance to endorse remedying societal discrimination as a "compelling" interest is not due to a lack of importance of this interest, but rather its inadequacy to constrain the scope of a race-based remedy. If race-neutral means are used instead of race-operative classifications, the Court's concerns over remedying societal discrimination largely disappear. As such, given the functions of strict scrutiny as articulated by the Court, remedying societal discrimination should be sufficiently compelling to satisfy such review when the means used to accomplish this purpose are race-neutral in their operation.

Part III offers an alternative theory for upholding race-neutral affirmative action without triggering strict scrutiny. Strict scrutiny can be avoided if, and only if, such programs are adopted without a racially discriminatory purpose. Rather than trying to benefit racial minorities, this Part advocates the pursuit of race-neutral affirmative action to benefit nonracial groups, such as victims of societal racial discrimination and members of ethnic cultures. As Section III.A demonstrates, such groups are not "racial" for equal protection purposes, and governmental policies designed to benefit them do not, therefore, trigger strict scrutiny. Section III.B focuses on some specific race-neutral affirmative action programs recently adopted or proposed by public universities. Despite this Article's defense of race-neutral affirmative action generally, this section acknowl-
edges serious doubts about the constitutionality of some of these programs given the circumstances in which they were developed. The section suggests, however, that universities that have adopted programs for impermissible reasons ought to be permitted to re-adopt such programs for the kinds of legitimate, nonsuspect purposes identified in this Part.

One final note. Rather than repudiating the Court’s doctrine, as affirmative action proponents often do, the arguments developed herein are premised on existing doctrine or at least a good faith clarification thereof. This should not imply an endorsement of the Court’s treatment of affirmative action. Nor is higher education necessarily the context in which race-neutral affirmative action is most urgently needed or would be most effective. An objective of this Article is to develop arguments for upholding race-neutral affirmative action that will have a realistic chance of success in the courts, and higher education is a context in which the legality of such efforts is likely to be litigated with precedential consequences for affirmative action in other contexts. The Court and our society are at a crossroads. Racial preferences are, for all practical purposes, no longer a permissible means for remedying historical discrimination or promoting multicultural diversity. The Court has not as yet foreclosed remedial measures that operate without regard to race. We must develop arguments that can persuade the Court to uphold such efforts. Only arguments that take existing doctrine seriously can provide public universities and other state actors with a good-faith basis for adopting race-neutral affirmative action policies and the courts with a judicially principled basis upon which to uphold them.

I. THE (UNSEEN) WRITING ON THE WALL: THE UNCONSTITUTIONALITY OF AFFIRMATIVE ACTION BY ANY MEANS?

In 1989, in City of Richmond v. J.A. Croson Co., a consensus was finally reached by a majority of the Court that state-sponsored benign racial classifica-

21. This Article recognizes that, as the pivotal vote in prior affirmative action cases, Justice O’Connor is a logical target of arguments defending affirmative action. See Akhil Reed Amar & Neal Kumar Katyal, Bakke’s Fate, 43 UCLA L. Rev. 1745, 1754 (1996) (emphasizing affirmative action opinions of Justice O’Connor, who “may well hold the fate of Bakke in her hands”); cf. Susan R. Estrich & Kathleen M. Sullivan, Abortion Politics: Writing for an Audience of One, 138 U. Pa. L. Rev. 119, 132 (1989) (discussing Justice O’Connor’s determinative position on the constitutional status of abortion rights). This Article shall attempt, however, to resist such strategic scholarship. Decisions representing a majority of the Justices are those of the Court. Moreover, the arguments developed below are consistent with the reasoning of a substantial majority of Justices currently on the Court. This Article shall therefore generally refer to the Court, and not Justice O’Connor, as the source of existing doctrine and as the object of its arguments. Concededly, on some issues over which the Justices have not reached clarity or consensus, a focus on opinions of Justice O’Connor may provide the most useful guidance in predicting the future direction of the Court. As a general matter, however, the author is reluctant, perhaps naively, to discuss constitutional law as if it were the province of an individual Justice.

tions are presumptively invalid and are subject to strict scrutiny.23 Although in the following year the Court held the federal government to a more lenient standard,24 it held in 1995, in _Adarand Constructors, Inc. v. Pena_,25 that federally enacted benign classifications are also subject to strict scrutiny. The principal significance of these decisions is the holding that benign racial classifications are as constitutionally troublesome or "suspect" as racial classifications that disadvantage racial minorities. By subjecting benign racial classifications to strict scrutiny, these decisions may have far-reaching implications for government-sponsored affirmative action. First, the nature of the strict scrutiny test articulated by the Court suggests that no affirmative action program employing a racial classification could withstand legal challenge. All such classifications thus may be doomed. Second, _Croson_ and _Adarand_ may spell the end to all government-sponsored efforts to remedy past discrimination or promote racial diversity, even when such efforts are pursued through race-neutral classifications. The Court's decisions in _Croson_ and _Adarand_ thus may forecast the abolition of affirmative action of any kind.

This Part highlights the potentially invalidating implications of _Croson_ and _Adarand_ for affirmative action in higher education and elsewhere, particularly with respect to the emerging trend toward using race-neutral means to accomplish affirmative action goals. Section A explores the requirements and implications of strict scrutiny for affirmative action programs that employ racial classifications. The section first examines the requirements of strict scrutiny as articulated by the Court in _Croson_26 and then considers its implications for benign racial classifications, particularly in the context of higher education. This section suggests that, under the demands of strict scrutiny, such classifications could not survive judicial review. Section B describes the trend among public universities toward using race-neutral means to pursue affirmative action goals and sets out the argument that such efforts may be subject to strict scrutiny and invalidated as a result. The section concludes by noting the puzzling endorsement of race-neutral affirmative action by the Court and other colorblind advocates.

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23. _See id._ at 493-99; _id._ at 520 (Scalia, J., concurring in the judgment). Under this most rigorous standard of judicial review, a racial classification will be upheld only if it was actually intended to further a "compelling" governmental interest and the use of the classification is "necessary" or "narrowly tailored" to the accomplishment of that interest.


26. The Court in _Adarand_ did not apply strict scrutiny, instead remanding the case for such analysis in the first instance by the district court. _See id._ at 237. The opinion therefore did not clarify the scope of strict scrutiny beyond the articulation of the test in _Croson_. The significance of _Adarand_ is in its holding that the federal government's authority to employ benign racial classifications is just as constrained as the states' authority. Whatever the demands of strict scrutiny require of state and local actors, _Adarand_ suggests that federally enacted racial classifications are subject to similar constraints.
A. IMPLICATIONS OF STRICT SCRUTINY FOR BENIGN RACIAL CLASSIFICATIONS: THE CASE OF AFFIRMATIVE ACTION IN HIGHER EDUCATION

An issue which remained unresolved after *Croson*[^27] and which *Adarand* did not address[^28] is exactly what strict scrutiny requires. The Court[^29] acknowledged as compelling the city’s interest in remedying effects of private discrimination in the local construction industry and of the city’s own discrimination, whether the city had direct or “passive” participation in private discrimination[^30]. Such discrimination must, however, be “identified” with sufficient particularity, which the city had failed to do[^31].

The Court rejected as insufficiently compelling the city’s interest in remedying the general effects of “societal discrimination,” that is, society-wide discrimination where specific instances or perpetrators cannot be identified, and in remedying similarly unidentified discrimination in the construction industry of the entire nation[^32]. Such objectives were too ill-defined and speculative to justify race-based relief, providing “no logical stopping point” or other guidance to the legislature regarding the appropriate scope of a race-based remedy[^33].

The Court did not squarely address whether racial diversity in the construction industry could be a compelling interest, but the opinion strongly intimated that only remedial objectives could justify a racial classification[^34].

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[^27]: 488 U.S. 469 (1989). At issue in *Croson* was a program by the City of Richmond, Virginia, that required prime contractors awarded city construction contracts to subcontract at least 30% of contract funds to minority-owned construction firms. See *id.* at 477.

[^28]: See *supra* note 26.

[^29]: The part of Justice O’Connor’s opinion applying strict scrutiny represents a majority of the Justices. See *Croson*, 488 U.S. at 493-99; *id.* at 520 (Scalia, J., concurring in the judgment).

[^30]: See *id.* at 500-03. What the Court means by “passive participation” is not entirely clear. At a minimum, the Court seems to mean the city’s support through public contracting funds of private companies that discriminate even if the city did not intend or was not aware of the discrimination. Thus, the city may be a passive participant in discrimination, which it has a compelling interest to remedy, even if the city itself did not violate the Equal Protection Clause by intentionally discriminating. Whether a state actor may be a passive participant in private discrimination without having financially supported the discriminator was not addressed. For an interesting discussion of possible interpretations of “passive participation,” see Ian Ayres & Fredrick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 COLUM. L. REV. 1577, 1586-87 (1998).

[^31]: To establish a compelling need for a race-based remedy, the Court explained, the city council must rely on more particularized evidence than congressional findings as to nationwide discrimination or the mere assertions by city councilmembers of discrimination in the local industry. The Court also rejected the city’s comparison of the percentage of residents in the Richmond area who are minority (50%) and the percentage of firms receiving city construction contracts that are minority-owned (0.67%) as a basis for inferring the existence of local discrimination, noting that the relevant comparison was between minority-owned firms receiving public contracts and those eligible to do so. It was unrealistic, the Court explained, to conclude that racial minorities would enter the construction industry in “lockstep” proportion to their percentage in the general population. See *Croson*, 488 U.S. at 507.

[^32]: *Id.* at 498-500.

[^33]: *Id.*

[^34]: *See id.* at 493 (“Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.”); see also *id.* at 511 (Stevens, J., concurring in part and concurring in the judgment) (disagreeing with “the premise that seems to underlie today’s decision, as well as the
The Court also criticized the means as not narrowly tailored to remedying discrimination in the Richmond construction industry. First, the thirty percent set-aside represented an unrealistically rigid racial quota, a disfavored means that failed to account properly for differences in qualifications between contract applicants or between those minority-owned firms that did and did not truly suffer from discrimination. The inadequacies in the “fit” between the racial quota and its purported remedial purpose were particularly obvious by the inclusion of preferences for racial minorities other than blacks, such as Eskimos and Aleuts, for which there was no evidence of local discrimination. The poor fit between purpose and means, the Court explained, undermined the credibility of the claimed remedial purpose. That is, to the extent the program failed to benefit only likely victims of discrimination, the Court could not be sure that the program was not based on stereotypical assumptions or, apparently more troubling to the Court, “simple racial politics.”

The demands of strict scrutiny as suggested by *Croson* are strict indeed. *Croson* potentially limits the list of compelling interests a state actor may pursue through racial classifications to the remedying of identified discrimination attributable to the state actor or to particular private actors. In terms of tailoring, not only are racial quotas virtually invalid per se, the Court also disfavors any reliance on race where race-neutral alternatives are available and particularly where individualized procedures enable the state actor to more effectively identify true victims of discrimination. In its most rigorous applica-

decision in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong”) (internal citations omitted).

35. The program required prime contractors on city construction projects to subcontract 30% of each contract to “Minority Business Enterprises,” defined as companies effectively owned or controlled by “[c]itizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.” *Croson*, 488 U.S. at 477-78. Noting the complete lack of evidence that the nonblack groups were victims of Richmond’s discrimination, the Court remarked that “[i]t may well be that Richmond has never had an Aleut or Eskimo citizen.” *Id.* at 506.

36. The Court noted: “The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city’s purpose was not in fact to remedy past discrimination.” *Id.* at 506.

37. In a half-hearted response to political process theorists’ defense of affirmative action, most notably that of Professor John Hart Ely, Justice O’Connor noted that a majority of the Richmond city council was black. See *id.* at 472. The comment seems half-hearted in that its passing nature following the lengthy defense of applying strict scrutiny to all racial classifications and the extent to which the comment reflects a highly superficial understanding of process theory suggests the Court was not relying on the racial composition of the city council in deciding to apply strict scrutiny. Nonetheless, the comment, along with other skeptical criticisms of the set-aside program, suggests that the plurality believed the affirmative action program was more a product of racial interest group politics rather than a meaningful effort to identify and remedy discrimination. For an account of what the Court may mean by “simple racial politics,” see *infra* Part I.A.1., and see also David A. Strauss, *Affirmative Action and the Public Interest*, 1995 Sup. Ct. Rev. 1, 25 (exploring Court’s apparent concern over racial interest group politics at the expense of the public interest).

38. The Court has, however, upheld racial quotas as a court-ordered remedy to racial discrimination where the discrimination had been flagrant and persistent. See, e.g., *United States v. Paradise*, 480 U.S. 149 (1987); *Local 28 of the Sheet Metal Workers’ Int’l Ass’n v. EEOC*, 478 U.S. 421 (1986).
tion, strict scrutiny would permit race-conscious state action only when the state actor has identified specific instances of discrimination by specific perpetrators, when the action benefits only actual victims of such discrimination, and when it does so only to the extent necessary to remedy the harm caused by such discrimination.

Proponents of benign racial classifications may gain some solace from the observation that much of Croson's discussion about strict scrutiny was _obiter dicta_. The shortcomings of the city council's findings of local discrimination and the obvious lack of fit between such findings and the large percentage set-aside for such a variety of racial groups leave uncertain how well an affirmative action plan might fare if based upon more particularized findings and more flexible and tailored means. Moreover, the Court in _Adarand_ did subsequently reassure that "we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" 39 Accordingly, whether any voluntary race-based affirmative action program could satisfy strict scrutiny remains unclear without further elaboration by the Court. In the meantime, the scope of strict scrutiny will depend on the application of _Croson_ and _Adarand_ by the lower courts.

Such developments have begun in the field of higher education, providing a useful context for observing the implications of strict scrutiny for racial preferences and, as explored in the next section, for race-neutral affirmative action. Public colleges and universities have been at the forefront of affirmative action efforts to increase and retain the participation of minority students in higher education since before, and in reliance on, _Regents of the University of California v. Bakke_. 40 Schools have relied on race in defining admissions criteria, awarding scholarships and other financial aid, recruiting applicants, operating summer training programs for minority high school and college students, providing academic assistance to enrolled minority students, creating minority student centers, hiring minority faculty, and devising race-related curricular offerings. The result has been that many schools of higher education have succeeded in creating student bodies with substantial minority representation, sometimes approaching the percentage of minorities in the general population. The question raised by _Croson_ and _Adarand_ is whether such programs can survive judicial review. Thus far, two federal circuit courts have addressed the scope of strict scrutiny in the context of higher education. These cases, _Podberesky v. Kirwan_ 41 and _Hopwood v. Texas_, 42 illustrate the potential for strict scrutiny to invalidate all racial classifications.

Perhaps the greatest difficulty for affirmative action, which _Podberesky_ and

40. 438 U.S. 265 (1978) (invalidating admission program based on racial quota but holding that race may be used as one of many factors in the admission process).
41. 38 F.3d 147 (4th Cir. 1994).
42. 78 F.3d 932 (5th Cir. 1996).
Hopwood demonstrate, is the Supreme Court’s rejection of “societal discrimination” as a justification for racial classifications. In Podberesky, which involved a University of Maryland scholarship for black applicants, the Fourth Circuit rejected as grounds for the program every condition the university claimed was an effect of its own past discrimination because the university could not completely rule out societal discrimination as a contributing factor. In Hopwood, the Fifth Circuit invalidated a race-based admission program by the University of Texas Law School. The court reasoned that the law school could not prove that the conditions it sought to ameliorate were caused exclusively by its own past discrimination and not by societal discrimination, discrimination by the state’s public education system as a whole, or even discrimination by the greater University outside the law school’s walls. The court in Hopwood

43. The scholarship program was voluntarily established by the University of Maryland at College Park. The district court granted summary judgment in the University’s favor holding that the scholarship was narrowly tailored to remedy the University’s own past discrimination. See Podberesky, 38 F.3d at 151-52.

44. The University had identified four such effects: (1) the University’s poor reputation within the black community; (2) the underrepresentation of blacks in the student population; (3) the low retention and graduation rates of blacks who do enroll; and (4) an atmosphere on campus perceived by blacks as racially hostile. See id. at 152.

45. The court denied that the racially hostile environment on campus was “necessarily” an effect of the University’s past discrimination because it could have resulted instead from present or past societal discrimination. See id. at 154. Similarly, with respect to the underrepresentation and attrition of minority students, the court held that the record failed to establish that any such effects were caused exclusively by the University’s own discrimination and not societal discrimination or economic factors. See id. at 155-57.

46. 78 F.3d 932.

47. The district court found the effects of the law school’s past discrimination included the school’s reputation in the minority community as a “white” school, a school environment perceived by minority students as racially hostile, and an underrepresentation of minority students. See id. at 952.

48. Relying on Podberesky, the court rejected the poor reputation and hostile environment effects because they were likely caused by societal discrimination rather than discrimination by the school. See id. at 952-53. The court further suggested that any racial tensions may have been caused by the affirmative action program itself. See id. at 953 (stating that “[a]ny racial tension at the law school is most certainly the result of present societal discrimination and, if anything, is contributed to, rather than alleviated by, the overt and prevalent consideration of race in admissions”); see also id. at 952 & n.45 (stating that “racial preferences, if anything, can compound the problem of a hostile environment” and citing trial testimony about disrespect toward minority students from students who “assumed that minorities attained admission because of the racial preference program”). The court also rejected minority underrepresentation in the student body as a basis for the program because, to the extent such underrepresentation was caused by the state’s discrimination, it was due to discrimination by the state educational system as a whole, including elementary and secondary schools, and not discrimination by the law school. See id. at 953-54. The court also expressed skepticism that remedying past discrimination was a sincere goal of the program because it gave a preference to Mexican-Americans without any evidence that they had been discriminated against in the past, whether by the law school or by the state educational system. See id. at 953, 954 n.46, 955 n.50.

49. Remediating discrimination is compelling, the court concluded, only if the discrimination is that of a specific governmental unit or agency, even if the highest state authority is pursuing the remedial goal. See id. at 949-52; see also id. at 951 n.43 (explaining that even if the State of Texas is responsible for the past wrongs of the law school, only the wrongs of specific governmental units can serve as the justifying interests of a racial classification); id. at 952 (“The fact that the law school ultimately may be subject to the directives of others, such as the board of regents, the university president, or the
also rejected as a justification for the admission program the law school’s purported interest in a diverse student body. The court concluded that such an interest reflected an irrational and demeaning notion that race determines thought and behavior and, notwithstanding Justice Powell’s opinion in *Bakke*, was unsupported by recent affirmative action decisions by the Supreme Court.

*Podberesky* also suggests the difficulty of meeting the tailoring requirement of strict scrutiny even if nonsocietal discrimination can be sufficiently identified. Assuming *arguendo* that minority underrepresentation in the student body resulted from the school’s past discrimination, the court concluded that the scholarship was insufficiently tailored. The court reasoned that a merit scholarship is unlikely to benefit the victims of the school’s discrimination because these victims are unlikely to be high achievers, the eligibility of out-of-state residents would likely benefit nonvictims, and the university failed to consider race-neutral alternatives.

Although *Hopwood* and *Podberesky* can be criticized as unduly strict in their application of strict scrutiny, their interpretations of *Croson* are not surprising. *Croson* does seem to require state actors to identify effects of their own discrimination, or that of particular private discriminators, and to address only those effects in the least race-conscious manner. As such, any public college seeking to pursue an affirmative action program would seem to have to confess to its own past wrongs, demonstrate how those wrongs affect the enrollment of minority students today, and remedy only those effects. Given that most schools, especially those schools that have been operating affirmative action programs, are unlikely to have discriminated against minority applicants during the lifetime of most of those currently applying for college, it is extremely unlikely that the beneficiaries of any existing affirmative action program in higher education were themselves victims of discrimination by the school now seeking

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50. See id. at 945-47.

