2007

Affirmative Inaction

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Georgetown Public Law and Legal Theory Research Paper No. 12-172

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Affirmative Inaction*

GIRARDEAU A. SPANN**

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** Professor of Law, Georgetown University Law Center. I would like to thank Stephen Cohen, James Forman, Steven Goldberg, Lisa Heinzerling, Emma Jordan, and Mike Seidman for their help in developing the ideas expressed in this article. Research for this article was supported by a grant from the Georgetown University Law Center.
INTRODUCTION

Perhaps the most exasperating aspect of racial discrimination in the United States is the self-righteous manner in which it is practiced. After a history of facilitating White exploitation of minority interests, the Supreme Court intimated in Grutter v. Bollinger\(^1\) that time was running out for racial minorities to take advantage of the opportunities for equality that the culture has offered in the form of affirmative action. Justice O’Connor’s majority opinion seemed to say that in another twenty-five years, the Court would cease to tolerate such special favors for racial minorities, thereby leaving minorities only a limited amount of time remaining to discover some way out of the economic, political, and socially disadvantaged caste that they have been unable to escape for the past four hundred years.\(^2\) There are at least three problems with Grutter’s sunset suggestion, all of which reflect the imprudence of delegating to the Supreme Court an active role in the formulation of racial policy.

First, as Part I discusses, Grutter’s twenty-five year admonition might be intended either to serve as a mere rhetorical flourish, or to have substantive content. Regardless of the intent with which it was penned, the inclusion of such sunset language in the Court’s opinion conveys the impression that the Supreme Court is disinclined to do anything meaningful to remedy the persistent problem of racial discrimination in the United States. Second, as Part II discusses, the concept of equality on which the Court’s distaste for affirmative action rests is itself discriminatory, because it favors the interests of Whites over the interests of racial minorities. Far from reducing the general societal discrimination that has long been the norm in United States culture, the Supreme Court’s equal protection jurisprudence has inverted the theory of racial discrimination in a way that has caused the very concept of equality itself to become racially invidious. Third, as Part III discusses, even when the politically accountable arms of the culture do make efforts to promote the interests of racial minorities, the Supreme Court appears to believe that its governmental function is to nullify those efforts through the process of politically unaccountable judicial review. As a result, the post-Grutter agenda, for those who favor a more meaningful conception of equality, should be to spend the next twenty-five years promoting affirmative inaction by the

\(^2\) See id. at 343.
Supreme Court in the realm of racial policy. This Article concludes that the role of the Supreme Court in the formulation of racial policy can successfully be marginalized, but only if the culture at large genuinely favors racial equality.

I. SUNSET ON AFFIRMATIVE ACTION

The future of affirmative action is uncertain. Although the Supreme Court presently tolerates race-conscious affirmative action in very limited circumstances, a majority of the Justices in *Grutter* signed an opinion suggesting that the Court might cease to tolerate any race-conscious remedies at all in another twenty-five years. Proper interpretation of the *Grutter* sunset language is subject to debate, but when paired with the Supreme Court's historical track record in discrimination cases, the Court's racial insensitivity is difficult to mistake. Regardless of how the Court's sunset language is ultimately construed, that language connotes an unflattering view of racial minorities. It suggests that minorities are not entitled to any meaningful degree of racial equality, and it does so in a way that is likely to reinforce the tacit stereotypes and prejudices that many members of the White majority already possess concerning racial minorities.

A. Twenty-Five Years

*Grutter* is the Supreme Court's reigning racial affirmative action decision. In *Grutter*, the Court upheld the constitutionality of a University of Michigan law school admissions program that gave positive consideration to the race of minority applicants in order to promote student diversity. *Grutter* held that the promotion of diversity in an educational context could constitute a compelling governmental interest sufficient to survive strict scrutiny. It also held that the consideration of race as part of a narrowly-tailored, holistic admissions process

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3. See id. (joining O'Connor, J., in the majority opinion are Stevens, Souter, Ginsburg & Breyer, JJ.).
4. Id.
5. See id. at 343-44 (holding that Michigan law school program did not violate equal protection clause). On the same day, however, the Court invalidated a racial affirmative action plan adopted by the University of Michigan undergraduate college, holding that the undergraduate plan failed to constitute a narrowly-tailored effort to promote the state's compelling interest in diversity, because it mechanically awarded a set number of points to applicants based on their minority racial status. See *Gratz v. Bollinger*, 539 U.S. 244, 271-76 (2003) (finding that Michigan undergraduate program violated equal protection clause because it was not narrowly-tailored).
was neither a prohibited quota system, nor a “patently unconstitutional” attempt to achieve racial balance.\(^7\) However, Justice O’Connor’s majority opinion went on to suggest that racial affirmative action might cease to be constitutional in another twenty-five years.\(^8\)

Emphasizing the need to avoid unfairness to the White majority, Justice O’Connor’s opinion stated:

> We acknowledge that “there are serious problems of justice connected with the idea of preference itself.” [Regents of the Univ. of Cal. v. Bakke, 438 U.S. [265], at 298 [(1978)] ... (opinion of Powell, J.). Narrow tailoring, therefore, requires that a race-conscious admissions program not unduly harm members of any racial group. ... To be narrowly tailored, a race-conscious admissions program must not “unduly burden individuals who are not members of the favored racial and ethnic groups.”

> ... Accordingly, race-conscious admissions policies must be limited in time. ... We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. ... In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.

> ... It has been 25 years since [Bakke, when] Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. ... We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.\(^9\)

This language has served as the basis for speculation about whether the Grutter Court imposed a twenty-five year sunset provision on the constitutional permissibility of racial affirmative action.

1. Rhetorical Surplus

The Grutter sunset language is probably best understood as dicta rather than holding, because it was doctrinally unnecessary to the Court’s decision. Although Justice O’Connor read the narrow tailoring requirement of strict scrutiny to necessitate “a logical end point”

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\(^7\) See id. at 329-30, 334-37.
\(^8\) See id. at 343.
\(^9\) Id. at 341-43 (citations omitted) (emphasis added).

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for affirmative action,\textsuperscript{10} she also found that the Michigan law school affirmative action program had the requisite "'reasonable durational limits.'"\textsuperscript{11} Quoting from the law school's brief, she stated, "[w]e take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable."\textsuperscript{12} At that point in the opinion, the legal analysis required to establish the Court's holding was complete. The twenty-five year admonition seems to be mere rhetorical surplus.

It is unlikely that Justice O'Connor viewed the imposition of a judicial sunset provision as necessary for the constitutionality of affirmative action, because there are prior cases in which the Supreme Court upheld affirmative action programs that lacked specific sunset provisions without imposing judicial sunset limitations of its own.\textsuperscript{13} Nor is it likely that Justice O'Connor viewed the imposition of a judicial sunset provision as an appropriate way to compensate for a program's lack of the requisite durational limit, because there are prior cases in which the Supreme Court invalidated affirmative action programs that lacked specific sunset provisions rather than trying to save the constitutionality of those programs by imposing judicial sunset limitations of the Court's own making.\textsuperscript{14} Moreover, the judicial imposition of a numerical sunset limitation to override the more functional "logical endpoint" that Justice O'Connor found to be present in \textit{Grutter} would be problematic. It would be inconsistent with the deference to expert educational discretion that was stressed so heavily in Justice

\begin{itemize}
\item \textsuperscript{10} See id. at 342.
\item \textsuperscript{11} See id. (quoting Brief for Respondent at 32, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241)).
\item \textsuperscript{12} Id. at 343.
\item \textsuperscript{14} See, e.g., Gratz v. Bollinger, 539 U.S. 244, 271-76 (2003) (invalidating student educational affirmative action program as not narrowly-tailored, without considering judicial sunset provision to limit duration); Miller v. Johnson, 515 U.S. 900, 915-20 (1995) (invalidating majority-minority voting district without considering judicial sunset provision to limit duration); \textit{cf.} Adarand, 515 U.S. at 204-05, 237-39 (applying strict scrutiny to minority construction set aside without considering judicial sunset provision to limit duration).
\end{itemize}

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O'Connor's opinion as the preferred method of advancing the state's compelling governmental interest in educational diversity.\footnote{See Grutter, 539 U.S. at 327-33 (discussing deference to expert educational discretion in complex task of promoting student diversity). But see id. at 377-78 (Thomas, J., concurring in part and dissenting in part) (objecting to deference to educational expertise of school in selecting means of promoting student diversity).}

Characterization of Justice O'Connor's sunset comments as dicta rather than holding is further supported by Justice O'Connor's language itself. She states, "[w]e expect that 25 years from now, the use of racial preference will no longer be necessary,"\footnote{Id. at 343 (emphasis added).}—not we "hold" that racial preferences will no longer "be permitted" in another twenty-five years. By its terms, Justice O'Connor's language seems more aspirational than mandatory. And when one reads the language in context,\footnote{Id.} it seems to be more of a comment about the state of race relations in the United States than a directive concerning the imposition of future constitutional demands.

Justice O'Connor's selection of twenty-five years as the pertinent sunset period also seems too arbitrary for something that was intended to serve as a true constitutional holding. She apparently settled on twenty-five years in order to mirror the amount of time that had elapsed between the Supreme Court's 2003 decision in Grutter and its earlier 1978 decision in Bakke.\footnote{See Grutter, 539 U.S. at 343 (noting that twenty-five years had elapsed since the Bakke decision, while expressing the hope that racial preferences would no longer be necessary after another twenty-five years).} However, there is no reason to believe that the time lapse between Grutter and Bakke would be at all relevant in forecasting the amount of time that will prove necessary to secure a meaningful degree of racial equality in the future. Justice Ginsburg points out that fifty years elapsed between Grutter and the Supreme Court's school desegregation decision in Brown v. Board of Education.\footnote{See id. at 344-45 (Ginsburg, J., concurring) (discussing fifty year approximate time lapse between Grutter and Brown v. Bd. of Educ., 347 U.S. 483 (1954)).} It would, therefore, be just as symmetrical to impose a fifty year sunset limitation on affirmative action as it would be to impose a twenty-five year limitation. Notably, the fifty years that have elapsed since Brown have not been adequate to integrate or equalize the quality of public schools.\footnote{See Geoffrey R. Stone et al., Constitutional Law 498-99 (5th ed. 2005) (discussing limited success of Brown in achieving integration of schools).} It is, therefore, unlikely that Justice O'Connor would seriously have believed that a mere twenty-five years would be adequate to accomplish the much more difficult task of
achieving a meaningful degree of racial equality throughout the entire society. Moreover, it would also be symmetrical to impose a 400 year sunset period on affirmative action, in order to mirror the approximate time lapse that existed between *Grutter* and the 1619 introduction of slavery into the colonial United States through indentured servitude.\(^2\) When mere symmetry is one’s judicial goal, it is more likely that one is seeking to generate dicta than holding.

The fact that Justice O’Connor’s twenty-five year figure has no instrumental justification takes on added significance when it is considered in light of Justice O’Connor’s actions in *Gratz v. Bollinger*.\(^2\) On the same day that *Grutter* was decided, Justice O’Connor signed the majority opinion in *Gratz*,\(^2\) which invalidated the University of Michigan undergraduate affirmative action program on the ground that its use of numerical points was so mechanical that it violated the narrow-tailoring requirement of the equal protection clause.\(^2\) She further focused on what she deemed to be an arbitrary use of points in the *Gratz* program as the very thing that distinguished the invalid undergraduate program from the law school program that was upheld by her opinion in *Grutter*.\(^2\) However, it seems apparent that the twenty-five years alluded to in *Grutter* bear even less relationship to a sensible sunset period for affirmative action than the numerical point scores, invalidated in *Gratz*, bore to the goal of student diversity. It is, therefore, unlikely that Justice O’Connor would have intended to elevate her own twenty-five year language in *Grutter* to the level of holding. That would subject her use of twenty-five years in *Grutter* to the same indictment that she herself leveled at the Michigan undergraduate program’s use of numbers in *Gratz*—a use that she viewed as impermissibly arbitrary.

It is also doubtful that Justices Stevens, Souter, Ginsburg, and Breyer—who typically vote to uphold racial affirmative action programs\(^2\)—would have joined an opinion that they viewed as reading

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\(^2\) Slavery in the United States now seems to have commenced in 1619, when the first African slaves were sold as indentured servants in the colony of Jamestown, Virginia. See Lisa Rein, *Mystery of Virginia’s First Slaves Is Unlocked 400 Years Later*, WASH. POST, Sept. 3, 2006, at Al.

\(^2\) *Gratz*, 539 U.S. 244 (2003).

\(^2\) See id. at 247 (noting that Justice O’Connor joined the majority opinion of Chief Justice Rehnquist).

\(^2\) See id. at 271-76.

\(^2\) See id. at 276-80 (O’Connor, J., concurring).

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into the Constitution a severe sunset limitation on affirmative action. In fact, Justice Ginsburg's concurring opinion in Grutter stated, "from today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action." Presumably, Justice Ginsburg was attempting to guard against the very possibility that Justice O'Connor's language might be interpreted as infusing a firm sunset requirement into the Constitution.

2. Instrumental Concerns

Justice O'Connor's twenty-five year language does not appear to be connected to any instrumental justification. Justice Thomas seems correct when he argues in dissent that it is unrealistic to suppose that differences in academic credentials between Whites and racial minorities will disappear in the next quarter century. Affirmative action is not new, and racial disadvantage has shown itself to be far too durable to permit its demise within the next generation. Therefore, the modest affirmative action that the Supreme Court now allows is not likely to produce changes more substantial in the next twenty-five years than the incremental changes it has produced during the last twenty-five years. Nor are the underlying attitude changes, necessary to trigger a paradigm shift in racial equality, likely to be produced by twenty-five more years of affirmative action alone. If Justice O'Connor intended her sunset language to operate as an actual time limit—permitting affirmative action only so long as it offered the hope of near-term racial parity—there would have been no reason for her to have refrained from invalidating the Grutter affirmative action program while it was pending before the Court. Nothing dramatic is

28. Id. at 346 (Ginsburg, J., concurring) (emphasis added).
29. See id. at 375-76 (Thomas, J., dissenting) (suggesting that nothing significant will change in the next twenty-five years).
30. Indeed, that is precisely why Justice Thomas argued that affirmative action should be declared unconstitutional now. See id.
likely to happen in the next twenty-five years that could realistically be recognized as the achievement of racial equality.

Finally, one might argue that Justice O'Connor was simply skeptical about the ability of affirmative action to redress racial inequities, and that she intended to hold that affirmative action would have one last chance to prove its constitutional worth. If such a test had been envisioned, one would expect it to be a fair test. But any test that Justice O'Connor might hypothetically have envisioned can hardly be deemed fair under the circumstances. The decisions handed down since 1989—when the Supreme Court was able to issue its first majority opinion in a racial affirmative action case—have simply been too restrictive to comport with any serious notion of an experimental inquiry. The strict scrutiny standard applied by the court, typically resulted in the invalidation of the affirmative action programs at issue, even when those programs were adopted by majoritarian political actors who had voluntarily chosen to accept the burdens that those programs placed on the White majority. If some test of affirmative action was intended, it would necessarily have been a test that was conducted with very little experimental data.

In addition, some of the decisions in which affirmative action programs were invalidated seem very difficult to distinguish from other decisions in which similar affirmative action programs were upheld. This is especially true of the *Grutter* and *Gratz* decisions. Any distinction that existed between the Michigan law school and undergraduate programs at issue in those cases is, at best, a subtle one. Seven of the nine Justices that considered the cases concluded that the two programs before the Court were, in fact, constitutionally indistinguishable. And even if the two cases were distinguishable, the

31. See *The Law of Affirmative Action*, *supra* note 26, at 44-84 (discussing Supreme Court majority affirmative action opinions).

32. See *id.* at 161-89 (discussing frequent invalidations of affirmative action).


34. See Girardeau A. Spann, *The Dark Side of Grutter*, 21 Const. Comment. 221, 242-49 (2004) [hereinafter *The Dark Side of Grutter*] (arguing that there is no analytical distinction between Supreme Court decision upholding law school affirmative action program in *Grutter* and Supreme Court decision invalidating undergraduate affirmative action program in *Gratz*); see also Girardeau A. Spann, *Neutralizing Grutter*, 7 U. Pa. J. Const. L. 633, 652-56 (2003) [hereinafter *Neutralizing Grutter*] (suggesting that *Grutter* and *Gratz* programs are indistinguishable in their efforts to promote racial balance); cf. Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 Tex. L. Rev. 517 (2007) (arguing that the
undergraduate program that the court invalidated in *Gratz* was, at least, arguably on firmer constitutional ground than the law school program because the undergraduate program required less consideration of race than the law school program did. If some final test of affirmative action were truly intended, it would have made sense for the Court to uphold both the *Grutter* and the *Gratz* programs, in order to determine which would offer the more promising strategy for eliminating the need for affirmative action in the next twenty-five years.

Interestingly, the Court was often led by Justice O'Connor herself when issuing the decisions that invalidated affirmative action during this period. Some of her decisions seem too artificial in the rigor with which they applied strict scrutiny to have been intended as part of an experimental test of affirmative action. For example, Justice O'Connor's majority opinion in *City of Richmond v. J.A. Croson Co.* expressed skepticism about whether there had ever been racial discrimination in the Richmond, Virginia construction trades, despite stark statistical evidence showing the virtual exclusion of all racial minorities from Richmond construction contacts. Justice O'Connor's majority opinion in *Adarand Constructors v. Pena* also seemed to reject even the suggestion that racial minorities were socially and economically disadvantaged. *Adarand* concerned two federal statutes that provided financial incentives for contractors to hire socially and economically disadvantaged subcontractors—something that the Court viewed as perfectly permissible. The provision of the statutes that Justice O'Connor found troubling did nothing more than establish a presumption that racial minorities remain among those who are socially and economically disadvantaged. Not only does such a presumption seem self-evidently correct over the range of cases, but even this mild presumption was rebuttable by evidence that a particular contractor in a particular case was not in fact disadvantaged.