51. The court observed that Justice Powell’s opinion in *Bakke* stood alone in endorsing diversity as a compelling interest and, moreover, subsequent affirmative action cases by the Supreme Court have clearly limited the proper bases for racial classifications to remedying discrimination. See id. at 944-48.

52. The court in *Hopwood* declined to consider whether the admissions program was narrowly tailored because it concluded that the evidence had failed to satisfy the compelling interest prong. See id. at 955.

53. See *Podberesky*, 38 F.3d at 157-58.

54. See id. at 158.

55. See id. at 158-59.

56. See id. at 160-61.

57. Most students entering college this Fall were born after 1982. Not only had public universities ceased discriminating against minorities by this time but most were operating under affirmative action policies. See supra note 58.
to recruit them. Most of those directly discriminated against are at least fifty years old. Even if courts are willing to consider intergenerational causal links between current minority underrepresentation at a school and the school's discriminatory practices of the past, identifying which effects are attributable exclusively to the school's past discrimination, and not societal discrimination, would be virtually impossible. Perhaps a school could give a preference to the children of those minority applicants previously turned away by the school on account of their race, provided that the discrimination suffered by those parents did not prevent them from gaining the educational experience necessary to prepare their children for college.

Given the rigors of strict scrutiny, it is thus not surprising that the courts in Hopwood and Podberesky found the admissions and scholarship programs wanting, and it is difficult to imagine any race-operative affirmative action programs faring much better. As such, the continued use by public schools of higher education of racial preferences to increase or maintain minority student enrollment has been called into serious doubt. Schools failing to abandon such practices are vulnerable to court challenge—federal lawsuits are currently pending against the Universities of Washington and of Michigan, and legal action has been taken or threatened against other schools as well. Moreover, in addition to the federal Constitution, pressure to abandon racial preferences may increasingly come from state law. Popular initiatives to ban race-based affirmative action through state law have succeeded in California and Washington, and similar campaigns are underway in other states.

58. Professor Issacharoff has made a similar observation. See Samuel Issacharoff, Can Affirmative Action Be Defended?, 59 Ohio St. L.J. 669, 681 (1998) (observing that "it is highly unlikely in this day and age that the institutions of higher education that have heavily internalized a commitment to affirmative action are at the same time remedying their own discrimination").


60. For example, lawsuits have been filed against both the National Institutes of Health and Texas A & M University alleging the illegal use of racial preferences, see Peter Schmidt, NIH, Texas A&M Sued Over Race-Based Policy, CHRON. OF HIGHER EDUC., Mar. 7, 1997, at A30, available in 1997 WL 24391283, and a complaint has been filed by the Washington Legal Foundation with the Office for Civil Rights alleging that Florida Atlantic University unlawfully sponsors race-based scholarships, see Yollander Hardaway, Affirmative Action: Does the Fifth Circuit's Hopwood Ruling Place Affirmative Action on Shaky Ground?, 122 EDUC. L. REP. 1089, 1098 (1998).

61. Enacted as article 1, section 31 of the California Constitution, Proposition 209 provides in relevant part: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." CAL. CONST. art. 1, § 31(a).


63. See, e.g., Hornbeck, supra note 59, at D1 (describing political efforts to abolish affirmative action in Michigan); see also supra note 4.
Affirmative action by private universities, moreover, may also be at risk. Virtually all private colleges and universities receive federal funds, and have been doing so on condition that they operate affirmative action procedures in their admissions programs. Courts applying *Adarand* will likely find such conditions unconstitutional. Some private schools may now choose to terminate affirmative action programs if such efforts are no longer required as a condition for receiving federal funds. Furthermore, even private schools that voluntarily engage in affirmative action may be vulnerable under civil rights statutes. Title VI of the Civil Rights Act of 1964, for example, prohibits racial discrimination by all schools, private or public, that receive federal funds. If benign racial preferences by state schools represent racial discrimination in violation of the Equal Protection Clause, then such preferences should likewise violate Title VI when practiced by any schools receiving federal funds. *Adarand* may not only prevent the federal government from requiring affirmative action by federally funded schools, it may also, through existing civil rights statutes, forbid the federal government from funding any schools that voluntarily engage in affirmative action. Given the vast number of private (and public) colleges and universities that depend on federal funding, *Adarand* may well signal the abolition of racial preferences by all schools of higher education.

65. An aspect of *Bakke* not often emphasized is that a majority of the Justices held that Title VI of the Civil Rights Act of 1964 is violated by racial discrimination that would violate the Equal Protection Clause if committed by a state actor. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) (Powell, J.) (concluding that Title VI prohibits “only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment”); id. at 340 (Brennan, J., joined by White, Marshall, & Blackmun, JJ., concurring in part and dissenting in part) (the “Brennan four”) (concluding that Congress equated “Title VI’s prohibition with the commands of the Fifth and Fourteenth Amendments, . . . [and] intended the meaning of the statute’s prohibition to evolve with the interpretation of the commands of the Constitution”); see also Amar & Katyal, *supra* note 21, at 1747 n.12 (noting that “post-Bakke, Title VI is to be interpreted in line with the Equal Protection Clause”). After *Croson* and *Adarand*, therefore, benign racial classifications that would violate the Constitution if employed by government would violate Title VI if employed by a school receiving federal financial assistance.

Indeed, *Bakke* provides particularly strong support for the proposition that Title VI is at least implicated by affirmative action, whether or not violated. The Justices in *Bakke* were *unanimous* in concluding that Title VI applied to the preferential admissions program at issue, although only a majority concluded that Title VI was actually violated. See *Bakke*, 438 U.S. at 287, 320 (Powell, J.) (concluding that Title VI prohibits what the Equal Protection Clause forbids, and further concluding that program violated Equal Protection Clause); id. at 417-18 (Stevens, J., joined by Burger, C.J., Stewart, & Rehnquist, J.J., concurring in part and dissenting in part) (concluding that admission program violated Title VI); id. at 357-62 (Brennan four) (concluding that although strict scrutiny was inapplicable, some form of intermediate heightened review was appropriate, but concluding that such review was satisfied).

66. See Corinne E. Anderson, *A Current Perspective: The Erosion of Affirmative Action in University Admissions*, 32 AKRON L. REV. 181, 191 n.48 (1999) (observing that “Title VI of the Civil Rights Act of 1964, which once provided an incentive to promote equal educational opportunities, is now used as a tool to force public and private universities to limit the reach of their affirmative action policies” and citing Tanya Y. Murphy, *An Argument for Diversity Based Affirmative Action in Higher Education*, 95 ANN. SURV. AM. L. 515, 516-17 (1995)). This effect can already be seen in Texas where the former state attorney general, as well as administrators of private Texas colleges, have interpreted *Hopwood* as
The Court's decisions in *Croson* and *Adarand* may thus have far-reaching implications for affirmative action programs in higher education that employ racial preferences in their operation. Although the implications for private schools are largely speculative at this point, racial preferences by public universities are clearly vulnerable. Furthermore, the Court's decision to apply strict scrutiny to all laws employing racial classifications, benign or invidious, state or federal, may jeopardize a wide range of race-operative affirmative action programs beyond the field of higher education. To the extent that it is virtually impossible for a racial classification to satisfy strict scrutiny, the Court's approach amounts, in practice, to a rigid "classification rule"—a per se rule against government use of racial classifications regardless of which race is benefited or burdened by the classification. Moreover, although the affirmative action cases have thus far involved express racial classifications, *Croson* and *Adarand* may jeopardize laws employing race-neutral classifications if enacted for race-conscious motives. These implications are considered in the following section.

B. THE UNCERTAIN TREND TOWARD RACE-NEUTRAL AFFIRMATIVE ACTION

With the increasing threat of legal challenge to race-based affirmative action, a number of public universities have turned to disadvantage-based and other race-neutral approaches to increase the enrollment of minority students. These attempts to avoid constitutional invalidation by using race-neutral classifications may, however, be as legally vulnerable as their racially classifying predecessors. In light of *Croson*, the benign purposes behind such efforts are arguably racially discriminatory and, per *Washington v. Davis* and some earlier precedent, for
d"classification rule"—a per se rule against government use of racial classifications regardless of which race is benefited or burdened by the classification.67 Moreover, although the affirmative action cases have thus far involved express racial classifications, *Croson* and *Adarand* may jeopardize laws employing race-neutral classifications if enacted for race-conscious motives. These implications are considered in the following section.

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67. Professor Klarman observes that the Court did not adopt a "racial classification rule," a presumptive ban against racial classifications that disadvantage racial minorities, until 1964 in *McLaughlin v. Florida*, 379 U.S. 184 (1964). See Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 Mich. L. Rev. 213, 255 (1991). Prior to that time, the Court applied a form of rationality review except where a racial classification denied racial minorities certain fundamental rights such as voting or jury service. *See id.* Because the context in which the racial classification rule was applied in the 1960s and '70s involved discrimination against racial minorities, it was unclear whether the racial classification rule would apply to benign racial classifications. The Court's affirmative action cases seem to have established a racial classification rule across the board. The rigors of strict scrutiny, moreover, mean that the racial classification rule is, in practice, a per se and not just a presumptive ban on all racial classifications.

68. For a description of several such programs, see *supra* notes 6-10 and accompanying text.


70. Several cases before *Washington v. Davis* involved laws that, though race-neutral on their face, were motivated by a discriminatory purpose to disadvantage blacks. Particularly illustrative are cases involving the use of race-neutral means by segregationist states to disenfranchise blacks, such as poll taxes, literacy tests, "grandfather" clauses, gerrymandered electoral districts, and criminal records. See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) (invalidating city boundary drawn to exclude black voters); *Guinn v. United States*, 238 U.S. 347, 365 (1915) (invalidating grandfather clause
should trigger heightened review notwithstanding the absence of express racial classifications.

In Washington v. Davis the Court held that a race-neutral law with a disparate racial impact on racial minorities was subject to strict scrutiny if, and only if, the law was enacted with a discriminatory purpose.\footnote{71} The search for a discriminatory purpose was thus made the touchstone of judicial review under the Equal Protection Clause. Strict scrutiny is triggered by evidence of such intent, whether reflected in a racial classification or, where a classification is race-neutral, by other evidence revealing a discriminatory purpose.

What counts as a racially "discriminatory purpose" sufficient to trigger strict scrutiny was further clarified in Personnel Administrator v. Feeney.\footnote{72} In Feeney, the Court upheld a state law giving a preference to veterans for civil service employment, which had a significant discriminatory effect against female applicants. Notwithstanding the obvious impact of such a preference, the Court upheld it on the ground that "'[d]iscriminatory purpose,' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."\footnote{73}

Enter Croson, holding that all state-sponsored racial classifications—regardless of the race burdened or benefited by the classification—trigger strict scrutiny, and Adarand, extending this rule to federally enacted racial classifications. These cases established that discrimination against whites for the benefit

designed to evade Fifteenth Amendment); see also Shaw v. Reno, 509 U.S. 630, 639-40 (1993) (describing ostensibly race-neutral devices employed by several states following adoption of the Fifteenth Amendment to disenfranchise blacks, including "grandfather" clauses, "good character" provisos, and gerrymandered electoral districts); Thornburg v. Gingles, 478 U.S. 30, 38 (1986) (describing North Carolina's disenfranchisement of blacks by poll tax and literacy test); Hunter v. Underwood, 471 U.S. 222, 31-33 (1985) (invalidating criminal record voting disability adopted to disenfranchise blacks); Bakke, 438 U.S. at 390 (Marshall, J., concurring in part and dissenting in part) (describing post-Civil War disenfranchising techniques employed by Southern states, "including poll taxes, deliberately complicated balloting processes, property and literacy qualifications, and finally the white primary"). Although many of these cases involved the Fifteenth Amendment rather than the Equal Protection Clause of the Fourteenth Amendment, the Court has subsequently relied on them as equal protection precedents. See, e.g., Shaw, 509 U.S. at 644-45.

It should be noted that, until Davis, the Court had not clearly resolved whether a discriminatory purpose was either necessary or sufficient to constitute unconstitutional discrimination. At the time of Guinn, for example, the Court insisted that it would not generally inquire into legislative motivation, but concluded that the grandfather clause was such a close surrogate for race that it was as if the classification explicitly relied on race. See Klarman, supra note 67, at 295-96.

\footnote{71} See 426 U.S. at 244-45.

\footnote{72} 442 U.S. 256 (1979). Although Feeney involved a claim of sex-based discrimination, the test there announced for determining whether a purpose is "discriminatory" with respect to a particular trait has been applied to claims of racial discrimination as well. See Hernandez v. New York, 500 U.S. 352, 360 (1991) (citing Feeney, 442 U.S. at 279).

\footnote{73} 442 U.S. at 279 (citation omitted). The Court established two years before Feeney that strict scrutiny is triggered when a governmental decision is shown to have been motivated in part by a discriminatory purpose, even if other motivations played an equal or greater role. See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977).
of racial minorities is still discrimination; a purpose to so discriminate is thus a discriminatory purpose. Read in conjunction with Feeney, Croson and Adarand establish that a "discriminatory purpose" exists whenever the government selects a course of action at least in part "because of" its adverse—or beneficial—effects upon a racial group. A "benign" racial purpose is nonetheless discriminatory, and a race-neutral law motivated by such a purpose is arguably just as "suspect" and subject to strict scrutiny as a similarly motivated express racial classification.

Accordingly, when a legislature or public university intentionally seeks to admit minority students through race-neutral means, such as disadvantage-based preferences, it has taken a course of action "because of" and not merely "in spite of" its effect on racial minorities. Such efforts, therefore, should trigger the same strict, and usually fatal, scrutiny applicable to admission policies that rely on racial classifications. Moreover, even proposals to improve the quality of all elementary and secondary schools, not just those predominantly attended by minority children, if motivated in any part by a desire to improve the disappointing educational achievement of minority schoolchildren, arguably represent discriminatory state action and are presumptively invalid.

Taken to its logical end, the Equal Protection Clause requires government to ignore the stark racial disparities that persist in our society. The government cannot, in response to the poor academic achievement of minority schoolchildren, seek to address the conditions that undermine their education, such as poor quality schools, poverty, or family breakdown, even if disadvantaged children of all races, including white, are benefited. The government cannot, in response to the high rates of unemployment and crime in minority communities, seek to enhance employment opportunities or strengthen law enforcement, even if such services are provided to communities of all races experiencing similar conditions. The government cannot, in response to the high rate of AIDS and other diseases among minorities, increase public health education even if high-risk communities of all races are targeted. If race must never occupy the thoughts of governmental decisionmakers, then the government cannot respond to racial problems in any fashion, not just without reliance on racial preferences. Consequently, by holding that helping racial minorities is discriminatory, the Court in Croson and Adarand may have effectively held that racial disparities that persist in America must simply be ignored.

A parallel can thus be observed between the evolution of equal protection doctrine in the era of segregation and its current development in response to affirmative action. During segregation, the Court increasingly invalidated invidious racial classifications. Discriminators then attempted to pursue similar purposes through race-neutral means, and the Court responded by looking to

74. Moreover, as suggested in the previous section with respect to benign racial classifications, a Croson-like interpretation of civil rights statutes could restrain the ability of private schools to pursue race-neutral remedial policies. See supra notes 64-66 and accompanying text.
legislative motivation. Now that the Court has decided to treat benign racial classifications as suspect, affirmative action proponents are turning to race-neutral means, and we may simply be awaiting the Court’s pronouncement that reverse discrimination, by any means, is still discrimination.

Curiously, notwithstanding the seemingly settled principle that a racially discriminatory purpose can no more be pursued through race-neutral criteria than through racial classifications, the implications of Croson and Adarand for race-neutral affirmative action have gone largely unrecognized, even by strong opponents of existing affirmative action programs. Perhaps more intriguing, even courts invalidating affirmative action programs have generally failed to acknowledge the constitutional difficulties inherent in race-neutral affirmative action, and indeed, many courts—including the United State Supreme Court—have explicitly endorsed such efforts for achieving the same purposes underlying the benign racial classifications they invalidated. In Croson, both the plurality and Justice Scalia suggested in dicta that a state may use race-neutral means to remedy disadvantages disproportionately suffered by racial minorities. “Even in the absence of evidence of discrimination,” Justice O’Connor wrote for the plurality,

the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect. Many of the formal barriers to new entrants may be the product of bureaucratic inertia more than

75. See, e.g., DINESH D’SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS 251-53 (1991) (condemning racial preferences but endorsing “nonracial affirmative action”); ANDREW KULL, THE COLOR-BLIND CONSTITUTION 222 (1992) (advocating colorblind governmental decisionmaking while endorsing race-neutral approaches to remedying past discrimination); Jim Chen, Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action’s Destiny, 59 OHIO ST. L.J. 811, 907-08 (1998) (proposing large-scale investment in primary and secondary education in exchange for eliminating race-based affirmative action); Terry Eastland, The Case Against Affirmative Action, 34 WM. & MARY L. REV. 33, 35-36 (1992) (opposing preferential affirmative action but supporting other means, such as Head Start, to remedy historical discrimination against minorities); see also Locke, supra note 10, at A6; All Things Considered, supra note 66 (while acknowledging concern over declining minority populations at Texas universities, then state Attorney General Dan Morales opposed a return to affirmative action advocating instead that “public universities can accomplish that [diversity] objective using race-neutral means and mechanisms”); Norris & Jennings, supra note 6 (noting that “[e]ven critics of affirmative action welcome these experiments” to achieve diversity in colleges by helping teenagers develop their academic skills). Only a few articles discuss at length the constitutional difficulties facing race-neutral affirmative action. See Ian Ayres, Narrow Tailoring, 43 UCLA L. REV. 1781, 1806-08 (1996) (arguing that race-neutral remedial programs are not only subject to strict scrutiny but are arguably less well-tailored than programs that use racial preferences); Kathleen M. Sullivan, After Affirmative Action, 59 OHIO ST. L.J. 1039 (1999) (defending their constitutionality); Chapin Cimino, Comment, Class-Based Preferences in Affirmative Action Programs After Miller v. Johnson: A Race-Neutral Option, or Subterfuge?, 64 U. CHI. L. REV. 1289 (1997) (arguing against their constitutionality).
actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms. Their elimination or modification would have little detrimental effect on the city’s interests and would serve to increase the opportunities available to minority business without classifying individuals on the basis of race.\textsuperscript{76}

Even Justice Scalia, although critical of the plurality for suggesting that racial classifications could ever be justified, seemed prepared nonetheless to accept race-neutral remedial efforts:

A State can, of course, act “to undo the effects of past discrimination” in many permissible ways that do not involve classification by race. In the particular field of state contracting, for example, it may adopt a preference for small businesses, or even for new businesses—which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have racially disproportionate impact, but they are not based on race. . . .

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\textellipsis Since blacks have been disproportionately disadvantaged by racial discrimination, any race-neutral remedial program aimed at the disadvantaged as such will have a disproportionately beneficial impact on blacks. Only such a program, and not one that operates on the basis of race, is in accord with the letter and the spirit of our Constitution.\textsuperscript{77}

Similarly, lower courts, both within and without the context of higher education, have appeared to endorse race-neutral efforts to remedy the underrepresentation of racial minorities. The Fourth Circuit in \textit{Podberesky}, for example, suggested that the University of Maryland should have provided greater economic opportunities for all students as a way to retain more minority students.\textsuperscript{78} In \textit{Lutheran Church-Missouri Synod v. FCC},\textsuperscript{79} the Court of Appeals for the District of Columbia Circuit suggested race-neutral efforts to create racial diversity within radio and television broadcast companies.\textsuperscript{80}

\textsuperscript{76} City of Richmond \textit{v.} J.A. Croson, Co., 488 U.S. 469, 509-10 (1989).
\textsuperscript{77} \textit{Id.} at 526, 528 (Scalia, J., concurring in the judgment).
\textsuperscript{78} Relying on a study concerning the causes of low retention and graduation rates of black students at the University of Maryland, the court in \textit{Podberesky} stated:

“[Minority students] are more likely to provide their own expenses and have little time for campus activities and friends due to off campus living and work.” . . . That study suggests that the best remedy is “campus job opportunities and convenient, attractive, and economically reasonable campus housing . . . available to a greater proportion of students.”

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\textellipsis The University has not made any attempt to show that it has tried, without success, any race-neutral solutions to the retention problem. Thus, the University’s choice of a race-exclusive merit scholarship program as a remedy cannot be sustained.

\textit{Podberesky} \textit{v.} \textit{Kirwan}, 38 F.3d 147, 161 (4th Cir. 1994).
\textsuperscript{79} 141 F.3d 344 (D.C. Cir. 1998).
\textsuperscript{80} In the process of invalidating, under strict scrutiny, an FCC policy that pressured broadcast
That many political activists and courts opposed to racial preferences assume the validity of race-neutral alternatives does not, of course, mean that such alternatives are constitutional, or that the Court would so hold when squarely confronting them. And while any attempt to explain the motives of conservative activists or Supreme Court Justices is well outside the scope of this Article, their reluctance to condemn all forms of affirmative action suggests some reason for pause. When interpreting constitutional provisions, particularly the more “open textured” clauses, the Court is unlikely to stray too far from widely held views. An intriguing question, then, is this: if the Court would uphold race-neutral affirmative action, as its dicta seems to suggest, on what basis could it do so?

II. SATISFYING STRICT SCRUTINY THROUGH RACE-NEUTRAL MEANS

This Part defends a form of race-neutral affirmative action that should satisfy strict scrutiny. The proposed form is remedial in nature, encompassing governmental efforts to remedy racial discrimination, including societal discrimination. It attempts to address, in a race-neutral manner, the disadvantages that disproportionately impair the lives and opportunities of racial minorities. For example, if racial minorities disproportionately fail to qualify for, or cannot afford, higher education because of economic hardship, then universities may provide need-based scholarships, not earmarked for racial minorities as were the scholarships invalidated in *Podberesky*. They also may give consideration in admissions to applicants based on socioeconomic background, provided equal consideration is given to white applicants from similarly disadvantaged circumstances. Legislatures may enhance the quality of public schools in response to the poor achievement levels of minority schoolchildren, provided that the improvements are administered on a race-neutral basis. And outside of the context of education, race-neutral affirmative action could entail governmental efforts to address the race-neutral factors that disproportionately cause racial minorities to be criminals and crime victims, to be poor, to be sick, and to die young. These programs represent “affirmative action” because of their remedial objectives: to remedy the effects of past discrimination, a principal justification for affirmative action. Such programs are “race-neutral” in the sense that they do not employ racial classifications or otherwise operate on the basis of race.

The greatest challenge for race-neutral affirmative action analyzed under strict scrutiny is establishing that remedying societal discrimination is a compelling interest, given that the Court has rejected this claim in the context of racial classifications. This Part shall argue, however, that a deeper understanding of the dangers of express racial classifications, the functions of strict scrutiny, and

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81. As explained more fully below, this Article does not defend efforts to promote racial diversity for nonremedial purposes against constitutional challenge. *See infra* notes 110-11 and accompanying text.
the Court’s reasons for holding that remedying societal discrimination is insufficient to justify racial classifications suggests that remedying societal discrimination could satisfy strict scrutiny if race-neutral classifications are used instead. Section A lays the groundwork for this argument by examining the Court’s concerns over racial classifications and the role of strict scrutiny in addressing these concerns. Racial classifications are not in fact intrinsically invalid but rather are deemed “suspect” because certain illegitimate racial purposes or beliefs are likely to have motivated their adoption. It is the illegitimate motivations, which include racial prejudice, stereotype, and “simple racial politics,” that government may not act upon. Strict scrutiny serves to ensure that racial classifications were not in fact motivated by such illegitimate motives. If, and only if, a classification satisfies strict scrutiny is the Court sufficiently confident that the racial classification was adopted exclusively for legitimate reasons.

In addition to concerns over certain purposes, the Court has also identified certain effects of racial classifications that raise additional concerns under the Equal Protection Clause. These effects include the harm to white persons (or members of other nonbenefited minorities)\(^2\) and the tendency of racial preferences to reinforce stereotypical thinking and to foster racial tensions. These potentially harmful effects of affirmative action policies further justify the application of strict scrutiny to such programs. In addition to guarding against the risk of illegitimate purposes, strict scrutiny serves to ensure that the harmful effects of discriminatory laws are outweighed by the interests they serve.

A close examination of strict scrutiny, moreover, suggests that its prongs are interdependent; the extent to which an interest is “compelling” depends on the nature of the means used to advance it. The more the means are racially restrictive or otherwise objectionable, the more compelling the government’s interest must be to justify it. Conversely, the more race-neutral or otherwise unobjectionable the means, the less compelling the government’s justificatory

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\(^2\) In this Article, I generally refer to white people when discussing those not benefited by commonly used racial preferences. I also refer to black people as the most common beneficiaries of affirmative action as well as the most common victims of historical discrimination. I recognize that such generalizations oversimplify the myriad circumstances in which discrimination and affirmative action operate. There are minority groups, most notably Native Americans, that have suffered serious discrimination, and there are minority groups who are not always included in the groups preferred by affirmative action programs. I do not mean to suggest otherwise. I refer to blacks and whites loosely as the principal minority and majority groups in part for convenience and in part because these groups have centered most prominently in the legal history of discrimination and affirmative action in the United States.

Several scholars have in fact argued that the history of discrimination experienced by black people makes them uniquely entitled to affirmative action. See, e.g., Paul Brest & Miranda Oshige, Affirmative Action for Whom?, 47 STAN. L. REV. 855, 900 (1995) (“[N]o other group compares to African Americans in the confluence of the characteristics that argue for inclusion in affirmative action programs.”); Roy L. Brooks, Race as an Under-Inclusive and Over-Inclusive Concept, 1 AFR.-AM. L. & Pol’Y REP. 9, 15 (1994) (“African Americans . . . are the only social group . . . that did not come to this country of their own free will.”); Alex M. Johnson, Jr., Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties, 1992 U. ILL. L. REV. 1043, 1071-73 (arguing that the unique experience of blacks justifies the use of racial quotas for their benefit).
interest must be. As the concluding discussion of Section A explains, the interdependence of interest and means follows logically from the functions served by strict scrutiny.

Section B argues thatremedying societal discrimination, if tailored through race-neutral classifications, ought to withstand strict scrutiny analysis. The discussion assumes that such programs, if intended to benefit racial minorities, would still have to satisfy strict scrutiny despite the absence of racial classifications. As discussed in the previous section, the purpose of benefiting racial minorities is arguably racially discriminatory under Washington v. Davis and Croson. However, when the justification for the discriminatory purpose is to remedy societal discrimination, and race-neutral means are used as operative criteria, race-neutral affirmative action should be upheld. The objective of remedying societal discrimination is sufficiently compelling, and the use of race-neutral means sufficiently unobjectionable, that the risks of illegitimate purposes and of harmful effects should be sufficiently minimized to satisfy judicial review.

These arguments, moreover, are not inconsistent with the Court's decided cases. Precedent rejecting societal discrimination as a basis for affirmative action has involved express racial classifications, and the Court's rejection of societal discrimination was based on its inadequacy as a justification for such race-operative remedies given the risks inherent in measures of that kind. The inadequacies of remedying societal discrimination as a justification for the use of racial classifications do not apply with equal force to the use of race-neutral means.

A. A CLOSER LOOK AT THE DANGERS OF RACIAL CLASSIFICATIONS AND THE FUNCTIONS OF STRICT SCRUTINY

Perhaps cognizant of the superficial implausibility of equating laws that purposely harm historically and politically disadvantaged groups with laws intended to undo such discrimination, the Court in Croson and Adarand went to great lengths to explain the potential harms of benign racial classifications and how the application of strict scrutiny serves to minimize these harms while preserving, at least in theory, the availability of narrowly tailored remedial measures. This section first delineates the potential risks inherent in racial classifications that, according to the Court, justify subjecting all such classifications to strict scrutiny, and then considers how strict scrutiny functions to minimize these risks. Section B will argue that the risks posed by racial

83. Part III shall argue that such programs could be adopted not to benefit racial minorities but to benefit the nonsuspect groups of victims of societal discrimination and members of cultural groups. Such programs would then not trigger strict scrutiny. This Part analyzes race-neutral affirmative action programs that have been adopted for the purpose of benefiting racial minorities and which, therefore, must satisfy strict scrutiny.

84. Cf. Strauss, supra note 37, at 14 (remarking that "[w]hatever the supposed vices of affirmative action, maintaining a system of racial supremacy is not among them").
classifications are sufficiently lacking in policies that use race-neutral means, and thus, strict scrutiny ought to tolerate such policies when designed to remedy societal discrimination.

1. Illegitimate Purposes, Discriminatory Means, and Expressive Harms

All racial classifications are inherently “suspect” and subject to strict scrutiny, the Court in Croson and Adarand explained, because the risk that such classifications have been motivated by illegitimate purposes or beliefs is too great to justify the judicial deference normally accorded legislative or executive policies. Such illegitimate racial motivations, according to the Court, include “prejudice,” “stereotypes,” and “simple racial politics.” Strict scrutiny serves to guard against the risk that such illegitimate purposes or beliefs motivated a racial classification. Although the Court has not defined the exact nature of these illegitimate motivations, this section shall suggest some plausible accounts consistent with decided cases.

Beginning with “racial prejudice,” such motivations surely include the kinds of invidious racist beliefs most clearly falling within the core proscription of the Equal Protection Clause, such as racial animosity or a belief in the inferiority of a particular race. Racial classifications may reflect such prejudice, especially those that disadvantage racial minorities, because they quite plausibly advance the purpose of harming racial minorities out of animosity or white supremacy. Indeed, given the economically and politically disadvantaged position of racial minorities as a group, it is difficult to conceive of a legitimate reason to adopt a racial classification for the purpose of disadvantaging them further. Turning to benign racial classifications, those that grant preferential treatment to racial minorities, a risk of prejudice is less obvious. Many have argued against application of strict scrutiny to such classifications on the ground that the good intentions they reflect belie the risk of an impermissible purpose—that a “welcome mat” can be distinguished from a “‘No Trespassing’ sign” —

86. Croson, 488 U.S. at 493.
87. In Loving v. Virginia, 388 U.S. 1, 11 (1967), for example, the Court rejected as impermissible the objective of preventing racial mixture through miscegenation, concluding that such a purpose was based on a belief in white supremacy.
88. Justice Stevens used this metaphor in chiding the majority in Adarand for equating affirmative action with historical discrimination against blacks:

The consistency that the Court espouses would disregard the difference between a “No Trespassing” sign and a welcome mat. It would treat a Dixiecrat Senator’s decision to vote against Thurgood Marshall’s confirmation in order to keep African-Americans off the Supreme Court as on a par with President Johnson’s evaluation of his nominee’s race as a positive factor. . . . An attempt by the majority to exclude members of a minority race from a regulated market is fundamentally different from a subsidy that enables a relatively small group of newcomers to enter that market.

Adarand, 515 U.S. at 245 (Stevens, J., dissenting).
without resort to strict scrutiny. The Court in *Croson* and *Adarand* nonetheless expressed the concern that even benign classifications present an intolerably high risk of illegitimate purposes.\(^8\) Given the historical abuse of race, ostensibly benign racial classifications may nonetheless reflect an illegitimate purpose designed to appear benign. Consider, for instance, how a legislature motivated to discredit racial minorities might adopt a "benign" classification in order to provide opportunities for minorities to fail. A benign racial classification may also reflect a form of reverse discrimination through which the concerns of whites burdened by a law are undervalued out of a belief that whites deserve to be punished for the discrimination they or their group have committed or tolerated.

Beyond such prejudice rooted in racial animosity or supremacy, the Court has also condemned the use of racial "stereotypes" to justify government action. By stereotypes, the Court seems to have in mind generalizations about a person or group of people based on their race. Such generalizations may include not only invidious assumptions about inferior intelligence or moral character, but even assumptions not necessarily irrational or condemned by most members of the group, for example, the assumption that race correlates to experience, perspective, or interests. The Court has therefore rejected the use of race as a proxy for juror perspective or voter interest as reflecting "the very stereotype the law condemns," and a majority of the Court appears to believe that positing a connection between race and diversity in the media broadcasting context is a demeaning stereotype.\(^9\) The reasons for the Court's resistance to the use of racial stereotypes or proxies are not entirely clear. One concern might be that such stereotypes are demeaning in the characteristics they correlate to race and that such generalizations are often or usually false. Moreover, even fairly accurate, empirically justified stereotypes will often be so only because of past discrimination and acting upon them in some sense perpetuates that discrimination. In any event, the Court increasingly takes the normative position that race is irrelevant and unrelated, even statistically, to any other characteristics, and that government policies ought not act upon any assumptions to the contrary. As Professor Michael Klarman observes, the Court seems to be moving toward a "relevance" theory of equal protection, which holds that "certain characteristics, of which race is the prototype, should be simply irrelevant to all, or almost all, governmental decisionmaking."\(^9\)

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89. See supra text accompanying note 85.

90. Four Justices currently on the Court dissented in *Metro Broadcasting*, criticizing Congress for relying on the "demeaning" assumption that a broadcaster's race was correlated with the broadcaster's choice of programming content. See Metro Broad., Inc. v. FCC, 497 U.S. 547, 617 (1990) (O'Connor, J., dissenting) (criticizing the assumption that race predicts viewpoint); id. at 636 (criticizing FCC policy as seemingly based on "demeaning notion that members of the defined racial groups ascribe to certain 'minority views' "). The replacement of Thurgood Marshall with Clarence Thomas makes five Justices that would likely vote with the *Metro Broadcasting* dissenters.

The Court’s normative vision that race is irrelevant, or at least should be treated as such by government, seems to underlie a further concern of the Court over the use of racial classifications, namely, “racial politics.” In addition to guarding against illegitimate racial prejudice and stereotypes, the Court in Croson justified the use of strict scrutiny to ensure that a law was not motivated by “simple racial politics.” Although the Court does not explain what it means by simple racial politics, the concern seems to be over the enactment of race-based laws simply to appease a racial group instead of laws designed to promote a “genuine public interest.” Permeating the Court’s plurality opinion in Croson were suggestions that the race-based set-aside was enacted because blacks had gained sufficient political strength on the city council and were determined to do something for blacks simply because they could. As Professor David Strauss suggests in explaining the Court’s aversion to affirmative action plans, “What the Court is concerned about is the risk that affirmative action plans will be enacted simply because groups that favor them have gained sufficient power.”

Given the Court’s concerns over what it views as illegitimate stereotypes and simple racial politics, its claim that benign racial classifications might reflect illegitimate purposes makes some sense. Such classifications may reflect the paternalistic assumption that racial minorities are inherently disabled and deserve special accommodation for their innate shortcomings. Stereotypical thinking or simple racial politics might, for example, motivate a legislature to adopt racial preferences in jury selection to ensure the presence of a “distinct” perspective, or to draw electoral district lines predominantly on the basis of race on the assumption that people, by the fact of shared race alone, “think alike, share the same political interests, and will prefer the same candidates at the polls.”

In the context of higher education, benign racial classifications may reflect the potentially inaccurate and patronizing assumption that racial minorities, because of their race, cannot meet traditional admission standards or have a “minority” perspective to contribute to classroom discussion. Accordingly, as the breadth of the Court’s concerns over racially motivated thinking suggests, all racial classifications might serve illegitimate purposes, and all such classifications are therefore suspect.

In addition to the risk that illegitimate purposes may underlie racial classifications, the Court in Croson and Adarand expressed concern over racial classifications—as means—because of the harmful effects such means have both in the

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93. Strauss, supra note 37, at 25.
94. See Croson, 488 U.S. at 495-96 (explaining that because blacks were majority of city council members the case was not one in which a majority was disadvantaging itself).
95. Strauss, supra note 37, at 25.
immediate impact of their operation and in their consequences for society at large. Such effects include that racial classifications, in their operation, involve discrimination against innocent individuals on the basis of their race, and they may have the further effect of reinforcing racial stereotypes and exacerbating racial tensions. These operative or consequential harms posed by even benign racial classifications seem to further justify, in the Court’s judgment, the application of strict scrutiny to such classifications.

First, the Court in the affirmative action cases has repeatedly criticized the use of racial classifications because of the injury they cause by their operation. Racial classifications and other race-operative laws require those charged with their administration to identify people by their race and to award or deny benefits based on these determinations. Regardless of the reason behind adoption of a racial classification, its implementation involves racial discrimination against individuals who bear little or no direct responsibility for the condition of racial minorities. Even when the purpose behind a racial classification is truly remedial, by discriminating against innocent third parties, such remedies inflict the same kinds of wounds they are intended to heal. As the Court explained in Adarand, “whenever 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.”97 As such, even presuming good faith on the part of those adopting racial classifications, equal protection concerns over racially discriminatory treatment counsel against such means.

In addition to the immediate harms of racial classifications, the Court has identified certain consequential “expressive harms” threatened by such classifications, which are independent of the motives for adopting them. These include the potential of racial classifications to perpetuate racial stereotypes and exacerbate racial hostility. Consider the perpetuation of stereotypes.98 Benign racial classifications, by their terms and operation, award benefits to racial minorities on the basis of their race and, by implication, deny opportunities to whites on the basis of their race. The stereotypical assumption potentially expressed by the classification is that all or most racial minorities are inferior or otherwise disadvantaged on the basis of their race itself, not necessarily because of some underlying disadvantage that correlates to race. With respect to whites, such classifications potentially send the message that whites, no matter what tangible difficulties many face, are necessarily privileged. Blacks are presumed disadvantaged to the point of deserving preferential treatment regardless of how privi-

98. The concern with perpetuating stereotypes is independent of, though related to, the concern with stereotypical motivations behind a law. A racial classification could express a stereotypical message, thereby perpetuating such thinking among the public without the enacting legislature having held the stereotype. The message could be inadvertent. The two concerns are related, however, in that the more a classification expresses a stereotype the more likely it is that the enacting body was motivated by similar assumptions.
leged individual black beneficiaries may be, and whites are presumed advantaged regardless of the difficult circumstances many endure. Such over- and under-inclusive generalizations about blacks and whites that posit a direct relationship between race and advantage or disadvantage represent the kinds of “stereotypes” the Court condemns. By expressing this message, intentionally or not, racial classifications may cause or reinforce stereotypical thinking, which in turn leads people to treat others based on stereotypical beliefs, and furthers us from the day when race no longer matters.

In addition to the perpetuation of stereotypes, racial classifications have a tendency to exacerbate or inflame racial hostility.99 Much of what causes resentment along racial lines is the way in which race-operative affirmative action appears to give preferential treatment to those who do not deserve it, relatively privileged racial minorities, and denies opportunities to materially disadvantaged persons, such as poor whites.100 Again, these concerns are present even if the adoption of the classification was well-intentioned. Whites who are disadvantaged by a racial classification might well accept or even endorse the remedial purpose behind the classification, yet still resent that relatively privileged minorities not in need of a remedy can take advantage of the remedial program, while more disadvantaged whites are harmed by it. Such resentment will understandably focus on race when that is the basis upon which some racial minorities gain a windfall and some already struggling whites are disadvantaged further.

In sum, racial classifications do not themselves violate the Equal Protection

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99. Professor Kathleen Sullivan notes the emergence in Croson of concerns among several Justices over the risk that racial classifications may cause resentment and hostility. See Kathleen M. Sullivan, City of Richmond v. J.A. Croson Co.: The Backlash Against Affirmative Action, 64 Tul. L. Rev. 1609, 1622-23 (1990) (quoting Justices O'Connor, Kennedy, and Scalia). The most “ominous” warning came from Justice Scalia, who wrote that “[w]hen we depart from this American principle [against racial quotas] we play with fire, and much more than an occasional DeFunis, Johnson, or Croson burns.” Id. (quoting Croson, 488 U.S. at 527 (Scalia, J., concurring)).