35. *See The Dark Side of Grutter*, supra note 34, at 242-49 (arguing that the program in *Gratz* required more consideration of race than the program in *Grutter*).

36. *See infra* note 105 (discussing the leadership role of Justice O'Connor in rejecting general "societal discrimination" as a permissible target of affirmative action).


38. *See id.* at 498-508.


40. *See id.* at 205-09, 223-28, 237-39 (applying strict scrutiny to rebuttable presumption that racial minorities qualified for construction contract preference given to socially and economi-
It also seems relevant in establishing Justice O’Connor’s intent to remember that, prior to *Grutter*, she had never voted to uphold the merits of a racial affirmative action program in the fourteen such cases that she had considered. If Justice O’Connor had been genuinely motivated by a desire to test the effectiveness of affirmative action as a remedy for the forms of racial discrimination that have persisted in the United States, it seems that she would at least occasionally have permitted some affirmative action plans to take effect, if for no other reason than to acquire the data necessary to make such a test meaningful. Justice O’Connor’s single vote in favor of affirmative action hardly seems sufficient to support the conclusion that she intended *Grutter* to announce some final test for the constitutionality of affirmative action.

3. Possible Holding

Although I believe that Justice O’Connor’s twenty-five year sunset language in *Grutter* was intended to be mere dicta, it nevertheless remains possible that this language will ultimately be read as announcing an operational limitation on the constitutionality of affirmative action. She preceded her twenty-five year language with a discussion of the need to impose time limits on the scope of affirmative action, in order to reduce the burdens that would otherwise be imposed on the White majority. Moreover, Justice Thomas treated Justice O’Connor’s language as substantive rather than rhetorical in his *Grutter* opinion (concurring in part and dissenting in part). He concurred in “the Court’s *holding* that racial discrimination in higher education admissions will be illegal in twenty-five years.”

Presumably, there is some point at which Justice O’Connor would cease to tolerate even limited Supreme Court endorsements of affirmative action, and perhaps twenty-five years actually does represent the

41. *See The Law of Affirmative Action, supra* note 26, at 159-63 (discussing voting record of Justice O’Connor in racial affirmative action cases). The two pre-Grutter merits decisions in which Justice O’Connor’s vote was even arguably sympathetic to a racial affirmative action program still stopped short of upholding racial affirmative action. *See* *Easley v. Cromartie*, 532 U.S. 234, 257-58 (2001) (holding that a redistricting plan resulted from a political rather than a racial gerrymander); *Hunt v. Cromartie*, 526 U.S. 541, 548-54 (1999) (holding that summary judgment was not appropriate in a redistricting case where racial motivation was a disputed issue of fact).


43. *See id.* at 351 (Thomas, J., concurring in part and dissenting in part) (emphasis added).
point in time when her patience is likely to have been exhausted. Moreover, Justice O’Connor is no longer on the Court, which means that her *Grutter* sunset language is now available for strategic citation by other Supreme Court Justices. In future cases, other Justices may be tempted to use Justice O’Connor’s sunset language to advance their own judicial agendas, operating free from any constraints on interpretation that might have accompanied Justice O’Connor’s continued presence on the Court.

As noted above, Justice Ginsburg apparently thought that the possibility of interpreting Justice O’Connor’s twenty-five year language as a substantive limitation was high enough to warrant the inclusion of a cautionary disclaimer in Justice Ginsburg’s own concurring opinion. The likelihood that Justice O’Connor’s sunset language will be viewed as substantive, rather than rhetorical, is at least high enough to be taken seriously as a topic for discussion in this symposium. Ultimately, however, it does not matter whether the *Grutter* twenty-five year sunset language is deemed to be holding or dicta. The subtle damage that the sunset language inflicts on the continuing quest for racial equality is potent enough to persist either way.

B. The Substance of Dicta

It seems unlikely that Justice O’Connor actually believed that racial parity in the allocation of societal resources could be achieved within the next twenty-five years. The question that leaps to mind, therefore, is why Justice O’Connor would choose to include the twenty-five year language in her *Grutter* opinion. Whether intended as holding or as dicta, Justice O’Connor’s sunset language was presumably intended to have some effect. She must have wanted someone to act differently, or to think about things in a different way, than they would have if the sunset language had not been included in her opinion. So what then was the effect that she intended? At least three troubling possibilities arise. First, Justice O’Connor may have

44. Justice O’Connor was replaced on the Supreme Court by Justice Samuel Alito. In addition, Chief Justice William Rehnquist was replaced by Chief Justice John Roberts. See Joan Biskupic, *Few Big Rulings as Justices Felt Out New Roles: Addition of Two Members, Rising Influence of a Third Left Court in Caution Mode*, USA TODAY, June 30, 2006, at 9A (discussing effect of new Supreme Court Justices).

45. See supra text accompanying note 28.

46. See Grutter, 539 U.S. at 346 (Ginsburg, J., concurring) (asserting that Justice O’Connor’s twenty-five year sunset language expressed a “hope” rather than a “firm forecast” that affirmative action would soon cease to be necessary).

47. See supra text accompanying note 9 (quoting Grutter sunset language).
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sought to reassure disenchanted Whites by reinforcing their historical sense of racial entitlement. Second, Justice O'Connor may have wished to convey the impression that it is racial minorities themselves who are primarily responsible for the continuing inability of minorities to overcome the disadvantages produced by prior discrimination. Third, Justice O'Connor may have wanted to establish that affirmative action is simply unrelated to the goal of achieving racial parity in the allocation of resources. All three possibilities are unfortunate, because all three seem likely to perpetuate rather than ameliorate racial inequality.

1. White Entitlement

Justice O'Connor's twenty-five year language serves to convey the impression that the clock is running down on affirmative action, but it is not clear why one would want to abandon affirmative action while racial discrimination remains persistent. There can be little doubt that racial discrimination continues to be a serious problem in the United States. Justice Ginsburg's dissenting opinion in *Gratz* emphasizes the many ways in which minorities continue to be the victims of both overt and subtle forms of racial discrimination in matters ranging from education, to employment, to housing, to the receipt of medical care.48

Although affirmative action has become politically controversial, there can also be little doubt that it constitutes a sensible strategy for attacking the problem of discrimination. It provides, at least, some antidote to the forms of racial discrimination that cannot be eliminated simply by adhering to a policy of prospective race neutrality.49


49. See, e.g., WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998) (arguing that affirmative action has been successful in educational contexts); Richard O. Lempert et al., *Michigan's Minority Graduates in Practice: The River Runs Through Law School, 25 LAW & SOC. INQUIRY 395 (2000) (same). But see Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools, 57 STAN. L. REV. 367 (2005)* [hereinafter *Systemic Analysis*] (arguing that Blacks are, on balance, systemically disadvantaged by affirmative action because they are admitted to law schools from which they do not have the academic ability to succeed, thereby ultimately producing fewer Black lawyers than would be produced in the absence of affirmative action). The Sander's "mismatch hypothesis" is quite controversial and has generated extensive responses. See e.g., Ian Ayers & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers, 57 STAN. L. REV. 1807 (2005)* (arguing that there are methodological flaws in Sander's analysis, and that affirmative action produces more Black lawyers than would be produced without affirmative action); David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of
Prospective neutrality does nothing to compensate for the present disadvantages suffered by racial minorities. It simply freezes existing inequalities that were produced by centuries of prior discrimination. Affirmative action, however, is intended to neutralize the head start that Whites received in the race against minorities for access to societal resources. Although affirmative action has not yet enabled minorities to catch up to Whites—and although it will not do so in the next twenty-five years—it has nevertheless been successful in reducing the competitive disadvantages that racial minorities have historically suffered. This has been particularly true in the contexts of education, employment, and voting rights. Although some have questioned the likelihood that affirmative action may be harmful to racial minorities because it provides them with opportunities that they are not qualified to take advantage of, those arguments have been largely discredited, and they ultimately seem to rest on veiled notions of White supremacy.


50. See, e.g., Bowen & Bok, supra note 49 (discussing success of affirmative action in educational contexts); Lempert et al., supra note 49 (same).


52. See, e.g., Shaw v. Reno, 509 U.S. 630, 676 (1993) (Blackmun, J., dissenting) (emphasizing that majority-minority redistricting plan challenged in Shaw had permitted North Carolina to send its first Black Representative to Congress since Reconstruction); cf. Miller v. Johnson, 515 U.S. 900, 938 (Ginsburg, J., dissenting) (emphasizing that it was not until 1972 that Georgia was able to send its first Black Representative to Congress since Reconstruction).

53. See, e.g., Systemic Analysis, supra note 49 (arguing that affirmative action is, on balance, bad for Blacks).

54. See, e.g., Ayers & Brooks, supra note 49; Chambers et al., supra note 49; Dauber, supra note 49; Wilkins, supra note 49.

55. Wilkins, supra note 49, at 1916-17. Sander’s argument ultimately seems to rest on the assumption that Blacks are not as well equipped as Whites to take advantage of the educational opportunities that law school offers. However, that should not cause one to oppose affirmative action. Rather, it should cause one to be more in favor of affirmative action that is designed to compensate minorities for past educational inadequacies. One would be opposed to offering minorities the affirmative action opportunities that are routinely offered to Whites based on geography, athletic ability, or alumni parentage only if one thought that minorities were less able than Whites to take advantage of those opportunities—which, of course, is simply a form of White supremacy.
Affirmative Inaction

Given that racial discrimination continues to be a serious problem, and that affirmative action continues to be one of the most promising strategies for addressing that problem, Justice O'Connor's apparent desire to truncate the remedial benefits of affirmative action requires some explanation. It is possible that Justice O'Connor's sunset language in *Grutter* was intended to provide a measure of reassurance to those members of the White majority who resent what they deem to be the unfair burdens imposed upon them by affirmative action—burdens such as the allocation of law school seats to racial minorities rather than to Whites in *Grutter*. Justice O'Connor may have wanted to comfort disgruntled Whites, by letting them know that she sympathized with their concerns, and that they would not have to endure the supposed burdens of affirmative action indefinitely. That reading of Justice O'Connor's sunset language is arguably consistent with her more general insistence that affirmative action should be subject to strict equal protection scrutiny—even when affirmative action is adopted by the White majority to impose burdens on itself. An attempt by Justice O'Connor to retain a long term connection to her political and ideological base while upholding a program of which her constituents disapprove might at first seem like a largely costless strategy. However, it has the adverse effect of both reinforcing and legitimizing the perceptions of unfairness experienced by Whites who consider themselves to be victimized by racial preferences. Moreover, the legitimation of those perceptions seems like the opposite of what one would expect from a Supreme Court Justice who was in the process of upholding the constitutionality of affirmative action.

One of the most stubborn obstacles to the achievement of racial equality in the United States has been the sense of entitlement that traditionally characterizes White resistance to discrimination reme-

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56. The named plaintiffs in *Grutter* and *Gratz* felt so unfairly treated by the University of Michigan affirmative action plans that they have since become vocal sponsors of the 2006 Michigan Civil Rights Initiative ballot proposal that would amend the Michigan Constitution to ban affirmative action. See Dawson Bell, *Affirmative Action Ban Up to Voters Now: Battle Over Change to State Constitution Likely to Be Tough One*, DETROIT FREE PRESS, Mar. 31, 2006 (final ed.), at 1 (discussing active participation by Grutter and Gratz).

57. Justice O'Connor has expressed some concern for the burden that affirmative action imposes on Whites, although she has not been particularly outspoken on this issue. See THE LAW OF AFFIRMATIVE ACTION, supra note 26, at 174.


59. Cf. infra, note 208 and accompanying text (suggesting that Chief Justice John Marshall made a similar political move in *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137 (1803)).
dies. That sense of White entitlement has frustrated efforts to abolish slavery, abandon *de jure* segregation, integrate the public schools, and invalidate anti-miscegenation laws. Now that same sense of entitlement is being invoked to frustrate contemporary affirmative action. Rather than reinforce that persistent sense of White entitlement, one might expect a Supreme Court that was genuinely interested in promoting racial equality to seek ways to combat it.

Justice O’Connor could have chosen to emphasize that feelings of White entitlement are unjustified because they are typically rooted in little more that the momentum of past discrimination. When Whites


61. See Dred Scott v. Sandford, 60 U.S. 393, 407, 452 (1857) (holding that Blacks could not be citizens within the meaning of the United States Constitution for purpose of establishing diversity jurisdiction and invalidating a congressional statute enacted to limit spread of slavery as interfering with property rights of slave owners).


64. In *Naim v. Naim*, 350 U.S. 985 (1956) (per curiam), and *Naim v. Naim*, 350 U.S. 891 (1955) (per curiam), the United States Supreme Court was asked to hold unconstitutional a Virginia miscegenation statute that had been upheld by the Virginia Supreme Court of Appeals. The United States Supreme Court vacated the Virginia decision and remanded for clarification of the record. *Naim*, 350 U.S. at 891. The Virginia Supreme Court of Appeals, however, merely reaffirmed its earlier decision and refused to clarify the record. *Naim v. Naim*, 90 S.E.2d 849, 850 (1956) (per curiam). Nevertheless, the United States Supreme Court declined to recall or amend the mandate, finding that the constitutional question had not been “properly presented.” This allowed the Virginia court’s decision to remain in effect. *Naim*, 350 U.S. at 985. Because the neutrality principle that had been announced in *Brown* seemed to make the Virginia miscegenation statute unconstitutional, and because the Supreme Court’s failure to resolve *Naim* on the merits also seemed to violate a federal statute giving the Supreme Court mandatory jurisdiction over the case, the Supreme Court’s actions in *Naim v. Naim* have been vigorously criticized. See, e.g., Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1, 12 (1964) (noting that “there are very few dismissals similarly indefensible in law”); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 34 (1959) (noting that dismissal of the miscegenation case was “wholly without basis in the law”). The Supreme Court ultimately invalidated the Virginia miscegenation statute as a manifestation of White supremacy eleven years later in *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967), when only 16 states still had miscegenation statutes on the books. See *Loving*, 388 U.S. at 6.

65. Supreme Court affirmative action opinions often express concern for the burden that affirmative action imposes on innocent Whites. *See The Law Of Affirmative Action*, supra note 26, at 173-76 (discussing burden on innocent Whites). However, it is only a sense of White entitlement that could cause one to think of Whites, who benefited from a history of prior discrimination, as “innocent.”
surpass racial minorities in areas ranging from LSAT scores to country club memberships, they are often simply capitalizing on the socioeconomic advantages that they receive in a culture that has long given Whites a more privileged status than it has given to racial minorities. Justice O'Connor could also have chosen to debunk the common belief that affirmative action burdens Whites, by stressing the fact that such a view is more perceived than real. Although affirmative action provides a moderate statistical benefit to racial minorities as a group, the burden that affirmative action imposes on Whites as a group is statistically negligible. Nevertheless, Justice O'Connor's sunset language in *Grutter* bypassed the opportunity to challenge the counterproductive feelings of White entitlement that have long remained ubiquitous in United States culture. Instead, Justice O'Connor chose to feed these feelings by treating affirmative action as something that must be terminated "as soon as practicable," even if no meaningful level of racial equality has yet been achieved.

2. Minority Culpability

To the extent that Justice O'Connor's opinion reinforces the notion that affirmative action is unfair to Whites, it also conveys a corollary message to racial minorities. It suggests that the benefits minorities receive from affirmative action programs are undeserved and illegitimate, because those benefits are conferred in a way that deviates from the merit- or seniority-based standards that we customarily use to allocate societal resources. It tells racial minorities that they are being accorded special rights, rather than equal rights. As a result, it also implies that minorities can no longer legitimately feel

66. For example, the history of segregated schools and residential segregation has almost certainly contributed to present inequalities in the educational attainments of White and minority students. See *Stone et al.*, supra note 20, at 488-500 (discussing past segregation and present educational inequalities).

67. Where there are both a large number of applicants for a limited number of opportunities and a large number of White applicants relative to the number of minority applicants, affirmative action will significantly increase the probability that particular minority applicants will be admitted to a program. However, the abolition of affirmative action will not significantly increase the probability that particular White applicants will be admitted to the program. See Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045, 1045-50 (2002).

68. See *Grutter*, 539 U.S. at 343.

69. See *Race Against the Court*, supra note 26, at 173 (discussing argument that affirmative action stigmatizes minorities).

mistreated, but should instead be appreciative of the sacrifices that are being made for them by a White majority that is willing to deviate from the principle of race neutrality in order to give minorities the benefits of affirmative action. So understood, Justice O'Connor's sunset language serves to instruct racial minorities that they cannot expect to continue as the "special favorites" of the law forever. If minorities cannot manage to pull themselves up by their own bootstraps within the next twenty-five years, their perpetually disadvantaged status will have become a plight of their own making. Accordingly, racial minorities will thereafter be estopped from demanding any additional favors from the White majority.

Unlike the message of reassurance that Justice O'Connor sends to disgruntled Whites, the message she sends to racial minorities is a message of impatience. It puts racial minorities on notice that they had better take advantage of the affirmative action benefits that have been offered to them before it is too late. There is, of course, nothing wrong with encouraging racial minorities to take full advantage of the opportunities for advancement that are presented to them. Indeed, when racial minorities are conferring among themselves, vigorous admonitions about the appropriateness of minority independence and self-determination seem particularly appropriate. However, when racial minorities are blamed for their own disadvantages by a White majoritarian institution, the message is far more suspect. The Supreme Court is itself so heavily implicated in the creation and perpetuation of racial minority oppression that impatient admonitions from Justice O'Connor are likely to seem like little more than another iteration of the Court's racial insensitivity.