100. See Richard D. Kahlenberg, The Remedy: Class, Race, and Affirmative Action 44 (1996) (arguing that racial preferences unfairly burden disadvantaged whites). The media routinely report anecdotal evidence of resentment toward affirmative action by disadvantaged whites. One article, for example, describes a conversation with a group of law students about affirmative action in which a white woman breaks in:

[Excuse me, I dated a black guy all throughout high school. My grades were better than his. He kept getting special assistance, counseling, scholarship offers. They were going out of their way to get him into college. His dad was a doctor. My mom was on food stamps. Tell me that's fair.


Even Justice Brennan, who would have upheld the affirmative action program in Bakke, acknowledged the potentially unfair burden to disadvantaged whites. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 361 (1978) (Brennan, J., concurring in part and dissenting in part) (observing that “[t]he ‘natural consequence of our governing process may well be’ that the most ‘discrete and insular’ of whites . . . will be called upon to bear the immediate, direct costs of benign discrimination’”) (quoting United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 174 (1977) (Brennan, J., concurring in part)).
Clause (or the equal protection component of the Fifth Amendment), but certain race-conscious purposes or beliefs do. Such illegitimate racial motivations include prejudice, stereotypes, and simple racial politics or, more generally, the premise that race is a meaningful distinction between people and groups. A law motivated by such purposes is invalid. Racial classifications, although potentially valid, are presumed invalid because they carry a great risk of having been supported by illegitimate purposes. Moreover, in addition to a concern over certain legislative purposes, the Equal Protection Clause is implicated by racial classifications as means because of the harmful effects such means threaten, both in their immediate impact and in their consequential harms to society. Racial classifications, even benign, cause largely innocent individuals to be discriminated against on the basis of their race, reinforce racial stereotypes, and exacerbate racial tensions.

Given the breadth of the Court's concerns over racial classifications, one might have expected it simply to ban them entirely. However, rather than adopt an absolute rule against racial classifications, as some Justices advocate, the Court purports to permit the use of racial classifications if they satisfy strict scrutiny, which, we are assured, is not necessarily fatal. The Court therefore appears to believe that strict scrutiny is a sufficient obstacle to the pursuit of illegitimate purposes and check against the infliction of unduly injurious effects, but also preserves the availability of racial classifications for truly compelling reasons. The following subsection explores how strict scrutiny might perform these screening functions. The subsequent section will consider whether race-neutral affirmative action can survive similar scrutiny.


Once the Court's concerns over certain illegitimate legislative motivations have been identified, one function of strict scrutiny can be understood. According to the Court, strict scrutiny serves to insure against the risk that a racial classification was motivated by an impermissible racial purpose. Thus, while conceding the possibility of a "benign" motivation for a racial classification, the Court in *Croson* explained that it is only through the application of strict scrutiny that a court can discern the actual purpose behind such a classification:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the

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101. I assume in this Article that, in light of *Adarand*, the analysis of racial discrimination and affirmative action by the federal government under the Due Process Clause of the Fifth Amendment is essentially identical to the analysis of similar programs by state entities. Accordingly, any references I make to the Equal Protection Clause or to "state" action are intended to apply equally to programs enacted by the federal government.
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.\(^{102}\)

This "smoke out" function of strict scrutiny has been explained by Professor John Hart Ely.\(^{103}\) According to Ely, the different levels of judicial scrutiny, from strict to rational basis, can all be understood to guard against the use of illegitimate discriminatory purposes. This function assumes that the means or classifications adopted by a legislature reflect the purposes behind them—in other words, that legislatures generally employ means that advance their objectives. The less a classification advances permissible purposes, the greater is the risk that the classification was adopted to pursue an alternative illegitimate purpose. A comparison of ends and means thus provides a basis for inferring the actual purposes behind a law.

The level of scrutiny applied to particular kinds of classifications depends on the risk, in the Court's view, that such classifications were enacted for improper purposes. Out of institutional respect for legislative autonomy and competence, the Court applies a deferential "rational basis" level of scrutiny to all classifications other than those deemed "suspect" or "quasi-suspect," such as race or sex. Under this level of scrutiny, the Court presumes the legislature is pursuing legitimate purposes if the means used rationally advance some legitimate purposes, even if other means might achieve such purposes more effectively. The Court's presumption of legislative good faith is overcome only if the fit between classification and end is so attenuated, that is, where no conceivable legitimate purpose is advanced by the classification, that an inference of an alternative impermissible motivation is inescapable. This deferential posture usually results in judicial "rubber stamping" of nonsuspect classifications.

With racial classifications, in contrast, the risk that illegitimate purposes motivated a law is significantly higher and the level of scrutiny is correspondingly greater. Race is a "suspect" classification because its historical abuse by legislatures as a tool to oppress racial minorities out of animus and a belief in their inferiority has been so pervasive that the risk of such illegitimate purposes is too great to justify judicial deference. Even benign racial classifications, given the Court's concerns over racial stereotypes and simple racial politics, require application of strict scrutiny since these illegitimate purposes are plausibly served even by benign classifications and application of a less rigorous

\(^{102}\) Croson, 488 U.S. at 493.

\(^{103}\) See John Hart Ely, Democracy and Distrust 145-48 (1980); see also Cass R. Sunstein, Naked Preferences and the Constitution, 84 COLUM. L. REV. 1689, 1699-1700 (1984) (arguing that function of heightened judicial review is to ensure that laws are enacted for public values rather than private preferences).
standard of review may leave such purposes undetected. The Court’s insistence that race is generally irrelevant further undermines the likelihood that a governmental actor pursuing legitimate ends would use a racial classification. For racial classifications, therefore, the Court requires a close fit between classification and a weighty purpose before the risk of illegitimate purposes is deemed acceptably low.

Another role for strict scrutiny, in addition to that of “smoking out” illegitimate purposes, seems also to have emerged from the Court’s concerns over the effects of racial classifications. Strict scrutiny serves to ensure that the potentially harmful effects of racial classifications are outweighed by the interests they serve. Such a “cost-benefit justificatory test,” as Professor Jed Rubenfeld characterizes it, “would serve to determine whether a law that causes acknowledged constitutional harms is justified by sufficiently important benefits that a less constitutionally costly (‘better tailored’ or ‘less restrictive’) law could not have achieved.” Although highly critical of this use of strict scrutiny, Rubenfeld argues that it provides a more plausible explanation for the Court’s reaction to benign racial classifications than does the alternative claim that such classifications carry a serious risk of illegitimate motivation. “Recast this way, strict scrutiny for race classifications would appear to make sense after all. All race classifications would properly demand strict scrutiny, because all such classifications, regardless of their purpose, would be deemed a constitutional evil that could not stand in the absence of compelling justification.”

Strict scrutiny thus appears to serve two functions: guarding against, or “smoking out” illegitimate racial purposes, and ensuring that potentially harmful effects of government-sponsored racial classifications are outweighed by the necessity of their use.

Regardless of which concerns—purposes or effects—influence the Court or individual Justices more in any given case, the factors that have informed the application of strict scrutiny across a range of cases are generally consistent with both theories of strict scrutiny’s function. The kinds of interests the Court has and has not found compelling and the factors the Court has identified as part of proper tailoring are consistent with an effort to prevent illegitimate purposes and to minimize harmful effects. Consider what interests have been recognized as compelling: remedying identified discrimination by government or by private actors within the government’s jurisdiction. Such interests are so important and so inconsistent with illegitimate racial attitudes that a law appearing to serve them is unlikely to be motivated instead by racial prejudice or stereotype. Similarly, the importance of such interests plausibly outweighs the potentially harmful effects that a racial classification might have on innocent victims and

104. After stating that governmental discrimination causes injury to its victims, the Court in Adarand explained that “[t]he application of strict scrutiny ... determines whether a compelling governmental interest justifies the infliction of that injury.” 515 U.S. 200, 230 (1995).
106. Id.
society. These conclusions are strengthened further when the basis for the remedial action, the evidence of identified discrimination, is strong and particularized. Such a basis gives further credibility to the state actor’s claim that remedying discrimination was its actual motivation and to the conclusion that the need to remedy discrimination is sufficient to justify the potentially harmful effects of a race-based remedy.

The requirement of tailoring the means to the justificatory interests further supports the functions of strict scrutiny. Minimizing the risk of illegitimate purposes by constraining the government to the pursuit of compelling interests would be undermined if the government could use means that hardly serve those interests, and which may in fact serve illegitimate interests. Moreover, the costs of racial classifications are unlikely to be outweighed by the interests served if the means used do not serve the compelling interests well. Accordingly, the Court prefers remedial plans that benefit only those racial minorities who are likely victims of discrimination without benefiting those who are not and without unnecessarily burdening innocent whites or members of other nonpreferred racial groups.

Consider also the Court’s preference for remedial plans that operate with minimal reliance on race. Rigid racial quotas are strongly disfavored; race-as-a-factor preferences that are temporary, flexible, and rebuttable receive greater tolerance, and the use of race-neutral means is most favored. With respect to the functions of strict scrutiny, the Court might plausibly conclude that the potentially stigmatizing and balkanizing effects of granting or denying benefits to individuals simply to fill predetermined racial slots is unlikely to be outweighed by the remedial interests served, at least not where those interests could be served by less racially restrictive means. A state actor who is sincerely interested in remedial goals, and who generally rejects the relevance of race, would likely be unwilling to endorse a policy that uses race in a blunt fashion whereas, in contrast, a state actor who holds stereotypical assumptions about race or is captured by “simple racial politics” would likely be less concerned by a policy that places heavy reliance on race at the expense of nonpreferred racial groups.

A further aspect of strict scrutiny that should be recognized is that the “prongs” of the analysis—what interests are “compelling” and what means are “narrowly tailored”—are interdependent concepts. That is, what constitutes a compelling interest varies depending on the nature of the means used to advance the interest. The more restrictive the means, including the more the means operate according to race, the more compelling the justifying interest must be and, conversely, the less compelling the justificatory interest, the less racially restrictive the means must be to count as sufficiently tailored. Consider, for example, the most restrictive race-based means possible—a racial quota. From Bakke to Croson, such remedies have generally been rejected as too restrictive even to advance a compelling interest. Yet, in United States v. Paradise, the Court upheld under strict scrutiny a court-ordered affirmative action plan involving a requirement that fifty percent of officers hired must be
black until a certain percentage in the department was reached.\textsuperscript{107} In upholding such a stark racial quota, the Court emphasized the egregiousness of the department's discriminatory practices, which made the interest in remedying the discrimination particularly compelling.\textsuperscript{108} Notice also that the hiring quota upheld benefited many blacks who were not necessarily the victims of the department's past discrimination. There was no requirement that only such victims be hired under the plan, and many innocent white victims, those white applicants who were not hired only because of the quota and who presumably had not been party to the department's discrimination, were probably harmed. Thus, what is generally considered an inadequately tailored means, a rigid racial quota that over- and under-includes true victims and perpetrators of the discrimination, is sufficiently tailored when the justification is particularly compelling.

In contrast, where acts of discrimination were less egregious, the Court has required less restrictive, less race-based means to satisfy strict scrutiny. In\textit{ Bakke}, for example, which did not involve allegations of discrimination by the medical school itself, those Justices who found the quota at issue too restrictive seemed prepared to uphold "softer" race-based remedies. Justice Powell endorsed a race-as-a-factor approach while Justice Stevens, who wrote for the wing of Justices completely against any racial preferences in admissions, nonetheless seemed to approve of racially preferential recruitment policies.\textsuperscript{109} Notice finally that the strict scrutiny test itself favors race-neutral remedies, the softest means possible, and will generally invalidate a plan that operates on the basis of race if race-neutral alternatives are available.

This interdependence between means and interests follows from the functions of strict scrutiny reviewed above. With respect to strict scrutiny's "smoke out" function, the more an ostensibly remedial program discriminates against innocent whites directly on the basis of their race or benefits minorities who may not have suffered from discrimination, the more likely the racial preference reflects paternalistic stereotypes or simple racial politics. A sincerely remedially minded legislature, however, might resort to such a suspect remedy if the interest in remedying discrimination is acute and the evidence of the need particularly strong. Where the evidence of discrimination is weaker, in contrast, a legislature

\textsuperscript{107} 480 U.S. 149, 185 (1987) (upholding court-ordered racial hiring quota enacted in response to persistent and egregious discrimination by state police force).

\textsuperscript{108} See id. at 167.

\textsuperscript{109} See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 418 n.22 (1978) (Stevens, J., concurring in part and dissenting in part) (distinguishing medical school's preferential admission program from nondiscriminatory "special recruitment policies" of the Department of Health, Education and Welfare). Indeed, regarding recruitment, in\textit{ Washington v. Davis}, in which the Court found insufficient proof of discriminatory intent by the police department, the Court cited with approval the police department's race-conscious efforts to recruit minority officers. 426 U.S. 229, 246 (1976) (approving district court's inference that the police department had not discriminated against blacks, which was based in part on the department's "affirmative efforts . . . to recruit black officers"). The Court's reasoning might be that the police department is unlikely to have discriminated against blacks because it discriminates against whites instead. More plausibly, the Court simply did not consider affirmative efforts to recruit black officers as unfair discrimination against potential white officers.
properly averse to racial sorting should prefer policies that operate with less or no sensitivity to race. Similarly, with respect to strict scrutiny’s concern over effects, the more egregious the discrimination sought to be remedied, the more likely a remedy that relies heavily on race-based means would outweigh the potential costs, whereas a remedy for less substantial or less identifiable instances of discrimination might not outweigh the costs unless it relies on minimally restrictive or race-neutral means.

B. REMEDYING SOCIETAL DISCRIMINATION AS SUFFICIENTLY COMPELLING WHEN TAILORED THROUGH RACE-NEUTRAL MEANS

This section argues that race-neutral affirmative action can satisfy strict scrutiny based on the justification of remedying societal racial discrimination. Contrary to widely held assumptions, the Court has not precluded the remedying of societal discrimination from ever qualifying as a compelling interest for strict scrutiny purposes. Rather, the Court has rejected this interest as insufficiently compelling to support racial classifications. In doing so, the Court has repeatedly emphasized the race-operative nature of the remedies at issue and the inability of societal discrimination to define and constrain the scope of such remedies. Race-neutral classifications, in contrast, are substantially less objectionable. The need to constrain their scope is, therefore, less imperative. Recall also the interdependence of the interest and means prongs of strict scrutiny. The preferable character of race-neutral policies from an equal protection standpoint suggests that remedying societal discrimination may be sufficiently compelling to justify such policies, even if insufficient to justify race-operative remedies. Accordingly, the Court could endorse as compelling, without violating existing doctrine, the remedying of societal discrimination when offered to justify policies that rely exclusively on race-neutral criteria.

Before exploring these arguments, it should first be explained why the goal of promoting racial diversity for nonremedial purposes would probably fail strict scrutiny. The Court today is unlikely to uphold policies designed to create racial diversity, whether through racial preferences or race-neutral means. First, to pursue racial diversity as an end in itself would represent racial discrimination "for its own sake," a rationale the Court would likely reject as illegitimate racial balancing.110 Nor could racial diversity be pursued as a means or proxy

110. Even Justice Powell’s opinion in Bakke, the only opinion endorsing diversity in some form, rejected the goal of racial diversity as an end it itself:

If [the medical school’s] purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.


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for other characteristics such as "experiences, outlooks, and ideas." The problem here is not whether intellectual or experiential diversity in a general sense is compelling or not. Such diversity in an academic setting is plainly important and possibly compelling. The problem is in positing a connection between intellectual diversity and racial diversity. The Court’s aversion to race essentialism and stereotypes reflected in recent affirmative action, jury selection, and electoral districting cases suggests it would reject as stereotypical and, therefore, illegitimate, the assumption that racial diversity correlates to intellectual diversity, whether or not that assumption is realistic. A governmental policy premised on illegitimate stereotypical racial beliefs would be invalid per se.

In contrast, the doctrine leaves room for the Court to uphold the objective of remedying societal discrimination, provided it is pursued through race-neutral means. This section shall first explain more fully what is meant by societal discrimination and what conditions reflect its effects. Then it will present the argument that remedying those effects through race-neutral means is a sufficiently compelling interest and is tailored to satisfy strict scrutiny.

"Societal discrimination" includes the widespread racial discrimination suffered by racial minorities in this country, particularly blacks, from slavery, through segregation, until and including racial discrimination by private and public actors occurring today. The effects of such discrimination are evident in the stark disparities that persist between racial groups, particularly blacks and whites, with respect to significant indicators of social and economic well-being. For example, although only 12.6% of Americans, or one out of eight, are black, more than half of the men in prison are black. The average economic status of blacks is significantly worse than whites. Although

111. A diversity of “experiences, outlooks, and ideas” was the kind of interest Justice Powell endorsed in Bakke, although he found the racial quota an inappropriate means for achieving it. See Bakke, 438 U.S. at 314.

112. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, U.S.A. STATISTICS IN BRIEF (1997) [hereinafter CENSUS] (reporting that, in 1995, 12.6% of Americans were black, 73% white and 10.4% Hispanic).

113. See Paul Butler, Affirmative Action and the Criminal Law, 68 U. COLO. L. REV. 841, 868 n.97 (1997) ("In 1994, for the first time in American history, there were more African American men in prison than white men."). Blacks are incarcerated at a rate eight times that of whites. See Pierre Thomas, Study Suggests Black Male Prison Rate Impinges on Political Process, WASH. POST, Jan. 30, 1997, at A3 (citing 1995 Sentencing Project report that the incarceration rate of blacks is 7.66 times that of whites). On any given day, one in three black men in their twenties is under the control of the criminal justice system, see id., more than the number of black men of all ages in college. See DERRICK A. BELL, JR., RACE, RACISM & AMERICAN LAW 340 n.33 (1992). In contrast, only 1 in 16 white males in the same age group is involved with the criminal justice system. See id. at 340. The Sentencing Project also reported that one of every seven black men (1.46 million of a voting population of 10.4 million) is barred from voting because of a felony conviction. See Thomas, supra, at A3.

114. The average income of blacks is 60 % that of whites, and the median wealth of blacks is a mere 8% of that of whites. See CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES 45 (1996). A recent study found that the average income of black high school graduates ($18,700) is roughly the same as that for white high school drop-outs. See Joan
whites outnumber blacks almost six to one overall,
there are more blacks than whites on welfare. In the education context, from elementary to graduate school, the achievement of blacks and Hispanics consistently falls far below that of whites and Asian-Americans. With respect to health, blacks live an average of seven years less than whites, and of that life, blacks enjoy eight fewer years of "reasonably good health" than do whites. Black infants die at two and a half times the rate of white infants, and those that live are placed in foster care at a much higher rate than white children. Blacks are more likely to suffer or die from serious diseases such as cancer.

Wallace-Benjamin & Ted Murphy, Editorial, Raising the Income of Poor Men, BOSTON GLOBE, Jan. 25, 1998, at E7. Blacks are less likely to be employed, to own their home or to own stock, and are dramatically overrepresented among the poor. See EDLEY, supra, at 43-44, 49.

See CENSUS, supra note 112.

See Jason Deparle, More Whites Than Minorities Abandoning Welfare, MILWAUKEE J. SENTINEL, July 27, 1998 ("By early 1997, blacks accounted for 37% of the nation's welfare caseload, although they are just 13% of the general population. Hispanics accounted for 22% of the welfare rolls, though they represent 11% of the general population. Whites, by contrast, accounted for just 35% of the welfare rolls, although they make up 73% of the general population.").

For example, in Montgomery County, Maryland, 41% of black seventh-graders passed a reading achievement test (the Criterion Reference Tests). This compares to passing grades by 81% of white seventh-graders, 46% of Hispanics, and 75% of Asian-Americans. See Fern Shen, Scores Rise in Reading in Montgomery; Disparity Persists for Racial Groups, WASH. POST, Dec. 10, 1997, at B1.