Aside from suspicions that may exist about Justice O'Connor's true motivation, the message of impatience implicit in her sunset language is itself simply inapposite. It might make sense to be irritated by the continuing inability of minorities to overcome their discrimina-

71. Shortly after the abolition of slavery, Justice Bradley stated, "[w]hen a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws." The Civil Rights Cases, 109 U.S. 3, 25 (1883).

72. See, e.g., Race Against the Court, supra note 26, at 1-6 (arguing that racial minorities are more likely to advance their interests through the political process than by relying on Supreme Court protection).


74. See infra Part II (discussing Supreme Court implication in racial discrimination).
tory disadvantages if the achievement of racial equality were within the control of racial minorities. But it is not. The primary reason that racial minorities are economically, politically, and socially disadvantaged is that minorities are discriminated against in the allocation of societal resources.\footnote{See supra text accompanying note 49 (discussing continuing discrimination against racial minorities).} Blaming racial minorities for the culture’s continuing discrimination against racial minorities is simply nonsensical.

The premise that affirmative action is objectionable because it deviates from neutral allocation principles is also problematic. To the extent that preferences have been used to deviate from the allocation of resources based on merit or seniority, those preferences have been used to benefit Whites to a greater degree than they have been used to benefit racial minorities. The manner in which legacy, athletic, and geographic preferences have dwarfed racial preferences in college admissions provides only the most obvious example.\footnote{See, e.g., David Benjamin Oppenheimer, Understanding Affirmative Action, 23 HASTINGS CONST. L.Q. 921, 965 (1996) (noting that more students are admitted to Harvard each year through legacy preferences than through all racial affirmative action preferences combined); see also Grutter v. Bollinger, 539 U.S. 306, 367-68 (2003) (Thomas, J., dissenting) (noting that legacy preferences undermine meritocracy in higher education admissions).} As a result, discrimination against racial minorities not only exists in the maldistribution of resources that gives rise to the need for affirmative action, but also in the application of affirmative action itself. Although a range of cultural preferences deviate from the abstract principles of merit and seniority, only racial preferences have generated any significant degree of political or constitutional opposition.\footnote{Note that gender segregation and remedial affirmative action also remain controversial in some contexts, although typically without the asserted affront to meritocracy that is often attributed to racial affirmative action. See, e.g., United States v. Virginia, 518 U.S. 515 (1996) (invalidating exclusion of women from Virginia Military Institute).}

For example, affirmative action in the form of ethnic preferences is a common way for minority groups to assimilate into mainstream culture, and to increase their economic and political power in the United States. Political patronage by Irish, Italian, Jewish, and other immigrant groups has historically been a staple of ethnic cultural advancement.\footnote{See David A. Strauss, Affirmative Action and the Public Interest, 1995 SUP. CT. REV. 1, 25-31 (arguing that political patronage is traditionally used as an accepted means for ethnic minority advancement, but such patronage is viewed as illegitimate when used for the advancement of racial minorities); see also Rutan v. Republican Party, 497 U.S. 62, 108 (1990) (Scalia, J., dissenting) (favoring political patronage for ethnic minorities but not racial patronage for racial minorities).} In City of Richmond v. J.A. Croson Co,\footnote{488 U.S. 469 (1989).} however, the
Supreme Court invalidated a Richmond, Virginia racial minority set-aside program for municipal construction contracts. In holding the set-aside program to be unconstitutional, Justice O'Connor's majority opinion stressed that the population of Richmond was 50% Black, and that five of the nine City Council members were Black.80 The fact that the program passed by a vote of 6–3 suggests that it was not the mere product of racially motivated political patronage.81 But even if it were, the Nation's historical tolerance of ethnic patronage makes it unclear why Justice O'Connor should view the potential for racial patronage as unconstitutional.82 This is particularly true given that race and ethnicity are typically treated as analogous for equal protection purposes.83

Justice Ginsburg made a similar observation concerning the use of race and ethnicity in drawing voter redistricting lines. In Miller v. Johnson,84 the Supreme Court invalidated a remedial majority-minority voting district in Georgia that was adopted in order to comply with the provisions of the Voting Rights Act that are designed to guard against minority vote dilution.85 In her dissenting opinion, Justice Ginsburg criticized the Court for invalidating the remedial voting district, arguing that the majority Black district at issue should not be treated differently from ethnic voting districts that have been recognized as valid, even though they group Irish or Italian voters together.86

Justice O'Connor's sunset language in Grutter not only suggests that racial minorities have been remiss in capitalizing on the opportunities for advancement that the White majority has made available in the form of affirmative action, but it also applies a more demanding constitutional standard to racial affirmative action than it does to the

81. See id. at 554-55 (Marshall, J., dissenting) (discussing Richmond City Council vote); J.A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1362-64 (4th Cir. 1987) (Sprouse, J., dissenting) (same).
82. See Strauss supra note 78 (discussing ethnic patronage); see also Croson, 488 U.S. at 555 (Marshall, J., dissenting) (arguing that deference to patronage by White municipal leaders but not Black municipal leaders constitutes racial discrimination).
85. See id. at 915-27 (describing and invalidating redistricting plan).
86. See id. at 945-47 (Ginsburg, J., dissenting) (rejecting distinction between racial and ethnic voting districts in recognizing what constitutes a constitutionally permissible community of shared interests for redistricting purposes).
forms of affirmative action that benefit Whites. This is true even though both forms of affirmative action utilize preferences that deviate from the supposedly neutral principles of merit and seniority. As such, Justice O’Connor’s sunset language contains connotations of racial inferiority that are impliedly directed to racial minorities. Racial minority interests are simply worth less than the interests of the White majority, as evidenced by the fact that only minority racial preferences are subjected to heightened constitutional scrutiny. Moreover, Justice O’Connor’s twenty-five year language has the effect of misdirecting any judicial incentive that exists for eliminating discrimination. Because it is Whites rather than racial minorities who are primarily responsible for the perpetuation of racial discrimination, it should be Whites rather than racial minorities, who are subject to the primary incentive for terminating that discrimination. Neither the message of reassurance that Justice O’Connor offers to Whites, nor the message of impatience that she delivers to racial minorities, seems to make much sense, because affirmative action is neither unfair to Whites, nor illegitimate in its provision of benefits to minorities. As a result, Justice O’Connor’s sunset intimation seems more pernicious than helpful. It also seems to miss the point of affirmative action.

3. Racial Parity

The purpose of affirmative action is to help remedy discrimination against racial minorities by making some effort to approximate the culture that would exist in the absence of the Nation’s long history of racial discrimination. Accordingly, it is not clear why Justice O’Connor would believe that affirmative action could properly be terminated after another twenty-five years, given that racial minorities are unlikely to have secured any meaningful degree of parity in the allocation of societal resources within that time. Justice O’Connor’s sunset language, therefore, seems to detach affirmative action from the goal of racial parity in a way that is particularly troubling. If affirmative action is not intended to promote racial parity, it is difficult to imagine what the goal of affirmative action might be—unless affirmative action is intended to be something whose function is more cosmetic than real. According to Justice O’Connor’s sunset language, the purpose of affirmative action is to promote diversity, which is a different goal than promoting racial parity.

87. Justice Thomas has referred to the use of affirmative action by elite educational institutions to promote diversity as “aesthetic” to emphasize his belief that its function is more cosmetic than substantive. See Grutter, 539 U.S. at 354 n.3 (Thomas, J., dissenting) (characterizing law school interest in affirmative action as “aesthetic”).
guage raises the possibility that the Supreme Court's tolerance for affirmative action is designed primarily to temper the demands that minorities can make for racial justice, by forcing minorities to settle for something less than actual equality.

Affirmative action was originally conceived as a strategy for reducing ongoing racial discrimination. It grew out of the recognition that mere conscious adherence to a regime of prospective race neutrality would not produce a racially just society. The Supreme Court has since held that the goals of affirmative action can be constitutionally pursued by compensating minorities for identifiable acts of past discrimination, or by promoting prospective racial diversity in certain social roles for which past discrimination has left minorities under-represented. The one thing that the Supreme Court has been adamant about, however, is the impermissibility of using affirmative action to promote racial parity. Justice O'Connor's majority opinion in Grutter stated that the use of affirmative action to assure "‘some specified percentage of a particular group merely because of its race or ethnic origin’ . . . would amount to outright racial balancing, which is patently unconstitutional."

If the Constitution does not permit the conscious pursuit of racial parity in the allocation of societal resources, the best that racial minorities can hope for is an incremental change in their economic, political, and social status. Incremental change may be appropriate for social problems that are too minor to warrant major adjustments in settled expectations, or for social problems that cannot be addressed in a more effective manner. But racial discrimination is not such a problem. Racial discrimination in the United States is so pervasive and persistent that it cannot be solved without a major adjustment in settled expectations. Moreover, the conscious pursuit of racial parity is likely to be the only effective strategy that exists for promoting ra-

88. See Exec. Order No. 10,925, 3 C.F.R. 448, 449-50 (1959-1963), reprinted in 1961 U.S.C.C.A.N. 1274, 1276 (1961) ("The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin." (emphasis added)); see also Middleton v. City of Flint, 92 F.3d 396, 404 n.6 (6th Cir. 1996) (discussing evolution in use of term "affirmative action").

89. See The Law of Affirmative Action, supra note 26, at 168-69 (discussing permissible goals for affirmative action); see also Grutter, 539 U.S. at 323, 328-30 (holding that diversity is permissible goal for affirmative action).

cial justice in a nation whose race-relations history is as bad as that of the United States.

The United States has discriminated against racial minorities in ways that are both dramatic and enduring throughout its history. From Indian genocide, slavery, and the Chinese Exclusion laws, to contemporary discrimination in education, employment, and housing, the United States has insisted on enforcing the subordinate social status of racial minorities.91 Even the present war on terror, which dominates the headlines in our daily newspapers, is fueled by racial discrimination. Our counterterrorism strategies depend heavily upon the disproportionate imposition of burdens on Arabs and Muslims in ways that are reminiscent of the atrocities inflicted on Japanese-Americans, which we supposedly learned to condemn after Korematsu.92 The United States is addicted to racial discrimination, and only a serious shock to its discriminatory system will ever permit the United States to overcome this addiction.

The conscious pursuit of parity in the implementation of affirmative action might provide the necessary shock to the system. By focusing on resource allocation results, rather than intractable inquires into the elusive concept of discriminatory intent, the culture's apparent inability to view racial minorities as equal to Whites will become less relevant. More equitable allocations of resources will become possible through direct action, even if the White majority continues to harbor feelings of minority inferiority. Prejudice is bad, but discrimination is worse, and the conscious pursuit of racial parity can help to marginalize the influence of discrimination on resource allocation.

Nevertheless, Justice O'Connor reads the Constitution as actually prohibiting the very type of paradigm shift in the culture's understanding of racial discrimination that is necessary to produce any meaningful level of equality. By detaching affirmative action from its most promising resource allocation strategy, she demands that affirmative action forever remains a band-aid rather than a cure. Unlike

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92. Korematsu v. United States, 323 U.S. 214, 216-18 (1944) (upholding World War II exclusion order directed at Japanese Americans); see also Spann, supra note 91, at 89-91 (arguing that war on terror discriminates against Arabs and Muslims, whose interests are discounted in the way that we customarily discount the interests of racial minorities).
many other conservative Justices on the Supreme Court,\textsuperscript{93} Justice O'Connor has never been willing to rule out the constitutionality of affirmative action completely.\textsuperscript{94} Even though the Michigan law school program she voted to uphold in \textit{Grutter} is the only racial affirmative action program whose merits she has ever found to be constitutional,\textsuperscript{95} Justice O'Connor has insisted that racial affirmative action has a constitutionally acceptable, limited role to play in formulating the Nation's race-relations policy. In one respect, however, Justice O'Connor's band-aid may be worse than the wound to which it is affixed. Most conservative opponents of affirmative action on the Supreme Court are at least willing to put racial minorities on notice that they can expect no meaningful assistance from the Court in the quest for racial justice. That realization, in turn, might spark racial minorities to seek other, politically more destabilizing means of prompting the needed paradigm shift in the Nation's understanding of racial justice.\textsuperscript{96} However, Justice O'Connor's refusal to rule out the permissibility of affirmative action may serve the function of a steam release valve on a pressure cooker. For the next twenty-five years, it may serve to dampen the appeal of political activism by holding out at least the theoretical possibility of judicial alternatives to the more destabilizing forms of political action that minorities might otherwise feel compelled to pursue. Those more destabilizing forms of political action would likely seek, \textit{inter alia}, to marginalize the Supreme Court's involvement in the formulation of future race-relations policy for the United States. Although such marginalization could ultimately prove beneficial to racial minorities, it would almost certainly impair the ability of the Supreme Court to serve as an effective check on minority demands for a more equitable allocation of societal resources—a checking function that the Supreme Court has become very adept at

\textsuperscript{93} A conservative voting bloc on the Supreme Court virtually never votes for affirmative action. \textit{See The Law of Affirmative Action}, supra note 26, at 159-61 (discussing Supreme Court voting blocs).


\textsuperscript{95} See supra \textit{The Law of Affirmative Action} note 41 (discussing voting record of Justice O'Connor in affirmative action cases).

\textsuperscript{96} I have argued in the past that racial minorities are likely to be more successful in advancing minority interests by pursuing political rather than judicial remedies for persistent racial inequality. \textit{See Race Against the Court}, supra note 26, at 85-171 (advocating "pure politics" rather than judicial protection of minority rights).
performing. Ironically, the Court has done so in the name of promoting racial equality.97

II. INVIDIOUS EQUALITY

The distaste for affirmative action underlying the sunset language of Grutter is noteworthy for what it seems to say about the peculiar understanding of equality adopted by the Supreme Court. The Court views affirmative action as constitutionally problematic because race-conscious efforts to redistribute societal resources from Whites to racial minorities jeopardize the equal protection rights of the White majority. The Court believes that this is true even though Whites already enjoy a disproportionately large share of those resources, and even though racial minorities continue to be disproportionately disadvantaged in virtually every facet of American life. The Court, therefore, reads the constitutional concept of equality as something that entitles Whites to retain the surfeit of resources that they presently possess, notwithstanding the discriminatory manner in which those resources were obtained.

By cementing the existing distribution of resources into the Constitution, the Supreme Court has inverted the customary understanding of discrimination so that disadvantaged racial minorities have now become the perpetrators of invidious discrimination, and the White beneficiaries of prior discrimination have become the innocent victims. Moreover, this inverted conception of equality invites the continued oppression of racial minorities, so long as that oppression is implemented through the momentum of prospective race neutrality. Every era in the Nation’s history has been marked by its own form of racial discrimination, and antipathy toward affirmative action simply constitutes the preferred form of discrimination in contemporary United States culture. Like the forms of discrimination preceding it, opposition to affirmative action continues the sacrifice of racial minority interests for the benefit of the White majority. Unlike the culture’s better known acts of racial oppression, however, this present form of discrimination is being justified in the name of racial equality itself. That is a curious conception of equality. But it is an appealing conception, if one is still wedded to a belief in white supremacy.

97. I have also argued in the past that one function of the Supreme Court has historically been to facilitate the oppression of racial minority interests for the benefit of the White majority. See id. at 1-82 (describing “veiled majoritarian” function of Supreme Court in sacrificing minority rights for majoritarian gain).
A. Constitutionalizing the Status Quo

It is no secret that Whites do better than racial minorities in the accumulation of societal resources. Whites acquired their resources during centuries of de jure and de facto discrimination, in which racial minorities were placed at a competitive disadvantage in seeking a proportionate share of society's economic, political, and social capital. What is less well known, however, is that the Supreme Court continues to interpret the Constitution in ways that seem designed to preserve existing inequalities despite the history of discrimination that produced them. By adopting the current allocation of resources as a baseline in conducting its equal protection analyses, the Court avoids the need to provide any remedy for the continuing effects of prior "societal discrimination." Furthermore, by reading the Constitution to require prospective neutrality in the vast majority of future allocation programs, the Court precludes political actors from adopting strategies that might eventually equalize the allocation of resources. In short, the Supreme Court has constitutionalized existing racial inequalities, and it has done so in the name of promoting equality.