By 1996, with the help of affirmative action, only 7.8% of students, or 1 in 13, graduating from college were black. See THOMAS SNYDER ET AL., U.S. DEP’T OF EDUC., DIGEST OF EDUCATION STATISTICS, 1998, 302-11 (1999). Blacks are particularly underrepresented among those graduating from professional or graduate schools, comprising less than 7% of those receiving professional and Master's degrees, and only 3.7%, or 1 in 27, of successful doctoral candidates. See id. And these fractions are undoubtedly smaller at the most prestigious schools that graduate the most influential members of our society.

See Egypt Freeman, The State of Black Health, HEALTH QUEST: THE PUBLICATION OF BLACK WELLNESS, Feb. 28, 1998, at 18 (reporting life expectancy for blacks is 69.6 years as compared to 76.5 years for whites).

A "National Institute for Aging [study] shows that blacks enjoy 56 years of reasonably good health, eight years fewer than whites and Hispanic[s] . . . ." Peter T. Kilborn, Racial Health Disparities Continue, Studies Say, PITTSBURGH POST GAZETTE, Jan. 26, 1998, at A6. Christopher Jennings, Chief White House advisor on health issues, said that "huge" disparities remain even when economic status and education are factored out. See id.


Black and other children of color are placed in foster care three times more frequently than white children. See Judith K. McKenzie, Adoption of Children with Special Needs, 3 FUTURE OF CHILDREN 62, 68-69 (1993). According to the U.S. Department of Health and Human Services' Administration for Children and Families, 43% of children in foster care on March 31, 1999 were black, 36% were white, and 15% were Hispanic. See U.S. DEP’T OF HEALTH & HUM. SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, RACE/ETHNICITY OF CHILDREN IN FOSTER CARE (Jan. 2000).

The American Cancer Society (ACS) estimates that 234 of every 100,000 black men will get prostate cancer in 1998, compared to estimates of 135 white men this year. The ACS reports that black men are two to three times more likely to die of the disease. See Health Watch: Prostate Cancer, ATLANTA J. & ATLANTA CONST., Jan. 14, 1998, at D6. Once diagnosed with prostate cancer, 66% of black men and 81% of white men survive for five years. See Kilborn, supra note 119, at A6. Since the early 1960s, black men's death rates from cancer have risen 61%, while the rate for white men has increased by only 19%, according to the American Cancer Society. See id. The
diabetes, asthma, and AIDS. In sum, as Professor Alexander Aleinikoff observes:

In almost every important category, blacks as a group are worse off than whites. Compared to whites, blacks have higher rates of unemployment, lower family incomes, lower life expectancy, higher rates of infant mortality, higher rates of crime victimization, and higher rates of teenage pregnancies and single-parent households. Blacks are less likely to go to college, and those who matriculate are less likely to graduate. Blacks are underrepresented in the professions, in the academy, and in the national government.

The question presented by the Court's affirmative action jurisprudence is whether governmental efforts to remedy such conditions or other effects of societal discrimination can satisfy strict scrutiny if achieved through race-neutral means. Such efforts are at least legitimate. If our society is truly committed to racial equality, it is difficult to imagine a more genuine and important public interest than helping those members of our national community who were officially and pervasively denied their constitutional rights for so long or who have inherited impoverished conditions from such discrimination. To satisfy strict scrutiny, however, remediying societal discrimination must be more than legitimate and important. It must rise to the level of compelling. The Court has not thus far clearly delineated what interests are compelling and what interests are not, but it has specifically recognized the remediying of "identified" discrimination as such an interest. The question then is whether remediying societal discrimination is an interest of comparable weight to that of remediying identified discrimination. A comparison of the two interests suggests that it is.

Consider the kinds of identified discrimination the Court has deemed compelling. The Court in Croson endorsed as compelling the city of Richmond's interest in remediying identified discrimination, past or present, by both the city itself, directly or as a "passive participant," and by private actors within the Center for Disease Control and Prevention reports that while the overall death rate from breast cancer fell 10% between 1990 and 1995, from 23.1 per 100,000 to 21, the death rate for black women remained at 27.5 per 100,000. See id.

123. The Center for Disease Control and Prevention (CDCP) reports that the number of blacks with diabetes rose by 33% from 1980 to 1994, three times the rate of increase for all other Americans. See Editorial, Let's Work to Bridge the Gap in Black Health, BALTIMORE SUN, Feb. 4, 1998, at A15.

124. According to a CDCP study, blacks die of asthma at more than twice the rate of whites. See Health Watch: Asthma on the Rise, ATLANTA J./ATLANTA CONST., Apr. 24, 1998, at F3 (reporting that blacks die of asthma at a rate of 38.5 per million, while the rate for whites is 15.1 per million).

125. See Sheryl Gay Stolberg, Epidemic of Silence: A Special Report; Eyes Shut, Black America Is Being Ravaged by AIDS, N.Y. TIMES, June 29, 1998, at A1 (reporting that African-Americans, only 13% of the U.S. population, account for 57% of this country's new HIV infections).


127. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989) (explaining that "[n]othing we say today precludes a state . . . from taking action to rectify the effects of identified discrimination").
city's jurisdiction. The Court also made clear that the government retains the authority to remedy and punish private acts of discrimination that violate civil rights statutes. The Court thus accepts as compelling the remedying of discrimination by governmental or private actors, past or present, provided the discrimination is identified with sufficient particularity. Notice, moreover, that the kind of discrimination that counts as compelling need not itself rise to the level of a constitutional violation. Distinguishing statements made by a plurality in Wygant, the Court in Croson clarified that a governmental actor may have a compelling interest in remedying more than just its own discrimination if it is acting within its legislatively authorized jurisdiction. Remedying private discrimination, which by definition is not of constitutional status, can thus be compelling. Notice further that the Court did not require that specific victims or perpetrators necessarily be identified for “identified” discrimination to be established. The Court only required that the city have a “strong basis in evidence” of a prima facie showing of discrimination in the local construction industry. The evidence, that is, need not be sufficiently particularized to establish legal liability on the part of any discriminators.

Now consider the government’s interest in remedying societal discrimination, the effects of the widespread discrimination that persisted in this society for much of our history, where the acts of discrimination and the particular perpetrators and victims thereof cannot be identified today with adequate specificity. The kinds of discrimination are essentially the same as those involved in identified discrimination—acts of racial discrimination by public and private actors. Indeed, societal discrimination is arguably worse as its effects represent the cumulative results of countless acts of discrimination so pervasive and enduring that its effects persist today. The principal difference between societal and identified discrimination lies in our ability to pinpoint the time, place, and actors involved. It is difficult to see why this difference makes the acts of identified discrimination any worse or our interest any greater in

128. See id. at 492.
129. See id. at 494 (explaining that “[s]tates and their local subdivisions have many legislative weapons at their disposal both to punish and prevent present discrimination and to remove arbitrary barriers to minority advancement”); id. at 500 (suggesting that Richmond could remedy “a prima facie case of a constitutional or statutory violation by anyone in the Richmond construction industry” but concluding that Richmond had failed to establish such a showing) (emphasis added).
130. See id. at 492 (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986)).
131. See Croson, 488 U.S. at 500.
132. See Strauss, supra note 37, at 15 (observing that “if the premise is that racial classifications are generally harmful, one would want them employed only to remedy the greatest evils, and offhand societal discrimination seems like a greater evil than discrimination in a specific area”); see also Goodwin Liu, Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test, 33 HARV. C.R.-C.L. L. REV. 381, 405 (1998) (arguing that “given our nation’s woeful history of racial discrimination and the Fourteenth Amendment’s promise of equal opportunity, it is reasonable to believe that a general interest in remedying societal discrimination is weighty enough to be constitutionally ‘compelling’ “); Brent E. Simmons, Reconsidering Strict Scrutiny of Affirmative Action, 2 MICH. J. RACE & L. 51, 84 (1996) (observing that “‘[s]ocietal discrimination’ is, of course, the sum total of local discriminatory practices”).

remedying its effects. The identification of discrimination with particularity may have emotional appeal, much like the display of war refugees on television increases public sympathy, but seeing it hardly makes the acts of discrimination any more egregious or the victims’ harm any more deserving of our compassion. The desire or interest on the part of government to remedy or “undo” the effects of societal discrimination would thus seem to be comparable in importance to that of remedying identified discrimination by both public and private discriminators. Just as remedying identified discrimination is compelling, remedying societal discrimination should be as well.

A likely objection to the argument thus far is that it conflicts with existing doctrine. Despite the importance of remedying societal discrimination, the Court already seems to have rejected this interest as not compelling and, therefore, insufficient to satisfy strict scrutiny.\(^{133}\) Indeed, some commentators apparently believe that the Court has rejected remedying societal discrimination as an entirely impermissible government interest.\(^{134}\) Accordingly, whether illegitimate or merely noncompelling, remedying societal discrimination simply cannot satisfy the interest prong of strict scrutiny, at least under the existing case law, which the present Court seems unlikely to expand in favor of affirmative action. Any expectation of persuading the Court to uphold race-neutral affirmative action based on remedying societal discrimination would thus seem implausible for the foreseeable future.

Contrary to this objection, the Court has never suggested that remedying societal discrimination is an illegitimate purpose and, indeed, the Court seems to take care not to dismiss this interest as unjustified or unimportant.\(^{135}\) Nor has the Court thus far held that this interest is insufficiently compelling to justify any remedial efforts. Rather, the Court has rejected this interest as an insufficient justification for remedial programs that use racial classifications. Beginning with \textit{Bakke}, Justice Powell rejected the remedying of societal discrimination as a justification for a race-based admission program, not on the ground that such a purpose was itself impermissible, but because it was too unfocused and “amorphous” to justify the use of a racial classification.\(^{136}\) Similarly, a plurality

\(^{133}\) See \textit{Croson}, 488 U.S. at 505.


\(^{135}\) Professor Strauss makes a similar observation, stating that “[t]he Court does not disparage the importance of societal discrimination as a concern; on the contrary, it repeatedly acknowledges the ‘sorry history of racial discrimination’ and its effects.” Strauss, \textit{supra} note 37, at 29 (quoting \textit{Croson}, 488 U.S. at 499, and citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (plurality opinion) and \textit{Wygant}, 476 U.S. at 276 (plurality opinion)).

in Wygant subsequently explained that “[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy,” and that “[t]his 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.”

The plurality continued: “No one doubts that there has been serious racial discrimination in this country... [b]ut as the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over expansive.”

And the majority in Croson, while expressing regret over the evident effects of societal discrimination, concluded that such a basis was insufficient to justify the extraordinary nature of the race-based set-aside:

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

... 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.... Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications.

The Court thus has not held that remedying societal discrimination is itself an illegitimate purpose or that it cannot support remedial relief of any form. The Court has instead emphasized the insufficiency of this remedial purpose based upon the nature of the means it is employed to justify—a racial classification or other race-operative remedy. Herein lies the real difference between remedying identified and societal discrimination for constitutional purposes: the insufficiency of the latter interest to define and thereby limit the scope of a race-operative remedy. Identified discrimination enables a governmental entity to

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Powell’s reasoning has been cited with approval in subsequent decisions. See Croson, 488 U.S. at 496-97, 505-06; Wygant, 476 U.S. at 276.
137. Wygant, 476 U.S. at 276.
138. Id. at 274; see also id. at 276.
139. Id. at 276.
140. Croson, 488 U.S. at 505-06 (emphases added) (quoting Bakke, 438 U.S. at 296-97 (Powell, J.)); see also Croson, 488 U.S. at 499 (expressing concern that permitting societal discrimination to justify race-based remedies “would give local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor”) (emphasis added).
limit its reliance on race to the extent minimally necessary to remedy the effects so identified. Societal discrimination, in contrast, provides less guidance as to who suffers its effects, who is most responsible for them, and when, if ever, it has been remedied. It is, in the Court's view, too "amorphous" and, as such, "provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." Accordingly, remedying societal discrimination cannot justify racial classifications analyzed under strict scrutiny, not because such an interest is insufficiently important, but because it is too ill-defined to constrain the use of race-based remedies.

Remediying societal discrimination should, however, be accepted as sufficiently compelling to pursue through race-neutral means. The Court's concerns over racial classifications that underlie its rejection of societal discrimination as a sufficient justification largely disappear when race-neutral means are employed instead. A comparison of race-neutral and race-operative classifications reveals that race-neutral affirmative action is substantially less likely to reflect stereotypical, illegitimate motivations, or to have harmful effects. The discussion shall first compare the use of race-neutral means to racial classifications with respect to the risk of harmful effects, and then will compare the two types of means as they bear on the risk of illegitimate purposes.

Regarding effects, race-neutral affirmative action avoids inflicting the immediate injury caused by programs administered on the basis of racial classifications. It is also less likely to exacerbate those race-related social problems identified by the Court, such as the perpetuation of stereotypes, inflaming racial hostility and, in general, delaying the day that race no longer has significance in American life. First, in terms of their immediate effect, the means used by race-neutral affirmative action, such as disadvantage-based classifications, are unobjectionable in the way they are administered. While racial classifications require those charged with their administration to identify and treat individuals differently on the basis of their race, and in so doing inflict "an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection," race-neutral classifications can be executed without racial discrimination.

Nor are race-neutral programs that classify on the basis of disadvantage likely to perpetuate the kind of stereotypical thinking with which the Court seems so concerned. Recall how racial classifications, by awarding benefits and burdens along racial lines, reinforce beliefs in the inferiority of racial minorities, who are treated as disadvantaged because of their race, and in the superiority of whites, who are treated as too privileged to deserve a compensatory preference. By contrast, race-neutral classifications based on disadvantage send a meaningfully different message. By their terms and operation, they award a preference to individuals who have been identified as suffering from a tangible disadvan-

141. Croson, 488 U.S. at 498.
tage and deny such a preference to those not suffering from that disadvantage, and they do so on a basis open to all regardless of race. Such programs send the realistic message that people who suffer from material or other tangible disadvantages are, indeed, disadvantaged.

To the extent that race-neutral classifications have a racial message, it is that blacks and whites who suffer from similar disadvantages share a common condition, while whites and blacks who do not suffer such disadvantages share a relative privilege. Race is not, by the terms of the classification, a common denominator. Rather, the classification finds commonalities between members of different (and the same) races and finds differences between persons of the same (and different) races. The classification, in other words, by its very silence on race, sends the message that "race does not matter," a normative proposition that the Court and opponents of racial preferences purport to embrace.

Race-neutral classifications are also less likely than race-operative classifications to cause racial divisiveness or resentment. As discussed earlier, much of the resentment over race-operative affirmative action stems from the way in which this kind of action both appears to give preferential treatment to some privileged racial minorities who do not deserve it and denies opportunities to disadvantaged white persons in need of help. Race-neutral affirmative action resolves both of these objections. Blacks who do not suffer from the identified disadvantage receive no benefit, and whites who do so suffer are benefited. The winners are disadvantaged blacks and whites, and the losers are advantaged blacks and whites. Such "losers" are unlikely to complain too loudly that those with less are being helped. Any resentment is at least unlikely to be as deeply held and racially defined as that fostered by racial preferences.

The salutary effects of race-neutral affirmative action can be seen in three other respects as well. First, a substantial number of white people would benefit from race-neutral, disadvantaged-based programs, likely reducing the risk of white resentment engendered by minority-exclusive preferences. Among the poor, although a disproportionate share are racial minorities as compared to the percentage of whites so disadvantaged, there are at least as many whites as minorities in actual numbers. A program designed to benefit the poor, therefore, would benefit as many whites as minorities. When one moves up the economic ladder to the lower middle class, a substantial majority of this class is white. That is why, especially in the context of higher education, the majority of those benefited by disadvantage-based programs are likely to be white. While the ineffectiveness of such an approach in creating racial diversity has led some to criticize race-neutral affirmative action, the fact that the beneficiaries of such

143. See Lincoln Caplan et al., The Hopwood Effect Kicks in on Campus, U.S. NEWS & WORLD REP., Dec. 23, 1996, at 28 (stating that University of California at Berkeley determined that Hispanic and black student population would drop under class-based affirmative action); Chris Klein, Law School Diversity Hinges on Race Policy, NAT'L L.J., Jan. 27, 1997, at A1 (discussing a study by Linda Wightman finding that minority enrollment would drop significantly under class-based affirmative action).

144. See, e.g., Brest & Oshige, supra note 82, at 897-98; Richard H. Fallon, Jr., Affirmative Action
efforts will include so many whites should soften concerns that the interests of whites were unfairly ignored in designing the program. The ineffectiveness of race-neutral classifications at benefiting only or mainly racial minorities may thus be a virtue from a constitutional standpoint.

Indeed, if one considers only the beneficiaries outside the target group of actual victims of discrimination, race-neutral affirmative action probably does not benefit minorities even in proportional terms, and not just in actual numbers. Since affirmative action is problematic only to the extent it fails to benefit or "fit" only true victims of discrimination, it seems legitimate to inquire how nonvictims of discrimination are actually affected. If we assume that, absent discrimination, the races would be represented in rough (not "lockstep") proportion among the disadvantaged, then disadvantage-based programs disproportionately benefit racial minorities because of discrimination. It follows that the disproportionate number of minorities compared to whites that benefit from disadvantage-based programs roughly represents the number of actual victims of discrimination. The remaining disadvantaged persons that benefit from disadvantage-based programs—those who are not disadvantaged because of discrimination—should include a roughly proportional percentage of different races, including whites. Accordingly, among the "undeserving" beneficiaries of a race-neutral disadvantage-based program, a proportional share is white. Thus, to the extent that race-neutral affirmative action "misses" discrimination victims, and instead benefits people who are not disadvantaged from discrimination, it does not favor racial minorities after all.

Second, as compared with racial preferences, there is little reason to be concerned about the length of time a race-neutral program remains in effect. Racial preferences that cause discrimination against whites are, at best, regrettable and few observers would want to see them continue indefinitely. Moreover, as racial preferences succeed in their purpose, they become more unfair in a racial sense. That is, as racial minorities become less disadvantaged compared to whites, fewer minorities who benefit from racial preferences will truly need or deserve it. Recall that these concerns seem to underlie the Court's rejection of race-neutral affirmative action as ineffective is that of Justice Blackmun in Bakke:

I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.


Bakke, 438 U.S. at 407 (Blackmun, J., concurring in part and dissenting in part). Notice that Justice Blackmun's assumption that race-neutral means would be permissible, even if ineffective, suggests that the principal concern of the Justices who voted to invalidate the affirmative action program in Bakke was its race-operative character rather than its motivating objectives.
of societal discrimination as a justification for racial preferences because it "provides no logical stopping point." The need to make race-neutral affirmative action temporary, by contrast, is less obvious. Not only do such programs avoid racially discriminatory treatment in their administration, but also as they succeed in remedying the effects of societal discrimination, their racially disparate impact should decline. That is, if race-neutral affirmative action succeeds in reducing racial disparities, then the (arguably) disparate impact of such programs in favor of racial minorities will be reduced. While initially conceived as an effort to remedy racial discrimination, race-neutral affirmative action programs could be retained indefinitely as legitimate programs that help disadvantaged persons without regard to race.

Third, race-neutral classifications avoid the necessity of choosing which racial groups to include in a preferential program, which groups not to include, and how to define such groups. With racial classifications, a choice of which racial groups to prefer is required, a choice that may appear arbitrary or unjustified for some groups compared to others that may have experienced more severe discrimination. Indeed, even the process of defining racial groups and deciding which are more "deserving" than others has a certain unseemliness. Moreover, such potentially offensive racial sorting might have to be repeated on a regular basis as changes occur in the relative status of different racial groups. Race-neutral classifications, by contrast, largely avoid these pitfalls. Because people receive benefits on the basis of disadvantage, anyone so disadvantaged is eligible, regardless of race, avoiding the need to choose, define, or categorize people by race. To the extent that different racial groups have suffered discrimination or are otherwise disadvantaged to different degrees, disadvantage-based preferences provide a sort of "rough justice" without racial sorting. Nor would re-sorting be required because, first, racial sorting is not involved at the outset and, second, any changes in the relative positions of racial groups would be automatically captured by the disadvantage-based preference. If some groups were to become more or less privileged compared to others, they would benefit proportionately less or more by need-based programs.


146. Justice Powell expressed this concern in concluding that all racial preferences must be subject to strict scrutiny. Otherwise, he surmised:

Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable.

Bakke, 438 U.S. at 296-97 (Powell, J.).
The effects of race-neutral affirmative action, both immediately and consequentially, are thus substantially less objectionable than racial classifications with respect to the Court's concerns. Race-neutral classifications are significantly less likely than racial classifications to perpetuate racial stereotypes or racial hostility and, by their very terms, encourage the transformation of race-based thinking to an approach based on more tangible race-neutral conditions shared or not shared by people regardless of race. Thus, to the extent the Court seems to have placed constitutional significance on the effects affirmative action may have in perpetuating and exacerbating race-conscious attitudes, race-neutral remedial programs are significantly less likely to foster—and may instead help to diminish—the relevance of race.

Next, consider the risk of illegitimate motivations with which strict scrutiny is also concerned. Here, too, race-neutral classifications are substantially less troublesome than race-based classifications. By classifying on the basis of tangible disadvantage and not race, race-neutral remedial policies are less likely than racial classifications to stem from illegitimate racial purposes or beliefs. Recall that one function of strict scrutiny is to "smoke out" illegitimate purposes by constraining the legislature to means that only serve compelling interests, thereby leaving little room for active pursuit of impermissible goals. The risk is significant that illegitimate purposes, such as prejudice, stereotypes, and simple racial politics, motivated racial classifications because such classifications plausibly serve these purposes. That is, many of the immediate and consequential effects caused by racial classifications, effects that make such classifications objectionable in themselves, contribute to the inference that illegitimate purposes may have motivated them. A classification that embodies, and thereby perpetuates, the stereotype that racial minorities are inherently disadvantaged and deserving of race-based preferential treatment serves the purpose of a legislature that believes this to be true. A racial classification that benefits racial minorities, regardless of whether individuals within the benefited class are truly disadvantaged, and which ignores or burdens the opportunities of whites who suffer from disadvantage, serves the purpose of a legislature captured by simple racial politics in which political power is exercised for the sake of racial minorities alone. A law that racially classifies, and thereby treats people differently on the basis of race, serves the purpose of a legislature that believes race to be a relevant and important character trait, in violation of the normative position of the Court that race is rarely relevant.

In contrast, a race-neutral law that operates directly on the basis of disadvantage is by its own terms a close "fit" to the purpose of helping those truly disadvantaged, some of whom are disadvantaged because of societal discrimination and others for other reasons. A remedial program that helps blacks and

147. See supra notes 102-03 and accompanying text (discussion of strict scrutiny's "smoke out" function); see also supra note 85 (citing Court's explanation in Croson and Adarand of this function of strict scrutiny).
whites identically with respect to similarly shared race-neutral disadvantages, and which fails to help blacks and whites who share similar advantages, serves the purpose of a legislature dedicated to moving from a mode of categorizing persons on the basis of race to one that views any differences among people to be based on tangible conditions and experiences, not skin color.

Thus, by operating without regard to race, race-neutral affirmative action ameliorates many of the concerns that have led the Court to reject remedying societal discrimination as a justification for racial classifications. The risks that require racial classifications to be justified by identified discrimination stem from what such classifications do. Because they discriminate on racial grounds, these classifications plausibly reflect illegitimate racial beliefs and may cause harms that must be clearly justified. In contrast, race-neutral classifications, by what they do and do not do, are less likely than racial classifications to reinforce stigmatic racial stereotypes or exacerbate racial tensions, and, in their administration, they completely avoid the need to discriminate against innocent individuals on the basis of race. Such classifications are likewise less likely than racial classifications to have been motivated by racial prejudice, stereotypes, or simple racial politics. Instead, when a race-neutral program benefits disadvantaged persons of all races in similar circumstances and evidence discloses a legislative intention to remedy societal discrimination, the program is likely to reflect just such a remedial purpose. Therefore, the Court may conclude, without unduly retreating from prior decisions, that the risks warranting application of strict scrutiny are sufficiently minimized by race-neutral affirmative action, and thus, these programs ought to survive such review. Strict scrutiny should be satisfied, that is, by the compelling interest of remedying societal discrimination tailored through race-neutral means.

Indeed, even if the foregoing discussion has overestimated the importance of remedying societal discrimination, as compared with remedying identified discrimination, the preferability of race-neutral means supports the conclusion that strict scrutiny should still be satisfied. Recall that the prongs of strict scrutiny are interdependent: whether an interest counts as compelling turns in part on the means used to pursue that interest. The more racially restrictive the means, the stronger the interest must be to justify its use. Conversely, the weaker the interest, the less racially reliant the means must be to qualify as narrowly tailored. Even if societal discrimination is less important, not just less remedy-constraining, than identified discrimination, the Court could find it sufficiently compelling to support the use of race-neutral policies. While race-operative classifications might be too racially restrictive to be justified on the basis of remedying societal discrimination, a race-neutral policy might be sufficiently preferable that the importance of remedying societal discrimination would assure the Court that the policy reflects only legitimate purposes and poses a minimal risk of undesirable consequences.

As the foregoing discussion demonstrates, race-neutral affirmative action may be more constitutionally palatable to the Court than race-operative pro-
grams. It should be recognized, however, that race-neutral affirmative action does not completely eliminate the risks raised by racial classifications. First, consider the risk of illegitimate motivations. While constraining a state professing to remedy societal discrimination to race-neutral means may well reduce the risk that illegitimate purposes actually motivated the legislature (or other state actor), it does not foreclose such a possibility. A legislature that targets disadvantages disproportionately affecting racial minorities may have selected the disadvantage to serve as a proxy for race, which, in turn, is stereotypically assumed to serve as a proxy for other characteristics such as student viewpoint, juror bias, or political affiliation. Consider also the minority-dominated legislature captured by racial politics that might endorse a race-neutral plan to benefit its more valued minority constituents. As the rigors of strict scrutiny would foreseeably apply to express racial classifications, a legislature with illegitimate stereotypical or raciopolitical objectives may well settle for a program that helps minorities through race-neutral means. Were efforts to remedy societal discrimination sufficient to justify race-neutral affirmative action, a legislature with illegitimate purposes could simply couch its intent in "remedial" terms to avoid invalidation.

A second concern, in addition to the risk of illegitimate motivations, is that race-neutral affirmative action may still have divisive racial effects. Even if the disproportionate benefit to racial minorities from race-neutral affirmative action is probably the result of societal discrimination, the overall disparate impact in favor of minorities may still stoke resentment among whites who perceive such programs as racial favoritism by proxy. Particularly those whites who do not qualify under a race-neutral program, and who may have fared better in its absence, may understandably claim injury by the government’s pursuit of a discriminatory purpose to benefit racial minorities.

Finally, the discussion has thus far compared the risks of race-neutral and race-operative affirmative action. A fair critique of race-neutral affirmative action, however, should also compare its effects with those of absolute colorblindness. While race-neutral classifications designed to remedy the effects of past discrimination may be preferable to racial classifications, a remaining option for legislatures is to completely refrain from pursuing race-related objectives, or at least to refrain in the absence of the narrow class of remedial interests that the Court has already endorsed as compelling. Any law motivated by a racially discriminatory purpose poses a risk of illegitimate motivations, the perpetuation of racial stereotypes, and the aggravation of race relations. That is why strict scrutiny is triggered by such a purpose, whether pursued through race-neutral or racially classified means. Although a law that explicitly relies on race makes its racial purpose obvious, the racial objective of race-neutral affirmative action will eventually filter into the public’s consciousness, reminding the public once again that its government is devoting time and limited public funds to the interests of racial minorities. It may be true that limiting the benefits of such policies to the truly disadvantaged—including whites similarly situated—will
reduce the extent of harmful racial effects, but the purpose of remediating discrimination suffered almost exclusively by racial minorities by targeting disadvantages disproportionately suffered by them may still provoke negative racial attitudes. Only by completely excluding the consideration of race from governmental decisionmaking can the risk of such effects be wholly avoided.

These concerns are valid. A risk surely remains that illegitimate purposes motivated a race-neutral program purportedly intended to remedy societal discrimination, and the risk of divisive effects cannot be ruled out. While these risks remain, they are likely to be sufficiently minimized by the use of race-neutral means, so as to be outweighed by society's interest inremedying its past discrimination. What is called for is a judgment, an assessment of the risks of governmental attention to race against the risks of abandoning efforts to rectify racial injustice. Although identified discrimination may constrain the risks of discriminatory action more than societal discrimination, the difference is a matter of degree. Even the remedying of identified discrimination does not foreclose the risk of impermissible purposes or of negative expressive harms. A racial classification that satisfies strict scrutiny may well have been adopted by a race-conscious, stereotypical-thinking, racial-interest-group-captured legislature that wanted to help racial minorities because it favored them or believed they are inherently handicapped and tailored the program to satisfy strict scrutiny merely to withstand legal challenge. Nonetheless, the Court is prepared to take this risk instead of banning discriminatory programs per se because the compelling interests served justify the risk. Similarly, although antidiscrimination laws may be abused or may generate resentment, their validity is not in serious doubt. White employees may, for example, believe black employees receive a sort of "just cause" employment while they are employed at will, and in some cases the white employees may be right. Nonetheless, the interests served by civil rights laws legally outweigh the risks of abuse or ill effects.

Notice as well that the Court's application of rational basis review to apparently nonsuspect classifications runs the risk that illegitimate purposes and racially undesirable effects will go undetected. Any race-neutral law that disproportionately disadvantages racial minorities may have been motivated by racial prejudice and may reinforce stereotypes even where a discriminatory purpose cannot be proven. On balance, however, the Court tolerates this risk to avoid excessive intrusion into the legislative process that could impair the legislature's ability to pursue worthy objectives.148 With race-neutral laws that disproportionately burden racial minorities, ostensibly unintentionally even if knowingly, the

148. As the Court explained in Washington v. Davis, subjecting race-neutral classifications to heightened review where no discriminatory purpose is demonstrated, simply because

in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Court has decided that the risk of undue interference with the legislative process outweighs the risk that, under rational basis review, the Court might fail to detect an impermissible purpose.

The question presented by race-neutral affirmative action is whether the risks that a race-neutral, disadvantage-based program was motivated by illegitimate purposes or will have unduly harmful effects are sufficiently great to invalidate such efforts, given the importance of remedying societal discrimination and the cost of disabling legislatures from attempting to do so. For the reasons discussed above, it seems plausible that remedying societal discrimination is sufficiently important that when pursued through race-neutral means, rather than racial classifications, the risks of illegitimate purposes and harmful effects worthy of concern are sufficiently minimized so that strict scrutiny should be satisfied.

Finally, there remains to be addressed the concern that, however preferable race-neutral affirmative action is to race-operative preferences, the best approach for our society is for the government simply to stop thinking about race. Perhaps only the complete elimination of race-conscious state action can avoid the perpetuation of the kinds of racialist thinking and hostility that have plagued our country for too long. Contrary to this objection, a concern over racial tensions and stereotypical thinking counsels in favor of using race-neutral affirmative action rather than refraining completely from efforts to remedy societal discrimination. The reason is that ignoring racial disparities carries its own risks. While affirmative action may well contribute in some way to racial tensions and stereotypes, it is hardly the only cause of these problems. The gross disparities between racial groups caused by historical discrimination exert significant influence upon the stereotypical assumptions people hold, consciously or unconsciously, about people of different races. People of good faith observe on a day-to-day basis that racial minorities occupy positions of inferior status in society. The only racial minorities many white people encounter are bagging their groceries, emptying their office trash, or shining their shoes. And for many people of color, the only doctors, lawyers, judges and business owners they observe are white. White children predictably develop caricatures of

149. To the extent the Court is concerned with harmful social effects of affirmative action, such as resentment by nonpreferred racial groups, it should limit its concern to resentment that is arguably legitimate. This means resentment by those who truly regret our discriminatory history and desire to remedy it but who may believe that affirmative action is sometimes unfair. Cf. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 276 (1995) (Ginsburg, J., dissenting) ("Court review can ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups.") (emphasis added). Resentment of any kind, in contrast, should not necessarily concern us, or the Court, because there is always a risk that anything that helps racial minorities will offend some people who believe minorities do not deserve equal rights. Resentment of this sort cannot be deemed a legitimate obstacle to remedial efforts. If any resentment over efforts to pursue racial equality were a basis to avoid such efforts, then the abolitionist and civil rights movements should never have been attempted. See Randall Kennedy, Persuasion and Distrust, A Comment on the Affirmative Action Debate, 99 Harv. L. Rev. 1327, 1330 (1986) (describing bitter resistance to civil rights movements).
minority people when, from simple observation at school, they conclude that minority children are disruptive and stupid. Minority children who, after spending all day every day of Winter break at their aunt’s crowded apartment until mom gets off work, hear their white classmates tell stories of Disney World, predictably conclude that being white is a luxury they missed out on. While the government might be able to act without stereotypes, people do not. People form opinions and unconscious assumptions based on observed correlations between race and other attributes, and act according to these opinions and assumptions. If, for example, a group of young black males is assembled on a street corner, both white and black pedestrians will cross the street out of a sense of prudence. Preach colorblindness all you like, but people act on stereotypes to protect themselves. When conditions such as poverty, crime, educational failure, and family breakdown fall along racial lines, people will develop generalizations and act accordingly even though such generalizations may be characterized as stereotypes.

The point is that stereotypes are recurrently formed, reinforced, and exacerbated by the effects of societal discrimination. These effects cause their own “expressive harms” by teaching through the example of reality that racial minorities are inferior to whites.150 “When certain groups always seem to fail,” one commentator has observed, “it is tempting to believe that this is because these groups are inferior.”151 Moreover, the conditions that perpetuate inequality along racial lines predictably reproduce themselves from generation to generation. As such, the failure to act in response to the overwhelmingly disproportionate numbers of racial minorities in disadvantaged circumstances threatens to perpetuate conditions that foster prejudicial and stereotypical racial beliefs as much or more than would responding to such conditions with race-neutral remedial programs.152 If a goal of the Equal Protection Clause is to

150. See DINESH D’SOUZA, THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY 245-87 (1995) (arguing that many people hold stereotypes about blacks as criminals based on personal experience or on an awareness that blacks commit a disproportionately high rate of crime); Carol R. Goforth, ‘What is She?’ How Race Matters and Why it Shouldn’t, 46 DePaul L. REV. 1, 63 (1996) (suggesting that negative media reports about blacks, such as high rates of crime, drug use, unemployment, and teen pregnancy reinforce stereotypical beliefs). A psychiatrist in the Boston area recounted his observations of people forming racial stereotypes from reports about blacks:

When they [his suburban neighbors] hear of all these murders, all these pregnant women in prison, all these women pregnant with no husbands, they don’t buy the explanation that it is poverty, or public schools, or racial segregation. They say, “We didn’t have much money when we started out, but we led clean and decent lives. We did it. Why can’t they?” I try to get inside that statement. So I ask them what they mean. What I hear is something that sounds very much like a genetic answer: “They don’t have it.” What they mean is lack of brains, or lack of drive, or lack of willingness to work. Something like that.


152. Professor Rubenfeld has also noted that abandoning affirmative action may have worse effects
carry us to the day in which race no longer matters in America, it must tolerate, even encourage, affirmative efforts to remedy the effects of societal discrimination that perpetuate the kinds of assumptions that foster racial intolerance.

It is not, moreover, inconsistent with the Court’s treatment of racial classifications to posit that, on balance, race-neutral affirmative action may be preferable to doing nothing. The Court may conclude that the risks inherent in racial classifications outweigh their potential benefits, and yet also conclude that the reduced risks posed by race-neutral affirmative action are outweighed by its potential benefits. Race-neutral efforts may need to be well-designed in order to minimize the burden on innocent whites or to avoid a windfall to those blacks not significantly disadvantaged by discrimination, but we cannot afford to do nothing. We cannot ignore the evidence of unremedied crimes of racial injustice or the people who have suffered therefrom. Nor can we fail to recognize the tendency of these conditions to perpetuate racial prejudice. We cannot afford to give up. The risk of doing nothing is too great.

III. AVOIDING STRICT SCRUTINY BY PURSUING NONSUSPECT PURPOSES THROUGH RACE-NEUTRAL MEANS

This Part advances a form of race-neutral affirmative action that should not be subject to strict scrutiny at all. The insight for lawfully avoiding strict scrutiny is in recognizing that helping racial minorities—as racial minorities—is not and has never been the ultimate objective of affirmative action, including programs that rely on express racial preferences. Rather, racial minorities have been intentionally benefited as a means to achieving other objectives, such as remedying discrimination or promoting diversity. These other objectives are not themselves suspect and subject to strict scrutiny. Rather, it is the racially discriminatory purpose of benefiting racial minorities as a means of achieving these objectives that is suspect. If race-neutral means were adopted to pursue these objectives directly, instead of through racial minorities, then strict scrutiny should not apply.

It is important to clarify the difference between the race-neutral affirmative action programs proposed in this Part and those analyzed in the previous Part. The programs discussed previously were assumed to have been motivated by a desire to benefit racial minorities, either to remedy societal discrimination or to create racial diversity. This appears to be the case with many recently adopted

on stereotypes and racial tensions than those created by affirmative action:

Does affirmative action “in fact promote notions of racial inferiority and lead to a politics of racial hostility”? Without doubt. Of course, affirmative action’s critics tend to forget that the relevant question on this point is whether affirmative action fosters more racial hostility and stereotyping than would exist without it. (To have extremely few black students at some of our most prestigious academic institutions would also promote notions of racial inferiority...).

Rubenfeld, supra note 105, at 446; see also Kennedy, supra note 149, at 1330-31 (arguing that it is unrealistic to think affirmative action is the primary cause of white disparagement of blacks).
affirmative action programs that rely on race-neutral means. Such programs would have to satisfy strict scrutiny as they involve racially discriminatory purposes and are, therefore, suspect. The programs proposed in this Part would not be subject to strict scrutiny provided they are enacted without a racially discriminatory purpose, that is, without any intention to target racial minorities, whether to create diversity or to remedy past discrimination.

As Section A will argue, the purpose of remediing racial discrimination—including societal discrimination—is not racially discriminatory and, therefore, not suspect, and neither is the purpose of promoting diversity, including a diversity of ethnic cultures commonly associated with racial groups. A state actor who pursues such nonsuspect purposes through race-neutral classifications has not, absent more, acted with a suspect purpose, either in the objectives sought or in the choice of means. Such race-neutral affirmative action is, therefore, not subject to strict scrutiny.

Section B analyzes some of the specific race-neutral affirmative action programs that have recently been implemented or proposed in the context of higher education. Applying the theory developed herein, some of these programs should be upheld. At the same time, the circumstances surrounding some of the recent, ostensibly race-neutral schemes suggest a suspect purpose, albeit benign, to benefit racial minorities and, therefore, raise serious questions about the constitutionality of such schemes. The discussion suggests a potential basis for upholding such programs if they are re-adopted for nonsuspect purposes.