1. Societal Discrimination

For much of the Nation's history, the White majority channeled resources to itself by adopting explicit policies of de jure racial discrimination, and the Supreme Court upheld the constitutionality of those discriminatory policies.98 When the Court later decided that that de jure discrimination was no longer constitutional,99 the White majority shifted to de facto discrimination as the means for channeling resources to itself, and the Supreme Court once again upheld the constitutionality of those discriminatory policies.100 One might think that the equal protection clause would invalidate allocation policies that

98. See, e.g., Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407, 452 (1857) (holding that Blacks could not be citizens within the meaning of the United States Constitution for purpose of establishing diversity jurisdiction, and invalidating congressional statute enacted to limit spread of slavery, as interfering with property rights of slave owners); Plessy v. Ferguson, 163 U.S. 537, 548, 551-52 (1896) (upholding separate-but-equal regime of racial discrimination in public facilities).


had a racially discriminatory effect, as Title VII does in the context of employment discrimination.\textsuperscript{101} But the Court chose instead to read the Constitution as requiring particularized showings of discriminatory intent to trigger the application of equal protection safeguards.\textsuperscript{102} Although \textit{de facto} discrimination policies are often motivated, at least in part by a desire to give Whites an advantage over racial minorities in the allocation of resources,\textsuperscript{103} the Supreme Court has adopted such a stringent standard of proof for intentional discrimination that the Court's standard is typically not satisfied even by practices that are commonly understood to be the product of racial discrimination.\textsuperscript{104}

The primary doctrinal technique that the Court uses to insulate customary patterns of racial discrimination from equal protection safeguards is to label such patterns "societal discrimination," and to announce that they are, therefore, beyond the remedial reach of the equal protection clause.\textsuperscript{105} As previously noted,\textsuperscript{106} this can make the Supreme Court's conception of equality seem quite artificial. For example, Richmond, Virginia was not only the capital of the Confederacy during the Civil War, but the continuing effects of historical discrimination in Richmond remained so pervasive in 1989 that only 0.67 percent of all municipal construction contracts had been awarded to minority contractors, even though the population of Richmond was

\begin{footnotesize}
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\item See, e.g., \textit{Milliken}, \textsuperscript{100} supra note 100 (discussing use of \textit{de facto} discrimination to keep minorities out of suburban schools).
\item See, e.g., \textit{Davis}, 426 U.S. at 238-48 (permitting use of non-validated verbal exam, with known racially disparate impact, to select police officers); see also Pers. Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 278-79 (1979) (holding that mere awareness of known discriminatory effects was not sufficient to satisfy the intent requirement of equal protection clause).
\item See \textit{supra} text accompanying notes 36-40.
\end{enumerate}
\end{footnotesize}
50% Black. Nevertheless, the Court found that even in context, this stark statistical showing was insufficient to establish the intentional discrimination necessary to permit the use of race-conscious affirmative action remedies for prior discrimination.\footnote{107. See J.A. Croson Co., 488 U.S. 469, 498-508 (1989) (discussing inability of statistics to establish past discrimination).} Rather, the statistics supported only a showing of general "societal discrimination,"\footnote{108. See id. at 496-97 (O'Connor, J., plurality) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (Powell, J., plurality)).} entailing merely "the history of discrimination in society at large," which "without more, is too amorphous a basis for imposing a racially classified remedy."\footnote{109. See id. (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986)).} The Court distinguished this general societal discrimination from "the 'focused' goal of remedying 'wrongs worked by specific instances of racial discrimination,'" which is necessary to establish the particularized acts of past discrimination required to trigger an affirmative action remedy.\footnote{110. See Jerry Kang, Trojan Horses of Race, 118 Harv. L. Rev. 1489, 1508-10 (2005) (discussing unconscious racial bias revealed by Implicit Association Test); Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 322-23 (1987) (arguing that much contemporary racial discrimination is unconscious).}

Most contemporary discrimination is, of course, "societal" in nature. Although some identifiable individuals undoubtedly still deny resources such as jobs, housing, or educational opportunities to individual applicants because of the applicant's race, those particularized acts of racial discrimination are not what account for the bulk of the statistical disadvantages that racial minorities presently suffer in the allocation of resources. Modern discrimination is more subtle. It grows out of the often unconscious racial prejudices and stereotypes that influence the application of supposedly neutral allocation standards, such as merit measured by standardized test scores, or seniority resting on generations of cultural expectations about appropriate job categories for racial minorities.\footnote{110. See Jerry Kang, Trojan Horses of Race, 118 Harv. L. Rev. 1489, 1508-10 (2005) (discussing unconscious racial bias revealed by Implicit Association Test); Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 322-23 (1987) (arguing that much contemporary racial discrimination is unconscious).} Most contemporary discrimination is, therefore, "societal discrimination"—the precise form of discrimination that the Supreme Court refuses to treat as constitutionally cognizable.

The Supreme Court's refusal even to recognize the most pervasive societal causes of minority disadvantage as a form of discrimination provides a tremendous advantage to Whites. Whites now get to keep all of the resources that they acquired through centuries of past discrimination without ever having to account for those centuries of
rational exploitation. Whites are given a vested constitutional right to retain the resources that they acquired by abridging the rights of racial minorities. Stated in doctrinal terms, the Supreme Court now adopts the current allocation of resources as the appropriate constitutional baseline in conducting its equal protection analyses.

A baseline is something that separates the factors that a court actively considers from the factors whose validity a court assumes without examination.\(^{111}\) For the Supreme Court, therefore, the prior discrimination that produced present racial inequalities is deemed constitutionally irrelevant because it lies beneath the Court’s analytical baseline. In ascertaining what the equal protection clause requires, centuries of racial discrimination—as well as the continuing effects that such discrimination produced—are simply ignored. To use a footrace metaphor, Whites cheated by shackling minorities long enough to give themselves an enormous head start in the race for resources. Under the analytical baseline adopted by the Supreme Court, however, the Constitution does not require Whites ever to slow down long enough for those minorities to catch up.

The Court’s notion that societal discrimination does not “count” as discrimination for equal protection purposes is a bit bizarre. One would think that the whole point of the Equal Protection Clause was to eliminate societal discrimination because that is precisely the type of discrimination that would ensure that racial minorities continued to occupy the lowest, most disadvantaged rungs on the socioeconomic ladder. It seems that only an affirmative desire to protect Whites by hindering minority advancement could account for a jurisprudence that viewed societal discrimination as non-cognizable. Unfortunately, however, the Supreme Court’s historical involvement in the culture’s previous forms of racial oppression, coupled with its current insistence on prospective race neutrality, make the attribution of such a motive to the Supreme Court uncomfortably plausible.

2. Prospective Neutrality

A corollary to the Supreme Court’s refusal to recognize past discrimination as constitutionally relevant is the Court’s penchant for prospective race neutrality. Because the Court appears to believe that there is no longer any prior discrimination to remedy, the Court also

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believes that prospective colorblindness is the best way to ensure compliance with the equal protection clause. That preoccupation with prospective neutrality is striking because the Supreme Court was noticeably oblivious to minority demands for race neutrality in the past. It seems as if neutrality is important to the Court only when it advances the interests of Whites. Moreover, an insistence on prospective neutrality now permits the Court to prolong the resource-allocation advantages that Whites have over racial minorities, while simultaneously claiming to be safeguarding the constitutional concept of equality.

Historically, the Supreme Court's concern with race neutrality was most notable for its absence. In addition to upholding the institution of slavery in *Dred Scott,* the Court largely ignored the idea of racial equality for the first 165 years after the Constitution was adopted, thereby allowing Whites systematically to engage in *de jure* discrimination against racial minorities. For example, the Court invalidated congressional efforts to outlaw racial discrimination in public accommodations in the *Civil Rights Cases,* it upheld the separate but equal regime of *Plessy v. Ferguson,* and it permitted the internment of Japanese-American citizens in *Korematsu v. United States.* Even after the Court finally declared *de jure* discrimination to be unconstitutional in *Brown v. Board of Education,* the Court declined to invalidate a Virginia miscegenation statute in *Naim v. Naim.* All of those cases have now become infamous for their disregard of racial minority interests when minorities were being oppressed by the White majority through the explicit use of invidious racial classifications.

112. See *Dred Scott,* 60 U.S. (19 How.) at 407, 452 (1857) (holding that Blacks could not be citizens within the meaning of the United States Constitution for purpose of establishing diversity jurisdiction and invalidating congressional statute enacted to limit spread of slavery, as interfering with property rights of slave owners).

113. There were isolated occasions on which the Supreme Court invalidated racial discrimination even during this early period. See, e.g., *Strauder v. West Virginia,* 100 U.S. (10 Otto) 303, 305-12 (1880) (invalidating state refusal to permit Blacks to serve on juries).

114. See *The Civil Rights Cases,* 109 U.S. 3 (1883) (invalidating public accommodations provisions of the Civil Rights Act of 1875, and imposing state-action requirement on the Fourteenth Amendment that made southern states, rather than the federal government, primary guarantors of civil rights).


117. See *Brown I,* 347 U.S. at 493-95 (rejecting separate-but-equal doctrine, and declaring official school segregation to be unconstitutional).

118. See supra note 64 and accompanying text (discussing *Naim v. Naim* litigation).
Affirmative Inaction

Although the Court largely ignored the equal protection clause when Whites discriminated against racial minorities, things were different once racial minorities began to pursue equal rights through the adoption of racial affirmative action. At that point, the Supreme Court infused new life into the equal protection clause, choosing to apply strict equal protection scrutiny to racial affirmative action, even though it had failed to apply strict scrutiny to earlier *de jure* discrimination. In addition, the Court refused to draw any distinction between invidious discrimination and benign affirmative action in selecting the appropriate standard of review. Curiously, the Court did this despite its 1954 decision in *Brown*. *Brown* had initially served as a beacon of hope for minorities seeking to obtain racial justice after a history of oppression and official segregation. *Brown* precluded the use of racial classifications that disadvantaged racial minorities through continued racial segregation, but subsequent cases implementing *Brown* expressly permitted the use of racial classifications to achieve desegregation. Nevertheless, the Supreme Court’s affirmative action decisions proceeded to turn *Brown* on its head. The Court began to use the race-neutrality component of *Brown* not as a means of protecting racial minorities, but as the basis for protecting Whites. The Court did so by strictly scrutinizing race-conscious affirmative action on the ground that it deviated from the constitutional norm of race neutrality.

Reading the Equal Protection Clause to favor prospective race neutrality over race-conscious efforts to remedy prior discrimination, the contemporary Court ended up invalidating most of the racial affirmative action cases that it considered. The Court held that the strict scrutiny standard could be satisfied only by showing the pres-

120. See Adarand, 515 U.S. at 223-27, 235 (applying strict scrutiny to benign affirmative action and overruling use of intermediate scrutiny in *Metro Broadcasting*).
122. See id. (holding that separate is inherently unequal in the context of public education).
124. See Adarand, 515 U.S. at 223-27, 235 (applying strict scrutiny to benign affirmative action).
125. See *The Law of Affirmative Action*, supra note 26, at 156-59, 162-63 (discussing results in Supreme Court affirmative action cases).
ence of both a compelling governmental interest and a narrowly-tailored connection between that interest and the means chosen by the government to advance it. 126 Although one could easily imagine that remedial affirmative action would satisfy even the stringent standards of strict scrutiny, the Supreme Court chose to apply strict scrutiny in a way that left little chance for affirmative action to survive constitutional challenge. True, the Court in Adarand had stated that strict scrutiny was not necessarily fatal scrutiny. 127 But prior to the Court’s 5-4 decision in Grutter, no affirmative action program had ever withstood strict scrutiny. 128 Furthermore, Justice O’Connor cast the fifth vote to uphold the affirmative action plan at issue in Grutter, 129 but Justice O’Connor is no longer on the Court. 130 As a result, it is unclear whether the constitutionality of any affirmative action will ever be upheld again in the post-Grutter era. 131 Ironically, this may be true despite Justice O’Connor’s twenty-five year language in Grutter. My colleague Emma Jordan refers to the possibility that a newly constituted Supreme Court will simply override Grutter’s arguable twenty-five year grace period for affirmative action as the Supreme Court’s “new math.” 132

Prospective neutrality might make sense as a method of promoting racial equality when Whites and minorities are similarly situated with respect to the allocation of resources. However, it is a perverse way of pursing equality when Whites and minorities begin with vast discrepancies in the resources that they have been allocated. Prospec-

126. See Adarand, 515 U.S. at 227 (requiring narrow tailoring to advance compelling state interest).
127. See id. at 237 (seeking to dispel notion that strict scrutiny is “strict in theory, but fatal in fact”).
128. See THE LAW OF AFFIRMATIVE ACTION, supra note 26, at 166-68, 176, 185 (discussing, prior to Grutter, failure of any case to survive strict scrutiny since Korematsu).
130. See Biskupic, supra note 44 (discussing new Supreme Court Justices).
131. The Supreme Court has now granted certiorari in two school cases that concern the use of race to break ties in pupil assignments as a way of promoting racial integration. Those cases, which can arguably be characterized as affirmative action cases, are set to be argued during the Court’s October 2006 Term. The decisions in those cases may provide more information about the current Court’s views on affirmative action. See Parents Involved in Cmt’y Schools v. Seattle School Dist. No. 1, 426 F.3d 1162 (9th Cir. 2005) (en banc), cert. granted, 126 S. Ct. 2351 (2006); McFarland ex rel. McFarland v. Jefferson County Pub. School, 416 F.3d 513 (6th Cir. 2005) (per curiam), cert. granted sub nom. Meredith v. Jefferson County Bd. of Educ., 126 S. Ct. 2531 (2006); cf. Comfort v. Lynn School Comm., 418 F.3d 1 (2005) (en banc), cert. denied, 126 S. Ct. 798 (2005) (denying certiorari in similar program upheld by lower court).
132. Emma Coleman Jordan is a Professor of Law at Georgetown University Law Center. Professor Jordan received a Bachelor of Arts from San Francisco State University and Doctor of Jurisprudence from Howard University School of Law.
The concept of equality advanced by the Supreme Court’s disregard of past societal discrimination and its focus on prospective neutrality is itself invidious. It has the obvious effect of perpetuating the advantages that Whites have over racial minorities into the indefinite future. This invidious equality not only permits, but also compels, the continued sacrifice of minority interests for the benefit of the White majority. It enables Whites to continue benefiting from the societal discrimination that channels resources toward them and away from racial minorities, and it enables them to feel good about themselves as they do so. After all, the White majority is only doing what the Supreme Court has declared that the Equal Protection Clause requires.

In addition to having a discriminatory effect, it is difficult to view the Court’s commitment to prospective neutrality as anything other than camouflage for an intent to discriminate against racial minorities. It seems that whenever the neutrality principle is invoked, it is invoked in a context that is racially oppressive. The principle was invoked to defend the separate-but-equal regime of *Plessy v. Ferguson*, where the Supreme Court accepted the argument that there was nothing unequal about racial segregation. If Blacks felt that segregation tainted them as inferior to Whites, the Court stated that this was simply an outgrowth of Black insecurity—not the result of any discriminatory treatment that Blacks received at the hands of the White majority. Similarly, defenders of the Virginia miscegenation statute that survived *Brown* in *Naim v. Naim* argued that the statute promoted race neutrality. They stressed that the statute’s prohibition on racial intermarriage necessarily had the same effect on both races implicated in a putative mixed marriage, thereby eliminating any pos-

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133. See *Plessy v. Ferguson*, 163 U.S. 537 (1896).
134. See id. at 551-52 (asserting that feelings of inferiority emanate from segregation “solely because the colored race chooses to put that construction upon it”).
135. *Naim v. Naim*, 350 U.S. 985 (1956) (per curiam); 350 U.S. 891 (1955) (per curiam). The Virginia miscegenation statute was ultimately invalidated by the Supreme Court in *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967). See supra note 64 and accompanying text (discussing history of *Naim* and *Loving*).
sibility of discrimination against racial minorities. More recently, California's famous Proposition 209 ballot initiative has now amended the State Constitution to prohibit affirmative action by state agencies in matters ranging from school admissions to the award of government contracts. Proposition 209 was formally titled the "California Civil Rights Initiative," in order to assert that the adverse effects of the initiative were being inflicted on racial minorities in the name of prospective neutrality. But Proposition 209 instead illustrates quite clearly how the concept of equality can be used to prolong invidious discrimination.

It seems more than mere coincidence that the proponents of prospective neutrality in those prior contexts were political conservatives striving to limit the rights of racial minorities rather than to advance those rights. The current Supreme Court's preference for prospective neutrality over affirmative action emanates from a Court that is also politically conservative and seems intent on sharing in the invidious pedigree that prospective neutrality had acquired from the earlier contexts in which it was advanced. There are now a number of cases in which the Court has invoked the concept of race neutrality as the justification for denying societal resources to racial minorities.

136. See Loving, 388 U.S. at 7-8 (arguing that the statute had equal effect on Whites and racial minorities). One problem with this interpretation was that the statute by its terms applied only to intermarriage involving White people. The Supreme Court, however, stated that the statute would be unconstitutional even if it applied equally to all races. See id. at 11-12 (invalidating even the statute that applied to all races).


138. See id. at 226-28 (discussing decision to name Proposition 209 the "California Civil Rights Initiative").

139. See id. at 292-322 (arguing that the so-called neutrality of Proposition 209 actually discriminates against women and racial minorities).

140. See The Law of Affirmative Action, supra note 26, at 159-63 (discussing Supreme Court voting blocs).

Those cases invalidated affirmative action programs that sought the redistribution of resources ranging from educational admissions, to voting rights, to government contracts. The Supreme Court is not only turning the concept of equality into a device that promotes invidious discrimination, but it is inverting the very concept of discrimination itself.

B. Inverse Discrimination

One recurrent tradition in United States race relations has been the effort to recast unattractive cultural practices in terms that are self-congratulatory rather than morally offensive. This tradition has permitted the culture to retain a positive image of itself, while continuing to engage in activities that would be normatively unacceptable if viewed from a more critical perspective. Accordingly, the moral repulsiveness of slavery was deflected by depicting it as a social institution that actually benefited Blacks through the provision of sustenance, civilization, and the discipline needed to tame the inherently savage nature of Black African slaves. Likewise, the theft of Indian lands, the decimation of Indian populations, and the relocation of survivors to reservations, was justified by the need for westward expansion and the desire to bring humanizing Christianity to the Indian tribes. Post-Reconstruction segregation simply reflected the accepted status of the races in a way that was required to preserve racial harmony and the natural social order. Furthermore, the internment of Japanese-American citizens during World War II was jus...
tified by the need for deference to the expert judgment of military officials seeking to protect the national security in a time of global war.\(^{146}\) The invidious nature of the manner in which racial minorities are mistreated by Whites is never conceded at the time it is occurring. Rather, invidiousness is only discovered in retrospect by some later generation, after a new theory of admirable conduct has been adopted to justify that generation's treatment of racial minorities.

True to form, we are told that the culture's present reluctance to redistribute resources in a racially equitable manner is to be understood not as an act of ongoing discrimination, but rather as adherence to a praiseworthy cultural value. Far from being invidious, the Supreme Court has taught us that resistance to affirmative action is rooted in the need to prevent a new form of racial discrimination—the reverse discrimination that occurs when racial minorities abuse their subordinate social status to take advantage of innocent Whites.\(^{147}\) However, it is only by entering a conceptual universe in which the customary attributes of discrimination have been thoroughly inverted that such a claim could have even facial plausibility. And any facial plausibility that might be present could exist only if one continued to acquiesce in the culture's long-standing tradition of White supremacy. Nevertheless, the Supreme Court's characterization of affirmative action as just another form of racial discrimination appears to be taking hold in contemporary culture.

1. Through the Looking-Glass

I had always thought that the problem of racial discrimination in the United States derived from the White majority's propensity to treat its own interests as more important than the interests of racial minorities, thereby enabling Whites to advance their own economic, political, and social welfare at minority expense.\(^{148}\) That is the problem which first produced a lack of racial parity in the allocation of societal resources, and that is the problem which has perpetuated the

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147. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495-96 (1989) (suggesting that racial minorities may sacrifice the interests of Whites for their own benefit once they gain political control).

It often seems as if Humpty Dumpty is now writing affirmative action opinions for the Supreme Court.

According to what is probably the prevailing contemporary theory of judicial review, racial discrimination is bad because the White majority has demonstrated an enduring capacity to disadvantage racial minorities who suffer representation-reinforcement difficulties stemming from their discrete and insular nature. As described by Justice Stone’s famous footnote four in *United States v. Carolene Products*, racial minorities pose a special problem for democratic theory. The discrete and insular nature of racial minorities makes Whites reluctant to deal with them in the normal give and take of pluralist political bargaining. That pattern, in turn, creates a danger that representation-reinforcement defects will cause the interests of racial minorities to be discounted in the supposedly democratic process of formulating social policy. Professor John Hart Ely elaborated on this representation-reinforcement problem by emphasizing that inaccurate stereotypes about racial minorities can unknowingly cause even well-meaning Whites to discount minority interests, simply

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149. See supra Part II.A (discussing perpetuation of past discrimination against racial minorities).
151. *Id.* at 213.
152. See *Ely, supra* note 148, at 135-79 (discussing representation-reinforcement theory).
153. See *Carolene Prods.*, 304 U.S. at 153 n.4.
154. See *id.*
because of mistaken facts or impressions about the ways that minorities think or behave.\footnote{155 See Ely, supra note 148, at 135-79 (discussing representation-reinforcement theory).}

Representation-reinforcement theory explains why the Supreme Court might want to invalidate an invidious social policy that discriminated against racial minorities, because the Court could not trust the integrity of the political process that produced the social policy at issue. However, it does not explain why the Supreme Court would want to invalidate a benign affirmative action policy that was adopted by Whites to benefit racial minorities. Because Whites constitute a majority in the political process, there is little danger that a process defect taints the resulting policy when the White majority chooses to disadvantage itself. Inverting the concept of racial discrimination so that it compelled the invalidation of affirmative action would, therefore, require an account of the political process that reversed the customary understanding of the manner in which discrimination operates. The Court would either have to believe that racial minorities constituted a local majority capable of dominating the political process; that minorities could control the political process despite their discrete and insular minority status; or that even benign discrimination was a deontological evil that could never be tolerated, regardless of its instrumental value. However, none of those alternatives seem tenable.

It is true that concentrated racial minority populations can sometimes constitute local majorities. Demographic patterns, and the high degree of residential segregation existing in the United States, can give racial minorities the status of a numerical majority in certain geographic regions.\footnote{156 See generally Douglas Massey & Nancy Denton, American Apartheid: Segregation and the Making of the Underclass (1993) (discussing concept of urban residential "hypersegregation" in United States).} However, this local majority status typically does not give minorities controlling political power. As has been noted,\footnote{157 See supra notes 79-80 and accompanying text (discussing Croson).} City of Richmond v. J.A. Croson Co. concerned an affirmative action plan adopted in Richmond, Virginia, where the population was 50% Black, and where Blacks occupied five of the nine seats on the Richmond City Council.\footnote{158 See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495-96 (discussing racial makeup of Richmond and of Richmond City Council).} Nevertheless, the minority set-aside plan adopted by the City Council reserved only 30% of future municipal construction contracts for racial minorities,\footnote{159 See id. at 476-86 (describing Richmond set-aside plan).} rather than a racially
proportional 50% or more. This suggests that Whites can retain sufficient residual political power to prevent racial minorities from exercising the full force of political leverage that their local majority status might be thought to give them. Moreover, even if the Black City Council majority possessed the political power to demand a racially proportional share of municipal construction contracts, the Richmond set-aside plan could still have been invalidated by the Virginia state legislature, or by the United States Congress. Both of those legislative bodies have the power to preempt City Council enactments, and both legislative bodies are controlled by White majorities. Because racial minorities continue to constitute numerical minorities at the state and national levels, any majority status that racial minorities might possess at the local level is always subject to nullification at a higher political level by the White majority. Indeed, the Richmond set-aside plan was itself nullified by the United States Supreme Court,160 and if one views the Supreme Court as an essentially political institution, its actions can be understood as yet another check on the power of racial minorities to operate in a politically autonomous manner as a local majority.161

The decade of Supreme Court redistricting litigation that followed efforts to create majority-minority voting districts under the Voting Rights Act after the 1990 Census further illustrates the ability of the White majority to control the political power of concentrated racial minorities.162 The need for a Voting Rights Act arose precisely because the White majority realized that it could draw voting district lines in ways that dispersed racial minority populations for electoral purposes.163 In fact, this racial gerrymandering proved so successful that States such as North Carolina—despite significant racial minority populations—were able to prevent any Black representation in Congress from Reconstruction until the creation of the first majority-minority districts under the Voting Rights Act.164 Notwithstanding the initial successes of the Voting Rights Act, the Supreme Court nevertheless invalidated virtually all of the majority-minority districts

161. I have argued elsewhere that this is, in fact, a "veiled majoritarian" function of the Supreme Court. See RACE AGAINST THE COURT, supra note 26, at 1-6 (describing veiled majoritarian function of Supreme Court).
162. See THE LAW OF AFFIRMATIVE ACTION, supra note 26, at 107-55 (discussing Supreme Court redistricting cases).
163. See id. at 85-86 (discussing function of Voting Rights Act).
164. See cases cited supra note 52 (discussing lack of Black representatives in Congress).
whose constitutionality it considered in the decade after the 1990 Census.\textsuperscript{165} Therefore, the superior political power of the White majority at the state and national levels, fortified by the ability of the Supreme Court to act as a check of last resort for any minority political power that slips through the political cracks, is typically sufficient to neutralize any danger that local concentrations of racial minority power will be used in ways that significantly harm the interests of the White majority.

One might argue that the Supreme Court is nevertheless justified in invalidating benign affirmative action programs because racial minorities possess the power to control the political process \textit{despite} their numerical minority status. At first blush, this manipulation-through-weakness suggestion seems implausible when offered in the context of a White majority that has had a long history of successfully subordinating the interests of racial minorities. However, economic theory lends some credence to the possibility that discrete and insular minority interests can trump the interests of the majority. Public choice theory posits that cohesive minority groups pursuing a shared interest will have a greater incentive to organize politically than the more diffuse majority, whose ability to engage in political action can effectively be paralyzed by the free-rider problem.\textsuperscript{166} According to the theory, individual Whites will assume that someone else in the White majority will take the political action necessary to preserve the existing advantages that Whites have over racial minorities, but because every individual White has the same incentive to "free ride" on the efforts of others, no one ends up taking the necessary political action. Racial minorities, however, will have a greater incentive to engage in political action. This is because the higher degree of group cohesiveness produced by a shared experience of oppression gives racial minorities a better understanding of the need for collective action to overcome the free rider problem.

There are at least two problems with this public choice account. First, it assumes a degree of minority cohesiveness that seems unrealistically high. Competition among different racial minority groups for the limited number of resources that the White majority makes availa-
ble to racial minorities can undermine group cohesiveness.\textsuperscript{167} Moreover, social and economic class divisions within particular racial minority groups can generate more friction than political cohesion, as evidenced by the common criticism that affirmative action really benefits middle class minorities rather than the most disadvantaged racial minorities.\textsuperscript{168} Second, public choice theory seems empirically incorrect when applied in the context of racial discrimination. It is true that racial minorities have benefited from the passage of some civil rights legislation and from the adoption of some affirmative action programs. However, those successes are extremely limited when compared to the vast discrepancies that continue to exist in the allocation of resources between Whites and racial minorities.\textsuperscript{169} If racial minorities truly possessed the political power to override the resource allocation preferences of a White majority that was cohesive enough to secure them, one would expect racial minorities to have achieved much more parity than they have been able to achieve in the last 400 years. Any enhanced political power that public choice theory gives to racial minorities is, therefore, insignificant when compared to the magnitude of the resource allocation problems that minorities continue to confront, and the high degree of White cohesiveness that such a distribution of resources suggests.

The Supreme Court could, in theory, attempt to justify its hostility to even benign affirmative action on the ground that all racial classifications are simply unacceptable as a deontological matter, because racial discrimination is morally wrong. Under this view, any instrumental benefits produced by affirmative action in facilitating a more equitable distribution of resources would arguably be irrelevant. Only race-neutral means of pursuing those instrumental objectives should normally be permitted.\textsuperscript{170} Again, there are at least two problems with this deontological justification.

First, the term “estoppel” cries out for recognition. If racial classifications violate some moral imperative, why has that violation be-

\textsuperscript{167} The problem of competition among minority factions is discussed in Part III.B.2.

\textsuperscript{168} See, e.g., \textit{Derrick Bell, And We Are Not Saved} 48-50 (discussing failure of affirmative action to benefit minorities in lower economic classes).

\textsuperscript{169} See Gratz, 539 U.S. at 298-301 (Ginsburg, J., dissenting) (citing statistics showing disadvantages suffered by racial minorities).

\textsuperscript{170} The Court sometimes uses language suggesting a deontological opposition to racial classifications. See, e.g., \textit{City of Richmond v. J.A. Croson Co.}, 488 U.S. 469, 493, 507, 509 (1989) (emphasizing the “personal right” to be free from racial discrimination and favoring “race neutral” efforts to remedy prior discrimination).
come apparent only now, when racial classifications are being offered to aid racial minorities? Why did the Court not invoke that same moral imperative when racial classifications were being used to aid Whites in their exploitation of racial minority interests? Any deontological evil that might be inherent in racial classifications would have to be of fairly recent vintage.

Second, even if one believes that the Supreme Court should adhere to a principle of race neutrality at the present time—irrespective of whether it possessed the moral courage to do so in the past—the moral principle being advanced is unacceptably truncated. Such a principle would pursue the goal of prospective neutrality in a way that completely ignored the need for corrective justice. Because such a principle would simply freeze existing distributional inequalities in the manner described in Part II.A.2 above, it would lack any normative appeal. Indeed, it would be difficult to conceive of a principle that totally disregarded the need for corrective justice as a moral principle at all.

The Supreme Court’s theory that racial affirmative action is somehow discriminatory, and that the perpetuation of White privilege in the allocation of resources is somehow nondiscriminatory, makes sense only on the other side of the Looking-Glass. It makes sense only in a place where the customary understanding of discrimination and discrimination remedies has been reversed. However, it seems that we have now passed through the Looking-Glass and have fallen victim to the laws of inverse discrimination that govern on the other side. That is the only satisfactory explanation for our willingness to accord the Supreme Court’s anti-affirmative action jurisprudence even a grain of plausibility. Nevertheless, the tolerance that we show for Supreme Court racial policies, combined with the adoption of anti-redistribution measures such as California’s Proposition 209, suggests that we now believe affirmative action to pose more of a threat to racial equality than the threat posed by perpetuating discrimination itself. That belief seems quite perplexing—at least until one realizes that it rests on a persistent notion of White supremacy that has influenced the United States culture from the beginning.

171. The problems entailed in attempting only a prospective application of colorblind race neutrality were discussed supra Part II.A.2.
172. See supra Part II.A.2 (discussing problems with prospective neutrality).
173. See Proposition 209, supra note 137 (discussing Proposition 209).
Affirmative Inaction

2. White Supremacy

United States culture has always viewed racial minorities as inferior to Whites. The sense of White supremacy that initially served as a justification for slavery, eventually found recognition in the United States Constitution itself. Article I, Section 2, Clause 3 enhanced the political power of slave states by increasing the representation of those states in Congress, so that it was based upon the state’s White population, plus three-fifths of the state’s slave population. Article I, Section 9, Clause 1 prohibited Congress from banning slavery before 1808. Article IV, Section 2, Clause 3 required even free states to deliver any slave, who managed to escape, back to the slave’s owner. And *Dred Scott* read Article III, Section 2, Clause 1 as not including Black slaves among those who could be “citizens” within the meaning of the United States Constitution, thereby denying federal court diversity jurisdiction to Blacks seeking judicial protection of their asserted rights. When the present Supreme Court uses that same Constitution to question or invalidate contemporary affirmative action programs, the Court’s decisions are rooted in that same notion of White supremacy.

The Supreme Court’s active participation in the Nation’s history of White supremacy can hardly be doubted. The language that the *Dred Scott* Court used in justifying its decision to deny citizenship to Blacks, has become legendary for its racial condescension. Chief Justice Taney stated:

> In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized

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174. See sources cited supra note 143 (discussing justifications for slavery).
175. See Stone et al., supra note 20, at 448-50 (discussing provisions of Constitution that protected slavery).
176. See U.S. Const. art. 1, § 2, cl. 3 (three-fifths clause).
177. See id. § 9, cl. 1 (prohibiting ban on slavery until 1808).
178. See id. art. IV, § 2, cl. 3 (rendition clause).
179. See Dred Scott, 60 U.S. (19 How.) at 407, 452 (1857) (holding that Blacks could not be citizens within the meaning of the United States Constitution for purpose of establishing diversity jurisdiction & invalidating congressional statute enacted to limit spread of slavery as interfering with property rights of slave owners).
and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.180

Some Supreme Court Justices maintained similar views about White supremacy even when they voted to protect the interests of racial minorities. Justice Harlan’s famous dissent from the Court’s decision to uphold the separate-but-equal regime of Plessy v. Ferguson asserted that “[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens.”181 A few sentences earlier, however, Justice Harlan’s opinion also included the following language:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty.182

As Dred Scott and Plessy illustrate, the sense of White supremacy that prevailed in the nineteenth century was so pronounced that Supreme Court Justices felt no compunction about endorsing it openly.

The Supreme Court’s sympathy for White supremacy became less visible in the twentieth century. Indeed, the Court sometimes rejected assertions of White racial privilege that emanated from other branches of the political culture. Brown explicitly rejected the White supremacist foundation of segregation in its 1954 denunciation of the

180. Id. at 407.
181. Plessy, 163 U.S. at 559 (1896) (Harlan, J., dissenting).
182. Id.
Affirmative Inaction

Plessy separate-but-equal doctrine, stating that "separate educational facilities are inherently unequal." In 1967, when the Supreme Court finally chose to invalidate Virginia's miscegenation statute in Loving v. Virginia, the Court emphasized that the statute's goal of maintaining racial integrity could be understood only as an unconstitutional measure that was "designed to maintain White Supremacy.", Moreover, the Supreme Court refused in 1958 to tolerate the White supremacist efforts by Arkansas Governor Orval Faubus to block desegregation of Central High School in Little Rock, announcing in Cooper v. Aaron that the Supreme Court—not a segregationist Southern Governor—had the final say in interpreting the meaning of the Constitution.

If the contemporary Supreme Court is to be the final expositor of constitutional rights, one would hope that the Court has finally extricated itself from the pull of White supremacy. Even those who disagree with the conservative racial politics of the current Supreme Court majority tend to think of the Court as more enlightened than its nineteenth century predecessors. But on closer examination, the current Court appears merely to have repositioned its acquiescence in White racial privilege, so that the Court's more subtle tolerance of White supremacy now lies beneath the surface of its opinions.

As noted above, the present Supreme Court has made its aversion to racial parity in the allocation of resources quite clear, viewing the enterprise of racial balancing as "patently unconstitutional."

In Part I.B.3 above, I characterized the Court's objection to this seemingly sensible use of affirmative action as something that is at least curious. But the Court's objection to racial parity may be more than merely curious. It may be an extension of the affinity for White

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184. 388 U.S. 1, 11-12 (1967) (invalidating Virginia miscegenation statute).
185. Id. at 11. The Supreme Court had previously declined to invalidate the Virginia miscegenation statute in Naim v. Naim, 350 U.S. 985 (1956) (per curiam); 350 U.S. 891 (1955) (per curiam); see supra note 118 (discussing history of Naim v. Naim and Loving).
186. See Cooper v. Aaron, 358 U.S. 1, 18-20 (1958) (declaring that "the federal judiciary is supreme in the exposition of the law of the Constitution," and that a Governor lacked the power to nullify a federal court order); see also Stone et al., supra note 20, at 484-85 (discussing Cooper v. Aaron and Little Rock school desegregation).
187. See supra note 90 and accompanying text (discussing unconstitutionality of racial balancing).
189. See supra note 87 and accompanying text (suggesting that affirmative action might be more cosmetic than real).
supremacy that was expressed by the nineteenth century Court. More disturbing than the holdings in the Court’s decisions is the tacit sense of White racial privilege that seems to underlie the Court’s aversion to affirmative action. It is as if the Court objects to affirmative action not because it deviates from some abstract principle of race neutrality, but because the Court objects to the idea of racial equality itself.