A. REMEDYING SOCIETAL DISCRIMINATION, PROMOTING DIVERSITY, AND OTHER NONSUSPECT PURPOSES

Objectives that have commonly been advanced by governmental actors in support of affirmative action programs include remedying racial discrimination and, particularly for educational institutions, promoting diversity—that is, assembling a group of people who have diverse interests, experiences, perspectives, and cultural backgrounds, including cultures associated with racial or ethnic groups. As explored previously, these purposes have generally failed to sustain racial classifications analyzed under strict scrutiny. Given the broad language with which the Court has condemned race-conscious decisionmaking, it is tempting to conclude that any attention to race-related issues in formulating or justifying governmental policies triggers strict scrutiny. Admittedly, a broad range of race-related legislative purposes would be viewed by the Court as racially discriminatory. Not all racial purposes, however, fall into this category, particularly those of a remedial nature. There are race-related objectives that are neither illegitimate nor suspect, whether compelling or not for the purposes of strict scrutiny. In particular, remedying discrimination, including societal discrimination, and promoting diversity, including of cultures commonly identified with racial groups, are not racially discriminatory purposes or otherwise suspect. Nor is the interest of reaching out to poor, underserved communities that happen to be predominantly minority. As none of these race-related interests—and there
may be others—is racially discriminatory or suspect, strict scrutiny is not triggered by their pursuit.

First, remedying societal racial discrimination is not suspect. Recall that a racial purpose is suspect if and only if it is racially discriminatory, whether reflected in a racial classification or in the motivation behind a law that is race-neutral on its face. Remedying societal discrimination is not, however, a racially discriminatory purpose. The point here is that the target group of this purpose—victims of societal discrimination—is not a racial group. An objective or classification is racially discriminatory only if it is intended to affect a group defined by race. The Court has explained that a classification defines a group by a particular suspect trait, such as race or sex, only when the classification is necessarily associated with the trait in all instances. Where the classification is both over- and under-inclusive, that is, there are people covered by the classification who do not have the suspect trait and there are people with the trait who are not covered by the classification, then the classification does not classify by that trait. For example, in Hernandez v. New York, the Court held that a prosecutor’s peremptory challenges that intentionally targeted Spanish-speaking jurors did not target Latinos because not all Spanish speakers are Latino and not all Latinos are Spanish-speaking. Similarly, in the context of alleged sex classifications, the Court in Personnel Administrator v. Feeney held that a law that classifies by veteran status does not classify by sex even though the overwhelming majority of veterans are male because some, albeit few, veterans are female and many nonveterans are male. Accordingly, a

153. See Hernandez v. New York, 500 U.S. 352, 361 (1991) (explaining that “Spanish speaking” is not equivalent to “Latino” for equal protection purposes because not all Latinos are Spanish-speaking and not all Spanish speakers are Latino).
156. Indeed, a couple of cases of dubious status suggest that a classification does not classify by race if it is only under-inclusive of a racial group, even if not over-inclusive. That is, provided there are members of the racial group who do not fall within the classification, then the classification is not based on race, even if everyone within the classification is a member of the racial group. In Morton v. Mancari, 417 U.S. 535 (1974), the Court held that a federal hiring preference for individuals who were “one-fourth or more degree Indian blood and . . . a member of a Federally-recognized tribe” was not a “racial” preference because it “operates to exclude many individuals who are racially to be classified as ‘Indians.’” In this sense, the preference is political rather than racial in nature.” Id. at 554. The preference was thus under-inclusive of the racial group—Indians—notwithstanding that everyone within the hiring classification was racially Indian. Accord United States v. Antelope, 430 U.S. 641, 647 & n.7 (1977) (holding that jurisdictional law that subjected Indians to felony-murder rule was not based on “impermissible racial classifications” because it only applied to members of federally recognized tribes and therefore did “not apply to many individuals who are racially to be classified as ‘Indians.’”’)) (quoting Mancari, 417 U.S. at 554). These holdings are aberrational and inconsistent with prevailing equal protection doctrine. A governmental policy that explicitly disfavors (or favors) members of particular racial groups plainly employs a racial classification even if it limits the burden to only some members of the disfavored groups. A state employment policy against hiring “any blacks without a college education” would trigger strict scrutiny notwithstanding that some blacks, those with a college education, would not be covered by the policy. Consider also Croson’s invalidation of the race-based set-aside, even though it benefited only minority persons who also owned construction firms and
purpose to employ a classification not inherently tied to a suspect trait, even if highly correlative, is not by itself suspect. As strict scrutiny is only triggered when a suspect classification or purpose is used, such as race, a classification that is not suspect does not trigger strict scrutiny, provided it is not intended as a proxy for a suspect classification.

Returning to the purpose of remedying societal racial discrimination, the group targeted by such a purpose is victims of societal discrimination. One can define a victim of societal discrimination quite broadly. A victim of societal discrimination can include anyone who presently suffers substantially\(^{157}\) from racial discrimination—in other words, those who are substantially worse off today as a result of racial discrimination than they would be absent such discrimination—and includes those who have experienced discrimination directly, or indirectly, such as those who have inherited disadvantages from prior generations who suffered direct discrimination.\(^{158}\) This classification distinguishes between victims of societal discrimination and nonvictims of such discrimination, not between people of different races. While it is true that the nature of the discrimination suffered by these victims is based on race, the group is not a racial group because membership in the group does not turn on one’s race, but rather on whether one has suffered mistreatment by others on account of one’s race. The classification is not coextensive with race; people of any race can be covered by the classification, and people of any race can fall outside the classification. While it is true that, in our society, the vast majority of victims of societal discrimination are members of minority racial groups, the otherwise qualified to perform the contracted work. The Indian classification cases might be explained in part because they involved the special relationship between the federal government and Native American tribes, a relationship which finds explicit support in the Indian Commerce Clause of the Constitution. See U.S. CONST. art. I, § 8, cl. 3. Those cases might be reconciled with equal protection doctrine to the extent that Congress’s principal intent was to address Native American tribes as political entities rather than as racial groups. If membership in a tribe does not necessarily require being a member of a particular racial group, so that there may be non-Indian members as well as nonmember Indians, then tribal membership would not be a racial classification under Hernandez.

157. The classification is here limited to those who suffer “substantially” from societal discrimination because otherwise the classification may well include virtually everyone, since most people might be said to suffer in some way from historical societal discrimination simply by experiencing the negative effects of racial tensions in our society. A state has a legitimate interest in focusing its limited resources on those most acutely harmed by societal discrimination, whose socioeconomic circumstances are significantly below what they would be had historical discrimination not occurred. A state may, of course, wish to target a broader class of victims of societal discrimination. The point is simply that victims of societal discrimination are not a racial group and, therefore, a race-neutral affirmative action plan may target all or any portion of them, whether or not “identified” with particularity, without triggering strict scrutiny.

158. As Professor Strauss observes:

A person might be subject to the effects of past discrimination even if he himself has never been the victim of a specific act of discrimination, or has not been discriminated against for decades. Discrimination at an earlier time (or even discrimination against earlier generations) can leave people without the resources, particularly human capital resources, needed to compete—education, experience, reputation, contacts.

Strauss, supra note 37, at 21.
fact remains that there are members of racial minorities who are and who are not members of this group. Indeed, opponents of affirmative action, including Supreme Court Justices, have recognized the distinction between racial minorities and victims of discrimination, repeatedly criticizing racial preferences on the ground that not all their beneficiaries are victims of discrimination. White people, moreover, may also fall both inside and outside the group “victims of societal discrimination.” Although relatively few white people have been discriminated against, some have been discriminated against, according to the Court, as a result of affirmative action. In addition, some white people residing in urban communities indirectly suffer from the effects of past societal discrimination manifest in their communities today in conditions of poverty, poor public schools and crime. Accordingly, the classification—victims of societal discrimination—does not denote a racial group; an intention to affect this group is not, therefore, a racially discriminatory purpose that triggers strict scrutiny.

The problem with remedying societal discrimination through racial classifications lies in how such classifications attempt to reach the victims of societal discrimination. Racial classifications use race as a proxy for victims of societal discrimination and, thereby, racially discriminate in the means used. It is not the purpose of benefiting victims of discrimination that is suspect. It is the purpose reflected in the classification to benefit the group “racial minorities” that is suspect, a purpose employed in the hope that this racial group will include a substantial number of victims of societal discrimination. It can be illustrated thus:

\[
\text{Suspect racial classifications} \\
\text{racial minorities [as proxy for] victims of societal discrimination}
\]

The discriminatory purpose that triggers strict scrutiny is reflected in the choice to use a racial classification. Analyzed under strict scrutiny, such classifications cannot be used to remedy societal discrimination. Put another way, racial classifications may not be used as a proxy for victims of societal discrimination. Race-neutral classifications are also arguably suspect and subject to strict scrutiny when they are intended to benefit racial minorities. Race is still being used as a proxy for other characteristics; a race-neutral proxy is simply being used as a proxy for race, which is in turn being used as a proxy for victims of societal discrimination. As illustrated below, the course of action still involves the discriminatory purpose to benefit racial minorities:

\[
\text{Suspect race-neutral classifications} \\
\text{race-neutral criteria [as proxy for] racial minorities [as proxy for] victims of societal discrimination}
\]

Race-neutral affirmative action of this form is subject to strict scrutiny although, as argued in the previous Part, the use of race-neutral classifications can enable such efforts to satisfy heightened review.
In contrast, when racial minorities are not targeted at all as a means of benefitting victims of societal discrimination, and race-neutral means are used, there is no racially discriminatory purpose reflected in the choice of means or in the ultimate objective. That is, strict scrutiny is not triggered when race-neutral means are used directly to reach victims of societal discrimination:

Non-suspect race-neutral classifications
race-neutral criteria [as proxy for] victims of societal discrimination

To illustrate, recall the examples discussed in the preceding Part for remedying societal discrimination. It was suggested that public universities might address the underrepresentation of racial minorities in higher education by providing need-based scholarships or giving an admission preference for economic hardship. To avoid strict scrutiny analysis, such programs would instead have to be adopted sincerely for the purpose of remedying the underrepresentation of victims of societal discrimination, not racial minorities. To take another example, rather than improving the quality of public education to raise the achievement levels of minority schoolchildren, states could, without triggering strict scrutiny, seek to help schoolchildren whose educational opportunities have been impaired by societal discrimination.

Effectiveness could be enhanced, moreover, by targeting a combination of disadvantages likely caused by societal discrimination. Therefore, a university might give weight in admissions to a wide variety of socioeconomic factors likely to correlate with victims of societal discrimination, such as a relative lack of intergenerational education and wealth broadly defined. Additionally, universities might elect to “lower,” or otherwise modify, their reliance on standardized measures of merit, such as grades and aptitude tests, based on the assumption that an inverse correlation likely exists between victims of societal discrimination and high achievement scores. Alternatively, schools that would resist this suggestion to avoid compromising admission standards could abandon “legacy” programs, which are extremely unlikely to benefit victims of societal discrimination and, therefore, serve to reduce the number of such victims that could be admitted even without affirmative action.

160. See Corinne E. Anderson, A Current Perspective: The Erosion of Affirmative Action in University Admissions, 32 AUCK L. REV. 181, 229 (1999) (suggesting as an alternative to racial preferences that universities reconsider weight given to standardized test scores and grade point averages). If a university modified reliance on standardized criteria in order to recruit racial minorities, then such action would be subject to strict scrutiny. If, however, replacing racial preferences with modified admission standards were intended to reach victims of discrimination directly through modified standards instead of relying on racial preferences as a proxy for discrimination victims, then strict scrutiny would not be triggered.
In other contexts as well, the government may seek to remedy the effects of societal discrimination directly through race-neutral means. The government may, for example, address the causes of crime, poverty, substance abuse, and disease, not to help racial minorities, but to help those people who disproportionately endure these conditions because of societal discrimination. In these examples of race-neutral affirmative action, race-neutral means are used instead of, not as a proxy for, racial classifications as a means to helping victims of societal discrimination. By taking race out of the chain of purposes, race-neutral affirmative action so conceived completely avoids the use of a racially discriminatory purpose and, therefore, does not trigger heightened review.

In addition to remedying societal discrimination, a non-racially discriminatory purpose associated with affirmative action is the promotion of diversity, including a diversity of viewpoints, experiences, and even of cultures commonly associated with or identified by members of racial groups. As this is not a racially discriminatory purpose, the pursuit of this interest directly through race-neutral means does not trigger strict scrutiny. The most controversial aspect of the foregoing claim is that it is not suspect to promote a diversity of cultures predominantly identified with by members of particular racial groups. The reason such diversity is not racially suspect is that people who identify with particular cultures are, like victims of societal discrimination, not a racial group, because membership in the group is not inherently connected to any race. Consider, for example, the group defined as people who identify with “black,” “African-American,” or “Afrocentric” culture. While most members of the group—people who identify with this culture—may be racially black, there are many blacks who are not members of that group\(^\text{162}\) and, as some race theorists have observed, people can identify with African-American culture without being racially black.\(^\text{163}\) Accordingly, neither African-American nor Black culture is a racial category and the purpose of promoting the culture or affecting its members through race-neutral means is neither suspect nor subject to strict scrutiny.\(^\text{164}\)

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University's legacy preference led to the admission of almost 200 students who arguably would have been rejected otherwise.” Yin, supra note 144, at 217 n.22 (citing Woo, supra, at A1). Abandoning the legacy preference could, of course, have its own real cost in lost alumni donations. See id. (explaining that defenders of legacy programs cite the increased donations from alumni such programs tend to encourage which in turn enables schools to fund more need-based scholarships) (citing Woo, supra, at A1).

162. See Kim Forde-Mazrui, Black Identity and Child Placement: The Best Interests of Black and Biracial Children, 92 Mich. L. Rev. 925, 948 (1994) (arguing that “not all Black families identify with Black culture”); Alex M. Johnson, Jr., Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law, 84 Cal. L. Rev. 887, 948 (1996) (advocating distinction between “black” as a race and “African-American” as a culture, and arguing that not all racially black persons are culturally African-American); Tommy E. Whittler et al., Strength of Ethnic Affiliation: Examining Black Identification with Black Culture, 131 J. Soc. Psych. 461, 461 (1991) (explaining that some blacks may identify strongly with Black culture while others may assimilate more with the majority culture).

163. See Johnson, supra note 162, at 950 n.222 (“Of course, nested within the ethnic categorization of African American are a plethora of people of all races, blacks, mestizos, mulattos, and surprisingly, whites.”).

164. The nonsuspect nature of cultural classifications applies equally to cultures commonly associated with particular national origins. Thus, for example, government sponsored events or programs that
The problem with racial classifications used to promote diversity, just as with racial classifications used for remedial purposes, is not in the ultimate purpose but in the choice of racially discriminatory means to achieve that purpose. Likewise, the use of race-neutral classifications as a proxy for racial minorities as a proxy for diversity would also involve a discriminatory purpose. If, however, race is taken out of the choice of means altogether, so that the legitimate nonsuspect purpose of promoting diversity is directly pursued through race-neutral classifications, then no racially discriminatory purpose exists and strict scrutiny is not triggered. The following formulations illustrate the various possibilities:

*Suspect* racial classifications  
*racial minorities* [as proxy for] diversity

*Suspect* race-neutral classifications  
race-neutral criteria [as proxy for] *racial minorities* [as proxy for] diversity

Non-suspect race-neutral classifications  
race-neutral criteria [as proxy for] diversity

Thus, states and public universities may seek to promote diversity in higher education without triggering strict scrutiny, provided that race-neutral means are used. Such diversity of a broad nonracial type may include people from different social, political, or economic backgrounds, having had different life experiences, or holding various viewpoints or perspectives. Such diversity is clearly a legitimate interest, particularly in educational contexts. The use of race-neutral means to achieve this nonracial concept of diversity is plainly unobjectionable. Moreover, as argued here, nonracial diversity may include people who identify with different cultures, including cultures typically associated with racial groups, but which are available to people of any race. As such, a public university's admission or scholarship application may, without triggering strict scrutiny, consider race-neutral criteria, such as organizational membership, community service, or personal essays, to identify applicants who will likely enrich the cultural diversity of the student body.165

In sum, race-neutral affirmative action programs can avoid strict scrutiny analysis by not pursuing a racially discriminatory purpose. First, race-neutral

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165. See, e.g., Brest & Oshige, *supra* note 82, at 876 & n.80 (suggesting that schools might identify students whose presence will most serve affirmative action goals by asking applicants to discuss their cultural backgrounds, "community" ties, or social or political viewpoints) (citing Ian Haney Lopez, *Community Ties, Race, and Faculty Hiring: The Case for Professors Who Don't Think White*, RECONSTRUCTION, Winter 1991, at 46, 49).
means must be used, although such means alone are not sufficient. The governmental actor must directly pursue nonsuspect purposes through race-neutral means and not use race-neutral means as a proxy for race as a proxy for nonsuspect interests. Remediating societal discrimination and promoting diversity are nonsuspect purposes. Provided that race-neutral classifications are used to pursue these goals directly, affirmative action remains viable without the risk of invalidation under strict scrutiny.

B. RE-ENACTING SUSPECT POLICIES FOR NONSUSPECT REASONS?:
UNCERTAIN DEVELOPMENTS IN HIGHER EDUCATION

This final section considers the implications for race-neutral programs when evidence suggests that an illegitimate stereotype may have motivated their adoption. Such circumstances are illustrated by the recent race-neutral programs in California and Texas, which were described at the outset of this Article. Although these programs might be justified on remedial or nonracial diversity grounds pursuant to arguments presented in the previous section, some of the circumstances surrounding their adoption suggest that they were adopted, not for remedial or nonracial diversity purposes, but as a proxy for racial diversity. That is, rather than relying on race-neutral means instead of race to pursue nonracial purposes, they instead appear to be targeting racial minorities, albeit through race-neutral means, to create a diversity of racial groups among the student body. Notably, many of these programs were adopted almost immediately after race-operative policies were invalidated. In California, for example, the move to class-based affirmative action came on the heels of Proposition 209's ban of racial preferences. In Texas, the legislature adopted the high school admission scheme shortly after Hopwood. Moreover, explicit state-

166. For example, class-based affirmative action programs with which some California schools are experimenting should be upheld if they are intended either to compensate for disadvantages caused by societal discrimination or as a means to obtaining students with diverse experiences defined nonracially, such as economic, educational, or cultural backgrounds. The consideration by school admissions officers of "diversity" or "hardship" essays in which applicants describe challenging life experiences could likewise be justified on remedial grounds or as a means for identifying students from a variety of backgrounds who could bring distinct outlooks, ideas, and cultural perspectives to the academic environment. Colleges in Texas might be justified in admitting the top 10% of every high school on the grounds that past societal discrimination, particularly residential and educational segregation, resulted in highly segregated, low-income, ethnic communities that still exist today and which would benefit from the 10% program. Alternatively, Texas colleges might seek students from a cross-section of high schools as a strategy to enrich diversity given that different communities are often defined by a unique mix of demographic characteristics including socioeconomic status, occupation, education, and political, religious, or cultural affiliation. Cf. Kim Forde-Mazrui, Jural Districting: Selecting Impartial Juries Through Community Representation, 52 Vand. L. Rev. 353, 366-67 (1999) (arguing that diversity of jury compositions could be enhanced by selecting jurors from a cross-section of communities).

167. See, e.g., Foote & King, supra note 10, at 61 (explaining that, in response to Proposition 209, the University of California at San Diego opened academic assistance programs for low-income and bilingual elementary school students, and quoting University of California at Santa Cruz Chancellor as vowing to "go all the way back to the first grade" if necessary).

168. See Why Colleges Need Affirmative Action, supra note 5 (stating that "[w]hen the 5th U.S.
ments by some school and state officials indicate a purpose to recreate racial diversity without the use of racial preferences.169 Consider also the “disadvantage” criteria being considered by some schools. In addition to socioeconomic and educational background, schools are giving weight to applicants who speak English as a second language or who grew up while a parent was in a gang or in prison.170 These traits are certainly disadvantageous and plausibly caused by societal discrimination, but when combined with other circumstances indicating a desire to avoid returning to a system of racially segregated schools, an inference might be drawn that such factors are being used as a proxy for race rather than instead of race. If such programs were in fact designed to create racial diversity, their constitutionality would be in question. As previously explained, the present Court is likely to conclude that promoting racial diversity to enhance the educational environment is stereotypical and, therefore, invalid, whether or not supported by empirical evidence. The Court would at least subject policies premised on such objectives to strict scrutiny.