When the actions of the current and historical Supreme Courts are compared, the twenty-first century Court seems best understood as serving a racially oppressive social function that is analogous to the oppressive social function served by the nineteenth century Court. Both Courts chose to target and invalidate the most serious prevailing threats to White supremacy; both chose to seize the power to do so from the political branches of government; and both chose to camouflage their support for White supremacy by generating counterintuitive legal doctrines. In fact, the similarities between the current and historical Courts are so strong, that it is difficult to escape the conclusion that the current Court has no greater capacity for promoting racial justice than its predecessor had.

Both the historic and contemporary Supreme Courts sought to identify, and then neutralize, the greatest prevailing threats existing to the maintenance of White supremacy in the allocation of resources. In the nineteenth century, Black chattel slavery permitted Whites to benefit enormously from the exploitation of racial minority labor, but one of the greatest threats to the continuation of slavery was posed by the nineteenth century abolitionist movement. When a political coalition that included abolitionists managed to limit the spread of slavery through enactment of the Missouri Compromise Act of 1854, the Supreme Court invalidated the statute in *Dred Scott*.

When a political coalition that included abolitionists managed to limit the spread of slavery through enactment of the Missouri Compromise Act of 1854, the Supreme Court invalidated the statute in *Dred Scott*. It also erected a virtually insurmountable prospective impediment to abolition by holding that Blacks could not be citizens under the Constitution, and Black slaves constituted constitutionally protected property.

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192. *See id.* at 407, 451-52 (holding that Blacks could not be citizens within the meaning of the United States Constitution for purpose of establishing diversity jurisdiction and invalidating congressional statute enacted to limit spread of slavery, as interfering with property rights of slave owners).
The current Supreme Court has performed an analogous function in perpetuating the existence of contemporary White privilege. Presently, the greatest threat to White racial privilege is posed by racial affirmative action that seeks to redistribute and promote allocative parity in resources that are currently channeled to Whites. The modern Supreme Court has protected the existing racial distribution of resources in cases such as Adarand Constructors, Inc. v. Peña, which held that racial affirmative action is subject to nearly-always-fatal strict scrutiny despite its benign nature. In addition, cases such as Grutter have held that the goal of promoting racial balance is "patently unconstitutional." Accordingly, the current Supreme Court has done for contemporary White supremacy in the existing allocation of resources what the nineteenth century Court did for the then-existing institution of slavery.

Both past and present Supreme Courts have also seized power from the representative branches of government in the course of offering judicial protections for White racial privilege. In the nineteenth century, the political branches of government were more sympathetic than the Supreme Court to the goal of promoting racial equality. Accordingly, when the Fourteenth Amendment was ratified in 1868 after the Civil War, section five was added expressly to grant Congress the legislative power to protect Blacks from the foreseeable discrimination that would follow emancipation. One function of section five was to modify the prevailing understanding of federalism, so that the federal government, rather than the states, would have the primary responsibility for protecting the constitutional rights of newly freed slaves. The nineteenth century Supreme Court, however, simply disregarded the language of section five. In the Civil Rights Cases, the Court not only invalidated the public accommodations provisions of Congress's Civil Rights Act of 1875, but the Court also adopted a state action requirement for the Fourteenth Amendment that had the effect of reinstating the very understanding of federalism that section

194. See Adarand, 515 U.S. at 223-27 (applying strict scrutiny); but cf. id. at 237 (stating that strict scrutiny is not necessarily fatal scrutiny).
197. See Stone et al., supra note 20, at 457-64 (discussing federalism and function of Fourteenth Amendment).
198. 109 U.S. 3 (1883).
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five had been designed to reverse.\textsuperscript{199} Accordingly, the Supreme Court's partial nullification of the Fourteenth Amendment entailed a judicial usurpation from the political branches of the precise legislative power that the Fourteenth Amendment had been adopted to create.

Once again, the current Supreme Court has performed an analogous function in usurping race-relations power from the representative branches of government. When the Supreme Court applied strict scrutiny to the minority set-aside plan in \textit{Adarand}, the Court effectively invalidated a legislative program that had been adopted by Congress pursuant to section five of the Fourteenth Amendment.\textsuperscript{200} Rather than defer to the judgment of the representative branches, the \textit{Adarand} Court instead overruled an earlier Supreme Court decision in \textit{Metro Broadcasting v. FCC},\textsuperscript{201} which had expressly recognized that Congress possessed special affirmative action powers emanating from section five of the Fourteenth Amendment.\textsuperscript{202} Moreover, the Supreme Court chose to override the political power of the representative branches even though it is difficult to imagine a non-invidious reason for it to have done so. The task of solving the longstanding problem of racial discrimination in the United States is obviously a difficult one, and there is no reason to believe that the politically unaccountable Supreme Court has any institutional advantage over the politically accountable representative branches in fashioning remedies. It is not as if the Court were reading the text of the Constitution, or implementing the intent of the Framers. The text gives Congress the power to address the problem of racial discrimination, and the intent of the Fourteenth Amendment Framers was to authorize legislative rather than judicial solutions to that problem.\textsuperscript{203} When the contemporary Supreme Court chose to override the remedial power of the representative branches, it was doing the same thing that the nine-

\textsuperscript{199} See id. at 8-19 (invalidating public accommodations provisions of the Civil Rights Act of 1875, and imposing state-action requirement on the Fourteenth Amendment that made southern states, rather than the federal government, primary guarantors of civil rights).

\textsuperscript{200} See Adarand, 515 U.S. at 254 (Stevens, J., dissenting) (discussing section 5 power). Prior to \textit{Grutter}, strict scrutiny had always been fatal for affirmative action. See \textit{The Law of Affirmative Action}, supra note 26 at 166-68, 176, 185 (discussing, prior to \textit{Grutter}, failure of any case to survive strict scrutiny since \textit{Korematsu}).

\textsuperscript{201} 497 U.S. 547 (1990).

\textsuperscript{202} See Adarand, 515 U.S. at 227, 235 (overruling \textit{Metro Broadcasting} and applying strict scrutiny to affirmative action).

\textsuperscript{203} See \textit{Stone et al.}, supra note 20, at 457-64 (discussing federalism and history of Fourteenth Amendment).
teenth century Court was doing in *Dred Scott*. Both Courts were nullifying the efforts of the political branches to ameliorate the problem of racial discrimination, in order to perpetuate the existing supremacy of Whites.

A third way in which the current Supreme Court echoes a function performed by its nineteenth century predecessor is that the Courts in both eras chose to hide their White supremacist inclinations behind a counterintuitive set of doctrinal rules and legal fictions. When *Dred Scott* upheld the institution of slavery in 1857, it did so primarily on the ground that federal courts lacked diversity jurisdiction over the case. 204 When the Court invalidated the Civil Rights Act of 1875 in the *Civil Rights Cases*, it did so on the technical ground that the Fourteenth Amendment contained a state action requirement with which Congress had failed to comply. 205 And when the Court upheld the separate-but-equal regime of *Plessy*, it did so pursuant to a legal fiction permitting the Court to conclude that racial separation implied racial equality rather than invidious White supremacy. 206 The advantage of basing a judicial decision in esoteric doctrinal terms is that it camouflages the invidious impact of the Court’s decision. Rather than saying that the Constitution favors the interests of Whites over the interests of racial minorities, the Court can issue a decision that has the same White supremacist effect, while talking about doctrinal issues that appear to be racially neutral. This technique may cause disadvantaged minorities to underrate the degree to which their interests are being sacrificed for the benefit of the White majority, and it may help the White majority to believe that it is doing something more principled than simply engaging in racial discrimination. Such judicial obfuscation has a venerated legal history, dating back to *Marbury v. Madison*, 207 where Chief Justice John Marshall succeeded in getting the institution of judicial review to grow out of a case that doctrinally


206. *See supra* notes 133-134 and accompanying text (discussing *Plessy* assertion that separate was equal).

207. 5 U.S. (1 Cranch.) 137 (1803).
concerned the scope of Supreme Court appellate jurisdiction under Article III.208

The current Supreme Court's affirmative action jurisprudence is similarly obfuscatory. As has been noted,209 the Court now seems to specialize in the legal inversion of equality and discrimination. The pertinent doctrinal niceties are such that the Court has successfully been able to characterize the perpetuation of existing inequalities as racial equality, while characterizing remedial efforts to equalize resource allocations as racial discrimination.210 Moreover, the bulk of the current Court's doctrinal attention in affirmative action cases has related not to existing inequalities in the allocation of resources, but to the appropriate standard of judicial review.211 Accordingly, the Court in Adarand was able to conclude that there was no doctrinally significant difference between invidious and benign discrimination, as it imposed a strict scrutiny standard of review for affirmative action.212 In the same decision, the Court was also able to insist on the legal fiction that strict scrutiny is not necessarily fatal for affirmative action, even though it virtually always is.213 Although the most significant form of racial discrimination that exists in the contemporary United States consists of the entrenched cultural practices that have caused us to think that the disproportionate allocation of resources to Whites is somehow natural and neutral, the Supreme Court has established a doctrinal definition of discrimination under which such general "societal discrimination" simply does not count.214 Like the nineteenth century Court, the present Supreme Court has managed to articulate the doctrines that are relevant to the constitutional concept of racial equality in a way that makes them too slippery to grasp in a satisfactory way.

208. See Stone et al., supra note 20, at 37 (citing Robert McCloskey, The American Supreme Court 40 (1960) for the proposition that Chief Justice Marshall's opinion in Marbury was a "masterwork of indirection"). Chief Justice Marshall is often said to have sacrificed a short term battle over judicial appointments in order to win the long term victory of establishing judicial review in Marbury. See id.
209. See supra Part II.B.1 (discussing inverse discrimination).
210. See id.
211. See The Law of Affirmative Action, supra note 26, at 161-68 (discussing standard of review).
213. See id. at 237 (dispelling notion that strict scrutiny is "strict in theory, but fatal in fact"). But see The Law of Affirmative Action, supra note 26, at 166-68, 176, 185 (discussing, prior to Grutter, failure of any case to survive strict scrutiny since Korematsu).
214. See supra Part II.A.1 (discussing "societal discrimination").
The contemporary Supreme Court has read the Constitution to preclude the goal of racial parity, even though conscious efforts to achieve racial parity offer the most promising strategy for achieving racial equality.\footnote{See supra Part I.B.3 (discussing racial parity).} The Court's doctrinal decision is difficult to comprehend if the Court is truly interested in promoting racial equality. In fact, it is so difficult to comprehend, that one is forced to conclude that the Court must be pursuing some other objective. Unfortunately, a White supremacist view that racial minority interests are simply not as important as the interests of Whites offers the only account of the Supreme Court's doctrinal behavior that seems to ring true. Therefore, the Court can best be viewed as a social institution whose function is to perpetuate the oppression of racial minorities for the benefit of Whites. The question that then naturally arises is how one who remains genuinely interested in the pursuit of racial equality can best respond to such a Supreme Court.

III. NEUTRALIZING THE COURT

The best way to respond to a Supreme Court that is more concerned with the interests of Whites than with the interests of racial minorities is to find some way to neutralize the racial impact of the Court's decisions. To date, the role of the Supreme Court has been largely to impede the equitable redistribution of resources, by invalidating affirmative action plans that redirect resources to racial minorities. Like the socially regressive role that the Supreme Court played during the \textit{Lochner} era,\footnote{See \textit{Lochner v. New York}, 198 U.S. 45 (1905); see also \textit{Stone et al.}, supra note 20, at 750-62 (describing rise and fall of \textit{Lochner} era).} the role that the current Court plays in formulating racial policy should be rejected as an inappropriate exercise of judicial favoritism. A better role for the Supreme Court to play would be that of a mere observer, committed to affirmative \textit{inaction} in the formulation of racial policy. Racial policy in the United States should be formulated by the representative branches of government, because the representative branches are politically more accountable than the Court, and are not doctrinally mired in the Supreme Court's invidious conception of equality.\footnote{See supra Part II (discussing invidious equality).} Accordingly, proponents of racial equality should devote the twenty-five year grace period, rhetorically granted in \textit{Grutter}, to the exploration of ways in which Supreme Court involvement can be held at bay. Limiting the
prospective influence of the Court on the Nation's racial policy will not be easy, but success is likely to turn more on reconceived cultural attitudes about the Court's legitimacy than on the Court's assertions of raw judicial power. Once minority coalitions are able to reassess the deference that they themselves accord Supreme Court racial adjudications, they may also be able to lead the culture at large in reassessing the legitimacy of the Court's racial jurisprudence.

A. Negative Action

Despite Grutter's nominal endorsement of racial diversity in education, the present Supreme Court seems clearly antagonistic to affirmative action in general, and to racial parity in particular. That antagonism is evident not only from the inclusion of sunset language in Justice O'Connor's opinion, but also from the holdings of the Court's other affirmative action decisions. When those decisions are considered against the backdrop of recent changes in Supreme Court personnel, it is difficult to escape the conclusion that the Court's tentative tolerance for affirmative action will prove to be fleeting at best. Notwithstanding the Supreme Court decision in Grutter, the overall effect of the Court's response to affirmative action can best be characterized as negative action. Moreover, by nullifying the redistributive efforts of the political branches, the Court has behaved in a manner that is reminiscent of the now-discredited Lochner regime.218 The negative action of the Supreme Court's affirmative action regime deserves to be similarly discredited.

1. Limits on Affirmative Action

The Supreme Court's decision in Grutter v. Bollinger is generally viewed as a victory for affirmative action because it upheld the constitutionality of using racial preferences to promote diversity in a law school educational context.219 However, Grutter did more to undermine racial affirmative action than to promote it. Justice O'Connor's majority opinion reaffirmed the application of strict equal protection scrutiny to even benign affirmative action;220 it stressed the impermis-
sibility of using affirmative action to remedy general "societal discrim-
ination;" \(^{221}\) and it rejected the legitimacy of using affirmative action to
advance racial parity. \(^{222}\) On the same day, the Court also invalidated
a similar affirmative action program in *Gratz v. Bollinger*, \(^{223}\) which
was designed to promote diversity in an undergraduate educational
context. The Court did so even though the program in *Gratz* seems
analytically indistinguishable from the program in *Grutter*. \(^{224}\) Those
two cases reflect the existence of a Supreme Court affirmative action
regime in which the constitutionality of affirmative action turns
largely upon the racial policy preferences of whatever five Justices
happen to constitute a Supreme Court majority in any give case.

Vesting such racial policymaking discretion in the Supreme Court
is troubling. As one would predict from the Court's historical lack of
sympathy for racial minorities, \(^{225}\) the contemporary Supreme Court
has exhibited a strong anti-affirmative action bias. \(^{226}\) During twelve
years of splintered plurality decisions, the Supreme Court was unable
to agree on a standard of review to govern the constitutionality of
affirmative action. \(^{227}\) In 1989, the Court was finally able to issue its
first majority opinion in an affirmative action case, when the Court
applied strict scrutiny to invalidate a minority construction set aside
plan in *City of Richmond v. J.A. Croson Co.* \(^{228}\) From 1989 until 2003,
before *Grutter* and *Gratz* were decided, the Court ruled on the consti-
tutionality of racial affirmative action in ten cases. The court invali-
dated the affirmative action plans at issue in seven of those cases. \(^{229}\)

Of the three remaining cases in which the constitutionality of affirma-

\[^{221}\] See *id.* at 323-25 (citing *Bakke* as rejecting interest in remedying societal
discrimination).

\[^{222}\] See *id.* at 330 (quoting Regents of the Univ. of Cal. v. *Bakke*, 438 U.S. 265, 307 (1978)
(opinion of Powell, J.)) (rejecting the goal of racial parity).

\[^{223}\] See *Gratz*, 539 U.S. at 271-76 (invalidating undergraduate affirmative action program).

\[^{224}\] See The Dark Side of *Grutter*, *supra* note 34, at 242-49 (arguing that there is no analyti-
cal distinction between the Supreme Court decision upholding law school affirmative action pro-
gram in *Grutter* and the Supreme Court decision invalidating undergraduate affirmative action
program in *Gratz*).

\[^{225}\] See *supra* Part II.B.2 (discussing historical Supreme Court hostility to racial minority
interests).

\[^{226}\] See generally *The Law of Affirmative Action*, *supra* note 26, at 156-92 (discussing case outcomes, issues, and voting blocs in Supreme Court affirmative action cases).

\[^{227}\] See *id.* at 164-68 (discussing standard of review).

\[^{228}\] 488 U.S. 469 (1989); see *The Law of Affirmative Action*, *supra* note 26, at 44-47
(discussing *Croson*).

\[^{229}\] See *The Law of Affirmative Action*, *supra* note 26, at 162 (affirmative action voting
chart); see generally *id.* at 156-61 (discussing outcomes in Supreme Court affirmative action
cases.)
affirmative action was upheld, one was subsequently reversed,\textsuperscript{230} one actually cut back on permissible affirmative action,\textsuperscript{231} and one was disposed of on procedural grounds.\textsuperscript{232} Collectively, those ten affirmative action decisions sent a fairly clear message of Supreme Court hostility towards racial affirmative action.\textsuperscript{233}

The Supreme Court has not only invalidated most of the recent affirmative action programs that it has considered, but the regulatory regime that it has established for affirmative action also chills the political branches from adopting new affirmative action programs. The Court now insists that racial affirmative action must be subject to strict scrutiny. This is true even though the Court was initially inclined to apply the more permissive standard of intermediate scrutiny to affirmative action, because of its non-invidious nature.\textsuperscript{234} Moreover, the Court curiously applies strict scrutiny to racial affirmative action, while applying intermediate scrutiny to gender-based affirmative action.\textsuperscript{235} This is surprising, because the Fourteenth Amendment was specifically adopted to authorize special Reconstruction protections


\textsuperscript{231} See Lawyer v. Dept't of Justice, 521 U.S. 567, 580-83 (1997) (upholding, under rational-basis scrutiny, constitutionality of voter redistricting plan that used race as factor, where race did not predominate over traditional districting principles and plan was part of a consent decree that omitted disputed majority-minority district); cf. Abrams v. Johnson, 521 U.S. 74, 77-79 (1997) (upholding court-adopted redistricting plan that substituted one majority-minority district for three majority-minority districts contained in plan adopted by state legislature after Supreme Court invalidation and remand in Miller).

\textsuperscript{232} See Hunt v. Cromartie, 526 U.S. 541, 548-54 (1999) (holding that summary judgment was not appropriate in a redistricting case where racial motivation was a disputed issue of fact). After remand, the Supreme Court ultimately upheld the constitutionality of the disputed voting district, finding that it resulted from a permissible political gerrymander rather than an impermissible racial gerrymander. See Easley v. Cromartie, 532 U.S. 234, 257-58 (2003). Since Grutter was decided, the Supreme Court invalidated 5-4, under the Voting Rights Act, a mid-decade Texas redistricting plan that eliminated a majority-Latino voting district. See League of United Latin American Citizens v. Perry, 126 S. Ct. 2594, 2612-23 (2006) (upholding Latino vote dilution claim). Chief Justice Roberts, joined by Justice Alito voted to reject this claim. See id. at 2652-63 (Roberts, C.J., dissenting in part, with Alito, J.). Justices Scalia and Thomas also voted to reject this claim. See id. at 2663 (Scalia, J., dissenting in part, with Thomas, J.). In addition, a majority of the Court rejected a Voting Rights Act claim asserting dilution of black voting strength). See id. at 2624-26 (plurality opinion of Kennedy, J., with Roberts, C.J., and Alito, J.); id. at 2652 (Roberts, C.J., concurring in part, with Alito, J.); id. at 2663-68 (Scalia, J., concurring in judgment in part, with Roberts, C.J., Thomas, and Alito, J.).

\textsuperscript{233} See generally THE LAW OF AFFIRMATIVE ACTION, supra note 26, at 189-92 (discussing Supreme Court hostility to affirmative action.)

\textsuperscript{234} See id. at 164-68 (discussing use of intermediate scrutiny in early affirmative action cases).

\textsuperscript{235} See Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 247 (1995) (Stevens, J., dissenting) (discussing the "anomalous result" produced by subjecting racial affirmative action to strict, scrutiny while subjecting gender affirmative action to intermediate scrutiny, even though primary purpose of Fourteenth Amendment was to end racial discrimination).
for *racial* minorities—protections that were the precursors of contemporary racial affirmative action. 236 Strict scrutiny not only demands the stringency of a compelling governmental interest and a narrowly-tailored means of advancing that interest, 237 but the Court has been both inconsistent and unclear about what it takes to satisfy those constitutional standards. The relevance of factors such as formal findings, past discrimination, prospective diversity, and the burden on Whites has been very unclear. 238 As a result, the Supreme Court has been able to combine doctrinal rigor with doctrinal uncertainty to impose an *in terrorem* disincentive on the adoption of affirmative action. Political actors who find it desirable to trade affirmative action for other concessions from civil rights constituents cannot be certain that their political deals will be honored by the Supreme Court. In addition, political actors seeking facial justifications for opposing affirmative action can invoke constitutional uncertainty as a stated basis for their opposition.

Supreme Court voting in affirmative action cases has always been politically polarized. 239 Many of the Court's affirmative action decisions were issued with 5-4 votes, where identifiable liberal and conservative voting blocs determined the outcomes. From the time that *Adarand* was decided in 1995, until *Grutter* and *Gratz* were decided in 2003, a five Justice conservative bloc—consisting of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas—virtually always voted against affirmative action. A four Justice liberal bloc—consisting of Justices Stevens Souter, Ginsburg, and Breyer—always voted in favor of affirmative action. 240 The customary voting pattern was broken in *Grutter*, when Justice O'Connor voted with the liberal bloc to uphold affirmative action, 241 and in *Gratz*, when Justice Breyer voted with the conservative bloc to invalidate affirmative action. 242 Chief Justice Rehnquist and Justice O'Connor are no longer on the Court. They have now been replaced by Chief Justice Roberts

236. See Stone et al., *supra* note 20, at 457-64 (discussing purpose of Fourteenth Amendment).
237. See Adarand, 515 U.S. at 227 (requiring narrow tailoring to advance compelling state interest).
238. See *The Law of Affirmative Action*, supra note 26, at 161-89 (discussing ambiguities and inconsistencies in Supreme Court affirmative action standards).
239. See id. at 159-63 (discussing Supreme Court voting blocs).
240. See id. (discussing Supreme Court voting blocs).
242. See Gratz, 539 U.S. at 276 (O'Connor, J., concurring, with Breyer, J.).
Although neither new Justice has yet voted on a Supreme Court affirmative action case, both Justices are viewed as conservatives who will likely oppose most affirmative action. The current Court seems more conservative on the issue of affirmative action than its immediate predecessor because Justice Alito would probably have voted to invalidate even the Grutter affirmative action plan that Justice O’Connor voted to uphold. The Court has now granted certiorari in two new cases that can arguably be viewed as affirmative action cases, and the outcomes in those cases may provide additional evidence of the current Court’s tolerance for affirmative action.

Because affirmative action and racial parity offer the best hope for ever achieving any meaningful degree of racial equality in the United States, it is difficult to imagine a non-invidious account of why we tolerate Supreme Court nullification of those strategies. The lack of political accountability for Supreme Court racial policy formulation makes such judicial nullification undemocratic. And the racial resentment that understandably ensues is exacerbated by the lack of any meaningful alternative solution for the problem of White supremacy that continues to simmer in our increasingly multicultural society. During the riots of the turbulent 1960s, and on other occasions thereafter, disregarded racial frustrations were sometimes expressed as civil disobedience. Now, during a time when oppressed groups in other parts of the world are increasingly turning to acts of terrorism to vent their anger and feelings of victimization, the danger of unrest in the United States also seems to be increasing.

Contemporary threats of terrorist activity range from disruptive computer viruses, to horrific internet postings, to insurgent military actions, to suicide bombings by those who feel that death is preferable to continued subjugation. The fear and anxiety produced by antici-

243. See Biskupic, supra note 44 (discussing new Supreme Court Justices).
244. But see cases cited supra note 232 (discussing rejection of minority vote dilution claims by Chief Justice Roberts and Justice Alito).
245. See Biskupic, supra note 44 (discussing political leanings of new Supreme Court Justices). Chief Justice Roberts and Justice Alito did vote to reject Black and Latino vote dilution claims in a recent Texas redistricting case. See cases cited supra note 232 (discussing Texas redistricting case).
246. See cases cited supra note 131 (discussing pending school cases).
248. See generally Terror and Race, supra note 91 (discussing race and the war on terror).
249. See id. at 91-93 (discussing terrorist threats).
pated acts of future terrorism has now become a seemingly inevitable facet of contemporary life. Those in power might initially suppose that increased repression is the best way to guard against the realization of such threats. But the fact that such potent apprehensions have been created by those who lack conventional power, suggests that there are inherent limits on the effectiveness of oppression as a means of economic, political, and social control.

Calm consideration and increased sensitivity to the perspective of those who feel victimized by longstanding abuses of power may ultimately prove more beneficial than the mere reflexive recourse to yet additional exercises of oppressive power. For example, a more prudent assessment of the need for military intervention by the United States in the Middle East, combined with a more serious concern for the risks imposed on already-victimized noncombatants, may have avoided some of the unfortunate collateral consequences produced by the United States military occupation of Iraq. The Iraqi experience may provide a lesson that is transferable to the realm of affirmative action. Perhaps, a more prudent assessment of the need for judicial intervention by the Supreme Court in the politics of affirmative action can avoid the unpleasant collateral consequences that may be produced by the Supreme Court's occupation of the Nation's race relations policy. One basis for hope stems from the fact that the Supreme Court did eventually learn to overcome its imprudent political interventions during the *Lochner* era.

2. Like *Lochner*

The *Lochner* era, which lasted from 1905 to 1937, has come to symbolize inappropriate Supreme Court usurpations of political policymaking power from the representative branches of government. By the end of the *Lochner* era, even the Court itself had come to realize that the political branches were institutionally more competent than the politically unaccountable judiciary to formulate social policy affecting economic regulation. Nevertheless, the contemporary Court continues to usurp policymaking power in some substantive ar-


251. See *Lochner* v. New York, 198 U.S. 45 (1905); see also STONE ET AL., supra note 20, at 750-62 (describing rise and fall of *Lochner* era).

252. See STONE ET AL., supra note 20, at 750-62.
eas by cementing its own policy preference into imprecise provisions of the Constitution. It then uses the power of judicial review to substitute those policy preferences for representative branch actions of which the Supreme Court disapproves. Unfortunately, the regulation of affirmative action has remained one of the substantive areas in which the Court has practiced this form of judicial activism. Hopefully, however, the Court will come to realize that the lesson of *Lochner* applies in the sphere of affirmative action just as forcefully as it applied in the sphere of economic regulation.

In *Lochner v. New York*, the Supreme Court invalidated a New York statute that imposed maximum-hours restrictions on the amount of time that bakers could work in a given day or a given week. *Lochner* held that the effort by the New York legislature to implement this form of health and safety regulation was unconstitutional because it violated the due process liberty rights of bakers and their employers to enter into the labor contracts that they desired. *Lochner*, therefore, came to stand for the constitutionalization of freedom of contract as an essential component of laissez-faire capitalism. For the next thirty years, the Supreme Court frequently invalidated economic regulations adopted by the representative branches of government, on the ground that those regulations violated the Due Process Clause of the Constitution. The *Lochner* era invalidations had the effect of frustrating the ability of politically accountable policymakers to implement what they deemed to be prudent public policies, because the Supreme Court wanted to protect the economic beneficiaries of Social Darwinism and free market capitalism from the redistributive effects of legislative action.

After the 1929 Depression generated widespread skepticism about the benefits of unregulated free market economics, the *Lochner* era finally came to an end. In 1934, the Supreme Court decided *Nebbia v. New York*, where it upheld legislatively enacted milk price supports. Then, in 1937, the Court decided *West Coast Hotel Co. v. Parrish*, where it upheld a minimum wage law for women. Although both the *Nebbia* and *Parrish* statutes violated the free market principle of *Lochner*, the Supreme Court had by then come to recog-
nize the imprudence of substituting its own economic preferences for the economic policies adopted by the representative branches of government. The *Lochner* era is now widely discredited. But unfortunately, the Court has yet to recognize the imprudence of substituting its own racial preferences for the racial policies adopted by the representative branches.

The lesson of *Lochner* is that the Supreme Court's lack of political accountability makes it ill-suited to formulate social policy. Judicial review may arguably be appropriate when the Court is protecting a right that is clearly established in the Constitution. But when the Court is merely using abstract constitutional language as a vehicle to convey its own policy preferences, judicial biases and predispositions are likely to cause the Court to make a mistake in formulating appropriate social policies. The Court was guilty of such a mistake in the context of economic regulation throughout the thirty years of the *Lochner* era. It has been guilty of such a mistake in the context of racial regulation throughout its entire history. The only constitutional basis for the Court's repeated interventions in the formulation of racial policy is the abstract phrase "equal protection" contained in the Fourteenth Amendment. Because that phrase simply begs the question of what equality requires, it provides no more basis for invalidating racial affirmative action than the phrase "due process" did for invalidating economic regulation in *Lochner*. The Supreme Court, therefore, lacks the institutional competence to supplant legislative determinations about appropriate affirmative action policy.

There is a disturbing irony in the Supreme Court's refusal to apply the lesson of judicial restraint that it learned in *Lochner* to the process of formulating affirmative action racial policy. The onslaught of the Depression in 1929 ultimately convinced the Supreme Court to recognize the dangers inherent in judicial usurpations of legislative power. Dramatic economic upheavals challenged the validity of laissez-faire economic theories and highlighted the lack of institutional competence exhibited by a Supreme Court that had placed those the-

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259. See Stone et al., supra note 20, at 750 (noting that *Lochner* is widely condemned).
260. See U.S. Const. amend XIV, § 1 (containing Equal Protection Clause).
261. See *Lochner*, 198 U.S. at 53 (1905) (invoking Due Process Clause of Fourteenth Amendment as basis for invalidation of statute at issue).
262. For a fuller discussion of my views concerning the relative institutional competence of the Supreme Court and the representative branches in formulating racial policy see Spann, Neutralizing Grutter, supra note 34, at 634-41.
ories beyond the reach of legislative modification. The irony stems from the fact that many racial minorities presently suffer economic disadvantages so severe that they are analogous to the disadvantages suffered by Whites during the Depression. The disproportionate harms that racial minorities suffered in the wake of hurricane Katrina provide a dramatic recent example, but racial minorities have always been economically more disadvantaged than Whites.

Although the prudent use of affirmative action might ameliorate many of the economic harms suffered by racial minorities, the Supreme Court has not itself internalized those harms. As a result, the Court has not identified the harms suffered by racial minorities as sufficiently pressing to warrant affirmative action remedies. Instead, it has treated those harms as merely marginal—in much the same way that it treated the harms suffered by bakers and other oppressed workers as marginal during the *Lochner* era. I fear that the reason the Supreme Court has been unable to internalize or identify with the harms suffered by racial minorities is precisely because those harms are suffered by racial minorities rather than Whites. That is not only consistent with the Court’s history of racial insensitivity, but the Court’s political insulation places it above any vicarious internalization that might otherwise be provided by electoral accountability.

Once again, the emergence of terrorism as an international problem might be instructive. A useful goal of judicial review—especially judicial review undertaken in the name of protecting individual rights—should be to help detect and remedy social problems before they become intolerably acute. If those who feel victimized by oppressive social practices perceive that the harms they suffer will continue to go unrecognized, they may conclude that they have no alternative but to engage in destabilizing activities as a means of em-

263. See Stone et al., supra note 20, at 755-62 (discussing end of *Lochner* era).
266. See Gratz, 539 U.S. at 298-301 (2003) (Ginsburg, J., dissenting) (citing statistics showing disadvantages suffered by racial minorities).
267. See supra Part II.B.2 (discussing history of Supreme Court hostility to racial minority interests).
phrasing and externalizing the magnitude of their plight. In the past, racial minorities have engaged in mild versions of social disorder, ranging from civil rights sit-ins to more disruptive urban riots.\(^{268}\) One thing that has been noteworthy about the riots that have occurred to date is that the personal injury and property damage they inflicted has been confined primarily to minority communities.\(^{269}\) But eventually, disaffected minorities may be recruited by more ambitious organizers—this time to cause disruptions in White neighborhoods, or to engage in activities that are even more disruptive. Analogous recruiting techniques have been effective for international terrorist leaders, who have even convinced suicide bombers to become martyrs for the causes that they espouse. Accordingly, if Justice O'Connor's twenty-five year window of opportunity for affirmative action is permitted to remain open by the newly constituted Supreme Court, it makes sense to use that time wisely. It should be used in an effort to convince the Court to help avert problems that can lead to domestic disruption, rather than to continue serving as a potential cause of those problems.

B. Affirmative Inaction

Rather than invalidating affirmative action programs adopted by the political branches of government, the Supreme Court should decline to review those programs in the same way that it declines to review other political questions. The Court's lack of political policymaking competence makes that conclusion seem reasonably clear. What is less clear, however, is how a Court with the historical habit of favoring Whites over racial minorities can be led to see the wisdom of that conclusion. Although the Supreme Court normally possesses the raw power of judicial review, it does not possess the power to make its policies culturally acceptable. That is a power that is inherently retained by the culture itself. There are certain doctrinal measures that the culture can take to limit the Supreme Court's policymaking power, even in the realm of constitutional adjudication. But those measures are only incidental to the underlying power that the culture possesses to establish its own normative values. If the culture genuinely desires to promote racial equality through the use of affirmative action, the Supreme Court will have no choice but to comply. The Supreme

\(^{268}\) See KLINGNER & SMITH, supra note 247, at 242-316 (discussing civil rights sit-ins, demonstrations and riots).

\(^{269}\) See, e.g., id. at 279-82, 288-91 (discussing riots in Black urban areas including Harlem, Watts, Detroit, and Washington, DC).
Court is but a functionary of the culture. It is the culture itself that supplies the moral guidance.

1. Doctrinal Measures

As a doctrinal matter, the Supreme Court is subservient to the normative values of the political culture. The power of judicial review gives the Court the ability to invalidate acts of the political branches of government, but that power is necessarily provisional. When the Court acts in a manner that is inconsistent with the culture's understanding of its own core ideals, there are doctrinal measures that the culture can take to constrain the Court's excesses. Those measures are rooted in separation-of-powers concerns, and in the recognition that the operational meaning of a culture's normative values is ultimately political.

The power of Supreme Court judicial review is nowhere written into the Constitution. Rather, it emanates from the Supreme Court's own declaration of that power's existence in *Marbury v. Madison*.\(^{270}\) Likewise, the view that the Supreme Court is the final expositor of constitutional meaning is also absent from the Constitution. It derives from a similar Supreme Court proclamation of judicial supremacy in *Cooper v. Aaron*.\(^{271}\) Although the political culture has largely acquiesced in those pronouncements of power, *Marbury* itself imposed limits on the scope of judicial review. Chief Justice Marshall's opinion recognized the existence of political questions, whose resolution was constitutionally committed to the representative branches notwithstanding the power of judicial review.\(^{272}\) The precise contours of the political question doctrine are often elusive.\(^{273}\) However, the functional nature of a political question is easy to understand. A political question is simply a question whose proper resolution lies within the institutional competence of the representative branches, rather than within the institutional competence of the Supreme Court. For the

\(^{270}\) 5 U.S. (1 Cranch.) 137 (1803); see also STONE ET AL., supra note 20, at 36-42 (discussing Chief Justice Marshall's opinion in *Marbury*).