While it remains to be seen how the Court would react to race-neutral programs in which potentially stereotypical thinking is indicated, the following points are offered in defense of their constitutionality. First, standing alone, the adoption of race-neutral policies in lieu of impermissible racial preferences to achieve the same objectives need not mean the program is a subterfuge for illegitimate purposes. If the objectionable nature of a racial preference-based program relates to its means and not its purpose, then the replacement of those means with race-neutral criteria cures the objection. Therefore, if a university has used race as a proxy for economic disadvantage or other nonracial experiential or cultural characteristics deemed valuable to the academic environment, then the use of race-neutral means to identify these nonracial factors represents compliance with, not evasion of, the Equal Protection Clause. Thus, if schools in California and Texas are substituting race-neutral criteria for racial criteria in order to re-create nonracial diversity, these alternative approaches should be accepted.

Second, even if circumstances in a particular case prove preponderantly that a state or public university acted upon an illegitimate purpose, the actor might counter that it would have adopted the same policy for nonsuspect reasons. If, for example, a university could demonstrate that it would have adopted a need-based scholarship for completely nonsuspect reasons, such as helping economically disadvantaged persons, victims of societal discrimination, or

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169. For example, University of Texas vice president Patricia Olendorf purportedly said that the new law guaranteeing admission to the top 10 percent of every high school graduating class was “designed to offset Hopwood.” This Morning: Newscaet—University of Texas Heads Back to Court to Get an Affirmative Action Ban Overruled (CBS television broadcast, May 18, 1998).
170. See supra note 7.
members of cultural groups, then the purpose of creating racial diversity would not have been a but-for cause of the scholarship's adoption, and the program should be upheld. Such a defense might be plausible, given the legitimate nonracial purposes often served by race-neutral classifications that benefit racial minorities.

Finally, if evidence showed that an illegitimate stereotype motivated a race-neutral program that probably would not otherwise have been adopted, the question would arise whether the state actor should be permitted to reevaluate the need for the new policy and possibly re-adopt it for legitimate purposes. For example, if a need-based scholarship were invalidated because it was intended to benefit racial minorities on the stereotypical assumption that it would bring diverse perspectives to the institution, should the university be permitted to re-adopt the program for nonsuspect remedial, diversity, or economic purposes? The argument against this approach is that once an impermissible purpose has been found to have tainted the decisionmaking process, the same state actor cannot be allowed simply to profess a change of heart while re-enacting the very same policy. The incentive for a state actor found to have acted for illegitimate reasons to fabricate a legitimate purpose is obvious. Consistent with this reasoning, the Court in *Hunter v. Underwood* invalidated a provision of the Alabama Constitution disenfranchising persons convicted of crimes of moral turpitude on the ground that the purpose for which it was originally enacted was to disenfranchise blacks. In so doing, the Court rejected the argument that the state has since retained the disenfranchising provision for legitimate purposes, stating, "We simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights*." In *Keyes v. School District Number 1*, the Court explained that a school board found to have intentionally segregated in the past cannot escape its duty to remove the vestiges of that segregation simply by observing that the discriminatory purpose has long since been abandoned. In the present situation, a claim by state officials that an affirmative action program initially based on illegitimate stereotypes has been re-adopted for permissible purposes would be even less credible, given that no significant time has passed since the impermissible

172. See id. at 233.
173. Id. at 233.
175. The Court stated:

We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less "intentional."

*Id.* at 210-11.
objective was acted upon, and that the very same individuals who so acted would now be claiming a different purpose.

Other equal protection precedents involving sex discrimination, in contrast, support the possibility of upholding a law for reconsidered reasons. In *Michael M. v. Superior Court,* 176 for example, the Court rejected a defendant’s claim that a statutory rape law that only targeted males was founded on stereotypical notions about the virtue and chastity of young females. Instead, the Court accepted the California Supreme Court’s determination that the law’s purpose was the prevention of pregnancy, noting that, after the lower court’s opinion, the state legislature had reconsidered the law and apparently retained the sex-based classification for the reasons suggested by the lower court. 177 Similarly, in *Rostker v. Goldberg* 178 when the male-only registration requirement of the Military Selective Service Act was challenged as an “accidental by-product of a traditional way of thinking about females,” 179 the Court refused to limit its inquiry into legislative purpose to the time of the statute’s original enactment and considered the legislative history surrounding the Act’s subsequent re-activation. 180

Finally, in *United States v. Virginia,* 181 the Virginia Military Institute defended its male-only admission policy, which it had maintained since the school’s founding in 1839, based on its reexamination of the policy following the Court’s 1982 decision in *Mississippi University for Women v. Hogan.* 182 Although the Court found the new justification inadequate, it nonetheless

177. In rejecting petitioner’s claim of illegitimate legislative motivation, the Court reasoned:

Subsequent to the decision below, the California Legislature considered and rejected proposals to render § 261.5 gender neutral, thereby ratifying the judgment of the California Supreme Court. That is enough to answer petitioner’s contention that the statute was the “accidental by-product of a traditional way of thinking about females.” Certainly this decision of the California Legislature is as good a source as is this Court in deciding what is “current” and what is “outmoded” in the perception of women.

*Id.* at 471 n.6 (citations omitted).
179. *Id.* at 58.
180. The Court stated:

[W]e reject appellees’ argument that we must consider the constitutionality of the MSSA solely on the basis of the views expressed by Congress in 1948, when the MSSA was first enacted in its modern form. Contrary to the suggestions of appellees and various amici, reliance on the legislative history of Joint Resolution 521 and the activity of the various Committees of the 96th Congress considering the registration of women does not violate sound principles that appropriations legislation should not be considered as modifying substantive legislation. Congress did not change the MSSA in 1980, but it did thoroughly reconsider the question of exempting women from its provisions, and its basis for doing so. The 1980 legislative history is, therefore, highly relevant in assessing the constitutional validity of the exemption.

*Id.* at 74-75.
182. See *id.* at 539 (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982)).
considered the justification relevant in determining the purpose of the single-sex school rather than relying exclusively on the outdated stereotypes that motivated the school's founding.\textsuperscript{183}

Why has the Court in some cases relied exclusively on the original purpose behind a law while in others it has been willing to permit a state to reconsider and re-justify a law based on new reasons? The distinction may lie in the extent to which the Court views the state actor as having been particularly culpable at the time of the original enactment. Where the original purpose for a law was invidious racial prejudice, the Court may believe, in hindsight, that the purpose was wrong then and those acting upon it knew or should have known it. The people acting in the Alabama state convention, for example, who vowed to preserve white supremacy in the state by disenfranchising blacks, albeit through race-neutral means, were acting immorally and in an effort to thwart the Reconstruction Amendments to the United States Constitution. Similarly, the Court's aggressive efforts to undo school segregation "root and branch"\textsuperscript{184} suggest a belief that segregation in the public schools was an evil that never should have happened. When invidious racial prejudice has been acted upon, especially recently, the credibility of a state actor who would act for such reasons may be so impeached that no recantation short of abandoning the law is acceptable. Even when a law's invidious purpose occurred a long time ago, the taint of that purpose may be so pernicious, so deep, and so enduring that it cannot be completely cleansed without invalidating the law.

The types of stereotypical assumptions that motivated sex-based classifications, in contrast, may be viewed by the Court as now outdated in light of changed cultural norms, but not as wrong, or at least not as invidious, at the earlier time. Thus, in \textit{United States v. Virginia}, the Court may not have been prepared wholly to condemn the motivations of VMI's founders, who in 1839 desired to establish an institution to train men to serve what was then their role in society responsibly and honorably.\textsuperscript{185} The distinction between the two ap-

\textsuperscript{183} See \textit{Virginia}, 518 U.S. at 535 ("Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth.") (emphasis added); id. at 536 ("Neither recent nor distant history bears out Virginia's alleged pursuit of diversity through single-sex educational options.") (emphasis added); id. at 539 (considering VMI's report on the re-examination of the single-sex policy and concluding that it did not demonstrate sufficiently important purpose to uphold the policy).

\textsuperscript{184} Green v. County Sch. Bd., 391 U.S. 430, 437-38 (1968) (declaring that segregated school systems have an affirmative obligation to dismantle their dual school systems "root and branch").

\textsuperscript{185} Chief Justice Rehnquist's concurrence most clearly reflects this position:

VMI was founded in 1839, and, as the Court notes, admission was limited to men because under the then-prevailing view men, not women, were destined for higher education. However misguided this point of view may be by present-day standards, it surely was not unconstitutional in 1839. The adoption of the Fourteenth Amendment, with its Equal Protection Clause, was nearly 30 years in the future. The interpretation of the Equal Protection Clause to require heightened scrutiny for gender discrimination was yet another century away.
proaches to reconsidered legislative intent is not adequately explained, however, by whether such intent was unconstitutional or otherwise illegal at the time of the law’s original enactment. Although the point can be debated, most legislators and school administrators reasonably believed school segregation was constitutional before Brown v. Board of Education,\textsuperscript{186} at least under prevailing precedent, yet the Court, for a time at least, rigorously sought to undo all its vestiges.

The best explanation may lie in whether the Court views a law’s original purpose, even if legally tolerated at the time, as nonetheless cruel or immoral. A purpose viewed by the Court as sufficiently blameworthy or unforgivable by contemporary constitutional standards, such as racial bigotry, may spell the invalidation of a law without chance of reconsideration. The Court may view sex discrimination instead as something right-minded people used to accept and who, when asked to reconsider, may well abandon those assumptions on learning that norms have changed.

The question then is whether states and public universities that have adopted race-neutral policies to benefit minorities for stereotypical purposes should be allowed to reconsider whether to retain these policies for legitimate purposes. The originating purposes involve race and are recent in time, both of which weigh against permitting reconsideration. In other respects, however, the culpability that characterizes diversity-based programs seems more analogous to sex discrimination than to old-style racism. Unlike the “odious” or “invidious” assumptions of white supremacy and the animosity that motivated many discriminatory policies that disadvantaged blacks, the purposes behind affirmative action that concern the Court are more in the nature of paternalistic stereotypes, much like the assumptions behind laws that have denied opportunities to women. Moreover, to the extent that legality is a factor, Bakke, which has not been explicitly overruled, endorsed the limited use of racial preferences.\textsuperscript{187}

\textsuperscript{186} 347 U.S. 483 (1954).
\textsuperscript{187} A majority of the Court in Bakke held that some use of race in university admissions was constitutional, reversing so much of the lower court’s opinion that prohibited any consideration of race. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (Powell, J.) (Part V-C of opinion); id. at 328 (Brennan, White, Marshall, & Blackmun, JJ., concurring in part and dissenting in part) (joining Part V-C of Justice Powell’s opinion); see also Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O’Connor, J., concurring) (noting that racial diversity in higher education has been found to be a compelling state interest) (citing Bakke, 438 U.S. at 311-15 (Powell, J.)).
Public universities have relied in good faith on this precedent and, in particular, on the diversity rationale endorsed by Justice Powell’s opinion. In addition, consider the suggestion in Croson that race-neutral means may be used to increase minority access to public construction contracts. Looking at Bakke and Croson together, states and public universities may have reasonably believed that race-neutral programs designed to achieve racial diversity are constitutionally commendable. If courts now conclude that the racial diversity purpose is invalid even when pursued through race-neutral means, perhaps states should be permitted to learn from their mistakes and determine whether they want to retain the race-neutral programs for permissible remedial or nonracial diversity purposes. At least where state actors have abandoned racial preferences in their attempt to create racial diversity, a step toward race-neutral decisionmaking has been made.

CONCLUSION

Colorblind advocates from the right insist that affirmative action is morally equivalent to official segregation, and they are succeeding in persuading the courts and country of their position. Applying their reasoning to race-neutral policies, a governmental decision to improve the quality of all public schools, out of a concern for the continued underachievement of minority children, is no better than a decision to close all public schools to avoid integration. Exploring the constitutional implications of race-neutral affirmative action, however, clarifies the fundamental difference between these practices. Segregation designed to exclude blacks from equal citizenship was wrong because of its motivating ideology—white supremacy. Affirmative action to remedy past discrimination, in contrast, is arguably objectionable not because of its motivating purpose, but because of the means it commonly uses to achieve it—racial preferences. By removing race from the means in attempting to remedy past discrimination, race-neutral affirmative action largely cures the objectionable nature of affirmative action, whereas removing race from the means of a policy still designed to keep blacks in their place merely masks the illegitimate purpose behind a race-neutral facade. The former attempts to accommodate equal protection concerns; the latter attempts to evade them. This difference may explain the apparent political and judicial consensus that race-neutral affirmative action is a

188. See Jonathan Alger, When Color-blind Is Color-bland: Ensuring Faculty Diversity in Higher Education, 10 STAN. L. & POL’Y REV. 191, 192 (1999) (“Because the Court has not provided further guidance on the issue, colleges and universities continue to rely upon Justice Powell’s opinion in Bakke to justify faculty and student diversity programs.”) (footnote omitted); Philip T.K. Daniel & Kyle Edward Timken, The Rumors of My Death Have Been Exaggerated: Hopwood's Error in “Discarding” Bakke, 28 J.L. & EDUC. 391, 400 (1999) (observing that “Justice Powell’s diversity rationale in Bakke has been embraced by college administrators as the blueprint of permissible admissions”).

189. See supra notes 76-77 and accompanying text (quoting suggestion by Justices O’Connor and Scalia that race-neutral means could be used to remedy disadvantages suffered by minority-owned firms).
legitimate alternative to racial preferences. Most Americans seem to understand, at least intuitively, that whatever flaws exist in affirmative action, the underlying purpose is hardly akin to that of the Ku Klux Klan.

The Equal Protection Clause, by any interpretation, should permit race-neutral efforts to undo the injurious effects of the racial discrimination it was intended to eliminate. This Article has presented arguments for upholding race-neutral affirmative action, arguments that take existing doctrine seriously. If strict scrutiny is not necessarily fatal, as the Court has assured, then race-neutral remedial programs ought to be upheld under such analysis, even if intended to remedy societal discrimination. Alternatively, if race-neutral policies are not intended to affect racial minorities, but are instead intended to benefit victims of societal discrimination or members of cultural groups, then such policies should be readily upheld under rational basis review. Whichever mode of analysis a case warrants, the importance of remedying societal discrimination and the unobjectionable nature of race-neutral means counsel in favor of judicial tolerance.

Finally, I close with a comment on the broader affirmative action debate currently being waged across the country. It has been almost four decades since Martin Luther King, Jr. delivered his “I Have a Dream” speech at the March on Washington, and over three decades since his assassination. Apparently, at least in recent years, Dr. King has become the hero of the political right. His Dream, they lament, that his children would “one day live in a nation where they will not be judged by the color of their skin but by the content of their character,” is being dishonored by affirmative action.190

It is true that his Dream remains just that, a dream. It is true that we as a society continue to assume that racial minorities, particularly blacks, lack intelligence and moral character. And how can we not? After all, black children are more likely than white children to grow up to be thieves, drug dealers, rapists and murderers. Black schoolchildren are more likely to receive poor grades, to need remedial education, and to be disruptive or violent to other children. Black children are less likely to graduate from high school, to apply to college, and to qualify for admission based on high school grades and achievement test scores. Black children are more likely to end up, in adulthood,191


191. See Kathleen A. Graves, Affirmative Action in Law School Admissions: An Analysis of Why Affirmative Action Is No Longer the Answer... Or Is It?, 23 S. ILL. U. L.J. 149, 171 (1998) (quoting King’s “I Have a Dream” speech as exemplifying that “[e]ven Martin Luther King, Jr. recognized the detriment of affirmative action and the need to do away with it”); Cass R. Sunstein, What the Civil Rights Movement Was and Wasn’t (with Notes on Martin Luther King, Jr. and Malcolm X), 1995 U. ILL. L. REV. 191, 203 (1995) (“As we have seen, King’s ‘I have a dream’ speech has been used to give moral weight to the constitutional attack on affirmative action.”); Sylvia R. Lazos Vargas, Deconstructing Homogeneous Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect, 72 Tul. L. Rev. 1493, 1517-18 (1998) (arguing that current attack on affirmative action is premised on the argument that individuals should be judged, according to Martin Luther King, Jr.’s aphorism, on the “content of character and not the color of skin”).
performing low or unskilled jobs, or to be unemployed and on welfare. Black males are more likely than white males to father children only to abandon them and their mothers and never pay a cent in child support. Black females are more likely than white females to get pregnant before the age of fifteen, by a male with no interest or capacity to support her, to bear infants addicted to drugs, and to do it again. Black parents are more likely than white parents to abuse their children, to raise them in unclean, unsafe households, to give their children little emotional or psychological encouragement, to feed their children unhealthy diets, to give their children inadequate medical attention, to send their children to unsafe, unclean, high crime, poor quality schools. These children, then, grow up to . . .

We cannot eliminate race from the American psyche until we understand and eliminate the conditions that cause people to make assumptions about others because of their race. Assuming, optimistically, that racism no longer seriously impairs the life chances of racial minorities, we cannot ignore the social and economic deprivations that do. These conditions, by their example, do more than affirmative action to reinforce stereotypes, justify racism, and thereby exacerbate racial tensions. Worse, these conditions cause misery to those who must endure them. To ignore these conditions is to guarantee their perpetuation and that of the racialist thinking they fuel. The day when race no longer matters will not arrive until we take active measures, or affirmative action, to improve the conditions and remove the disadvantages that keep racial minorities down. And we have a legal and moral obligation to try. Unless we assume that race really does matter, that along with darker skin a child of color congenitally inherits a propensity to fail, to commit crime, and to die a violent death, we must acknowledge that centuries of slavery and decades of legalized racial oppression created an underclass identifiable by race.

Martin Luther King, Jr. was right to espouse the principle that people ought not be judged by the color of their skin. The Court was right in Brown v. Board of Education192 and much of its progeny193 to strive for a similar vision under the Equal Protection Clause. But the right not to be discriminated against on the basis of race includes the right to have the effects of such discrimination remedied. Perhaps the Court is right that racial preferences are not always

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justified, may inflict upon innocent people the very injury they seek to remedy, and may perpetuate stereotypes and inflame racial hostility. But surely the principle of equality is not offended when states help disadvantaged persons on a race-neutral basis as a means to undo our history of discrimination against blacks. Such efforts do not treat blacks as the "special favorite of the laws."  

Nor would King have dreamed otherwise:

In asking for something special, the Negro is not seeking charity. He does not want to languish on welfare rolls any more than the next man. He does not want to be given a job he cannot handle. Neither, however, does he want to be told that there is no place where he can be trained to handle it. So with equal opportunity must come the practical, realistic aid which will equip him to seize it.  

194. The Court so characterized congressional legislation passed during Reconstruction, which it invalidated, that would have prohibited racial discrimination in places of public accommodation. See Civil Rights Cases, 109 U.S. 3, 25 (1883).

195. MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 136 (1964). Indeed, while Dr. King's principal concern was the condition of blacks, he offered solutions that would help all disadvantaged persons on a race-neutral basis. Thus, in proposing a "Bill of Rights for the Disadvantaged" to "transform the conditions of Negro life," King explained the need to help disadvantaged whites as well:

While Negroes form the vast majority of America's disadvantaged, there are millions of white poor who would also benefit from such a bill. . . .

It is a simple matter of justice that America, in dealing creatively with the task of raising the Negro from backwardness, should also be rescuing a large stratum of the forgotten white poor.

Id. If opponents of affirmative action seek guidance from Martin Luther King, Jr., as we all should, they—and the Court—should also remember all of his Dream. Whatever his position would have been today on racial preferences, he clearly would have supported race-neutral affirmative action.