\(^{271}\) 358 U.S. 1, 18-19 (1958); see also STONE ET AL., supra note 20, at 57-60 (discussing judicial exclusivity in constitutional interpretation).

\(^{272}\) See *Marbury*, 5 U.S. (1 Cranch.) at 170 (disclaiming jurisdiction over questions that are "in their nature political").

\(^{273}\) See STONE ET AL., supra note 20, at 119-58 (discussing political question doctrine).
reasons that have been stated, the policy desirability of racial affirmative action is best understood as a political question. Unfortunately, the Supreme Court has viewed the policy issues surrounding affirmative action as judicial questions rather than political questions. Nevertheless, constitutional doctrine provides means by which the political branches can reclaim control over the formulation of affirmative action policy. As I have discussed elsewhere, this can be done in either moderate or more forceful ways. Adopting a moderate strategy, the reclamation of control over affirmative action policy can be pursued within the racial regulatory framework established by the Supreme Court through the adoption of policies that fall between the cracks left by the Court's doctrinal oversight of affirmative action. More forcefully, this reclamation of policymaking control can also be pursued by confronting the Supreme Court's usurpations of racial policymaking power directly.

Within the Court's existing regulatory framework, it might be possible to salvage some affirmative action programs by capitulating to the Supreme Court's regulatory restrictions. suggests that it may still be possible for an affirmative action program to satisfy strict scrutiny. But as indicates, the difference between programs that are constitutional and those that are unconstitutional can be extremely subtle. Because of this doctrinal uncertainty, the way in which affirmative action is packaged may end up being dispositive. Accordingly, the holistic consideration of race in an effort to promote educational diversity may be constitutionally permissible, whereas the use of programs that look more mechanical than holistic may not.

274. See supra, notes 259-267 and accompanying text (discussing relative institutional competence of the Supreme Court and the representative branches).
275. These doctrinal techniques are described more fully in Neutralizing Grutter, supra note 34, at 646-68.
276. See id. at 646-56 (discussing moderate strategies for marginalizing Supreme Court).
277. See id. at 656-57 (discussing more confrontational strategies for marginalizing Supreme Court).
279. See Gratz, 539 U.S. at 271-76 (2003) (finding that Michigan undergraduate program failed to satisfy strict scrutiny because it was not narrowly-tailored); see also Spann, The Dark Side of Grutter, supra note 34, at 242-49 (arguing that there is no analytical distinction between the Supreme Court decision upholding law school affirmative action program in Grutter and the Supreme Court decision invalidating undergraduate affirmative action program in Gratz); Spann, Neutralizing Grutter, supra note 34, at 652-56 (suggesting that Grutter and Gratz programs are indistinguishable in their efforts to promote racial balance).
280. See The Dark Side of Grutter, supra note 34, at 242-49 (discussing holistic consideration of race); Neutralizing Grutter, supra note 34, at 652-56 (same).
Similarly, programs that are described as promoting diversity may now have a higher chance of surviving strict scrutiny than programs that are described as remedies for past discrimination.281

Efforts to identify weak spots in the Court's opposition to affirmative action are complicated by the fact that Justice O'Connor's departure from the Court makes future doctrinal rules less than certain.282 Therefore, a supplemental capitulation strategy might be use race-neutral factors that correlate with race as a basis for affirmative action. Factors such as present economic disadvantage, proven ability to overcome past hardships, use of English as a second language, or even political preference may serve as proxies that can camouflage the consideration of race in permissible affirmative action programs.283 Although such a tacit racial motivation might at first blush seem disingenuous or problematic under the Washington v. Davis test for intentional discrimination,284 the racial equality goal lying behind facially neutral affirmative action is no more disingenuous or problematic than the racial motivation behind Supreme Court doctrines that purport to be race-neutral while deliberately preserving the existing regime of White privilege.285

The use of capitulation strategies that rely on racial proxies or camouflaged intent may provide marginal benefits for affirmative action, but they still leave in place an existing regulatory paradigm in which judicial review permits the Supreme Court to retain the final say over the constitutionality of affirmative action. However, the political culture can challenge that existing paradigm by using more assertive measures. Vocal political opposition to Supreme Court policies can dramatically affect the Court's subsequent adherence to disfavored policies. Perhaps the most well-known example of Supreme Court submission to political opposition is provided by the Court's retreat from its hostility to New Deal economic reforms in

281. See Grutter, 539 U.S. at 322-25 (adopting Justice Powell's preference in Bakke for diversity, rather than remedies for past discrimination, as a basis for permissible affirmative action).
282. See Biskupic supra note 44 (discussing new Supreme Court Justices).
283. See Neutralizing Grutter, supra note 34, at 646-56 (discussing proxies for race).
285. See supra Part II (discussing invidious use of concept of equality).
response to President Franklin D. Roosevelt’s proposed Court-pack- ing plan.\textsuperscript{286}

Even when public opinion is not championed by a political leader as powerful as the President of the United States, it can be effective when it is focused and expressed in a manner that is forceful enough to threaten the Court’s perceived legitimacy. Accordingly, the threat of popular opposition caused the post- \textit{Brown} Court to tolerate Virginia’s plainly unconstitutional miscegenation statute in \textit{Naim v. Naim}.\textsuperscript{287} Likewise, the threat of massive Southern resistance caused the Court to delay for a decade its implementation of \textit{Brown’s} desegregation requirement after the “all deliberate speed” gloss of \textit{Brown II}.\textsuperscript{288} The introduction of jurisdiction stripping legislation that would bar the Court from ruling on affirmative action cases, as well as the introduction of constitutional amendments that would expressly authorize affirmative action, might have a similar effect on the Court’s future rulings. Even if such measures were not actually enacted, the Court might well respond to the political pressure that they represented. Jurisdiction stripping and proposed amendment strategies have been used in the past to express political opposition to busing, and they may be part of the reason that public schools remain largely segregated today.\textsuperscript{289} Symmetrical use of such strategies might, therefore, be appropriate this time to promote rather than to frustrate racial equality. In addition, current constitutional amendment proposals would ban same sex marriage, prohibit flag burning, and block removal of the phrase “under God” from the Pledge of Allegiance.\textsuperscript{290} The substantive goal of protecting the ability of the political branches

\textsuperscript{286} See Stone et al., supra note 20, at 198-200 (discussing Court-packing plan).

\textsuperscript{287} See sources cited supra note 64 (discussing \textit{Naim v. Naim} litigation).

\textsuperscript{288} See \textit{Brown II}, 349 U.S. 294, 301 (1955) (tempering effect of \textit{Brown I} by declining to order immediate school desegregation, and instead requiring desegregation “with all deliberate speed”); see also Stone et al., supra note 20, at 482-88 (discussing delay in desegregation after \textit{Brown II}).

\textsuperscript{289} See Neutralizing Grutter, supra note 34, at 660-61 (discussing political use of proposed jurisdiction-stripping legislation and constitutional amendments).

to promote racial equality through affirmative action would seem to be at least as important as those largely symbolic amendments.

If all else fails, political opposition to the Supreme Court's racial policies can be expressed by largely ignoring the Court. If political players continue to adopt affirmative action programs with even fig-leaf arguments to support their asserted distinctions from previously invalidated programs, the courts will have a continuous flow of affirmative action plans that they will have to review and rule upon. Aside from the judicial fatigue that such a volume of cases will produce, the Supreme Court may come to appreciate the strength of the opposition that exists to its anti-affirmative action policies. This, in turn, may cause the Court to modify those policies. That is arguably what happened in response to the barrage of redistricting cases that were filed in the wake of the Shaw v. Reno decision requiring strict scrutiny of majority-minority voting districts following the 1990 Census. After being inundated with Shaw-based legal challenges, the Court appears ultimately to have concluded that its anti-affirmative action policy in the redistricting context had proved too burdensome to be prudent. As a result, it chose to uphold as permissible political gerrymanders plans that were realistically indistinguishable from those that it had previously invalidated as racial gerrymanders.291

I do not wish to sound naïve. All of the capitulation and confrontation strategies that I have described do require a high degree of coherent and coordinated political opposition to the Court's anti-affirmative action policies. And it remains to be seen whether the requisite political will exists to use affirmative action as a means of promoting racial equality and resource allocation parity in the face of Supreme Court opposition. More than is commonly acknowledged, however, a major component of political power may end up being all in our heads.

2. Mind Over Matter

The White majority has historically possessed enough power to control most domestic political events. However, racial minorities also possess considerable political power. They possess political power when they join forces with sympathetic Whites. But they also possess sufficient power when acting alone to control their own politi-

291. See supra notes 162-165 and accompanying text (discussing redistricting challenges following 1990 Census).
cal agendas. As the White population approaches that point in the near future when it will no longer constitute a numerical majority in the United States, the relative political power of racial minorities should increase even more. Nevertheless, the ability of minorities to capitalize on their political power will turn on the ability of minorities to act collectively. If minority political power remains fragmented and dispersed, an unsympathetic White minority can continue to command a disproportionate share of resources by acting as a dominant political plurality. Ironically, it can do this most effectively by using the hegemony of race neutrality as a divisive impediment to the formation of durable minority coalitions. Accordingly, the degree of political power possessed by racial minorities in the future is likely to be determined by two things: the degree to which racial minorities perceive their collective interests to be more important than their discrete parochial interests; and the degree to which racial minorities are able to free themselves from the influence of the culture's hegemonic neutrality rhetoric that deters them from forming race-conscious alliances.

Fostering divisiveness among racial minorities has been a common and effective technique for promoting White domination over racial minorities. Harriett Beecher Stowe illustrated the use of this technique in her novel *Uncle Tom's Cabin*, where Black slaves were sometimes used as overseers by White slave owners, because Black overseers were more brutal than White overseers in their efforts to control Black slaves. In addition, Black overseers were sometimes paired and pitted against each other in the competition for approval and favors from their White owners; Black overseers were sometimes rewarded for their control of other Black slaves with gifts of unwilling Black female slaves; and the Black slaves themselves were sometimes forced to compete against each other for the limited resources that their White owners made available. More recently, one of the ways that the White minority maintained the regime of apartheid in South Africa was by officially dividing the population into four distinct racial classifications—White, Black, Asian, and Coloured. The White minority then fostered divisiveness both among non-White racial groups, and within various "tribes" of the Black racial group, for the purpose

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294. See id. at 350-59 (describing divisiveness that owners induced among slaves).
of preventing the formation of coalitions among non-Whites that could challenge the power of the White minority.295 Similarly, when White Germans and Belgians colonized the African nation of Rwanda, they fostered such severe divisiveness between the previously stable Hutu and Tutsi groups of Black Rwandans that racial frictions eventually led to a civil war, and to one of the worst episodes of racial genocide in recent history.296

Contemporary culture’s consignment of disadvantaged minorities to substandard neighborhoods, segregated schools, undesirable jobs, and racially identifiable voting districts seems similarly divisive. Like the consignment of Blacks to South African “homelands,”297 the current “American Apartheid”298 forces racial minorities to compete with each other—rather than with Whites—for the limited economic, political and social resources that Whites make available to racial minorities. And the strategy appears to be working. Tensions often run quite high among racial minority groups, such as the tensions that have existed in recent decades among Blacks, Latinos and Asians.299 Tensions also exist among Black subcultural groups, based upon things like shade of complexion,300 or whether Blacks are of African, Caribbean, or other descent.301

Additional tensions often exist between White and minority subcultural groups whose histories of oppression should make them natural allies. Blacks and Jews sometimes exhibit animosity toward one


296. See Bruce D. Jones, Peacemaking in Rwanda: The Dynamics of Failure 16-20, 35-38, 39-41, 43-47 (2001) (discussing European efforts to promote racial divisions in Rwanda).

297. See Cell, supra note 295, at 72-81, 220 (discussing homelands and reserves); MacDonal d, supra note 295, at 12-13 (same); Thompson, supra note 295, at 169-72, 191-96 (same).

298. See Massey & Denton, supra note 156 (discussing concept of urban residential “hyper-segregation” in United States).


another,\textsuperscript{302} as do the United States Palestinians and Jews who identify with their own membership groups concerning the continuing conflict that exists in the Middle East.\textsuperscript{303} That is particularly disturbing when one remembers that Jews themselves used to be considered a racial minority group.\textsuperscript{304} Moreover, in the post 9/11 environment, where heightened security concerns have also generated heightened levels of xenophobic animosity, United States racial minorities sometimes endorse and engage in hostility to Arab or Muslim groups. They do so even though their own present and historical experiences with unjust racial stereotypes should have taught them to know better.\textsuperscript{305}

Human beings appear to be a self-interested species. We are concerned primarily with our own welfare and the welfare of the membership and reference groups with whom we identify. Our self-interest is expressed in diverse ways, ranging from school spirit; to hometown pride; to vigorous support of our favorite sports teams; to the intensity of our “red” and “blue” political party affiliations. We succumb to the nationalistic patriotism that our governmental leaders demand from us as a way of suppressing dissent from their efforts to export “democracy” to the rest of the world. And we persist in the notion that God should bless America. Accordingly, we are inclined to adopt beliefs such as the view that foreign countries are obligated to sell their oil to us at reasonable prices, but that we are justified in prohibiting foreign countries from buying our advanced computer encryption technology at any price—simply because we are us, and they are merely them.\textsuperscript{306} All of this seems disturbingly reminiscent of the color wars that we used to play in summer camp.

\textsuperscript{302} \textit{See, e.g.}, Julian Bond, \textit{Introduction}, in MAURIANNE ADAMS \& JOHN H. BRACEY, \textit{Strangers \& Neighbors} 1-13 (1999) (discussing natural alliance and racial tensions that have existed in Black-Jewish relations).

\textsuperscript{303} \textit{See, e.g.}, Sam McManis, \textit{Conversations in the Crossfire: Dialogue Groups Bring Palestinians, Jews Together in Lafayette}, S.F. CHRON., NOV. 17, 2000, at 1 (discussing tensions between domestic Jews and Palestinians).

\textsuperscript{304} \textit{See Ira Katznelson, When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America} 103 (2005) (noting that “[a]fter the First World War, [Jews] often were classified with Blacks as a racial minority.”).

\textsuperscript{305} \textit{See Manning Marable, Racism in a Time of Terror, 4 SOULS} 1, 11-12 (2002) (discussing complex social forces that cause some Blacks to acquiesce in post-9/11 discriminatory imposition of burdens on Arabs and Muslims).

Not surprisingly, the racially correlated competition for resources that seems inevitable in contemporary culture can be understood as yet another outgrowth of our commitment to self interest. Whites feel cheated if resources are channeled to racial minorities, and racial minorities feel cheated if Whites continue to demand a disproportionate share of those resources. Moreover, individual racial minority groups are willing to compete with each other for limited resources, while basing their sense of self-interested identity on shared subcultural or ethnic differences. Although racial minorities seem more than willing to accept the invitation to compete with each other for resources, they seem less willing to demand a larger share of the resources that are presently allocated to Whites. What racial minorities sometimes seem not to realize is that they themselves have considerable control over the degree to which they view their own interests as unitary or discrete.

A lot has been written about multiculturalism and identity politics.\textsuperscript{307} While much of that scholarship has been controversial, there now seems to be a widely shared consensus that race itself is not a biologically significant category, but is instead a socially constructed concept.\textsuperscript{308} That means that the culture in general, and racial minorities in particular, can decide how they want to define the concept of race. Racial categories can be defined narrowly and divisively in a way that continues to benefit Whites, as racial categories were defined under the apartheid regime of South Africa.\textsuperscript{309} Alternatively, racial categories can be defined at a higher level of generality, in a way that is likely to benefit racial minorities by emphasizing the collective interests that racial minorities share. In this regard, it is noteworthy that one of the political strategies that some South African racial minorities adopted to resist the apartheid regime was to reject the Black, Coloured, and Asian racial categorizations attributed to them by the White minority. As an act of racial solidarity, many non-White South Africans chose to view themselves as Black, notwithstanding the dif-

\textsuperscript{307} See, e.g., \textsc{Michael J. Gerhardt et al., Constitutional Theory: Arguments and Perspectives} 405-13 (2d ed. 2000) (discussing critical race theory, multiculturalism and identity politics).

\textsuperscript{308} See \textit{id.} at 387-95 (discussing social construction of race).

\textsuperscript{309} See \textsc{Cell}, supra note 295, at 220 (discussing racial classifications); \textsc{MacDonald, supra} note 295, at 45-46 (same).
ferent designations imposed upon them by the White South African government.310

One way that Whites have been able to retain their dominance in the allocation of resources is by using the hegemony of race neutrality to deter collective action by diverse racial minorities. Spearheaded by the Supreme Court's insistence on a colorblind conception of equality, the White majority is able to characterize race-based efforts to build minority coalitions as somehow inappropriate and un-American. That sort of race consciousness is said to be inconsistent with the colorblind aspirations of the United States Constitution.311 Ironically, efforts to unify the interests of diverse racial minorities are themselves characterized as divisive, because they are potentially antagonistic to Whites.312 As a result, eminently sensible and non-divisive strategies, such as the pursuit of equality through the promotion of racial balance, become "patently unconstitutional."313 However, racial minorities can overcome this otherwise disabling impediment to minority collective action simply by ceasing to believe in the normative desirability of race neutrality. Supreme Court moral pronouncements and abstract cultural rhetoric will cease to be effective constraints on minority political cooperation once they cease to be believed.

In an effort to boost broadcast ratings by capitalizing on the competitive nature of our "ethnic pride," CBS decided to structure its fall 2006 reality TV show, Survivor: Cook Islands, as a "social experiment." The show initially pitted White, Black, Asian, and Latino "tribes" against each other in a mock struggle for survival, after being stranded on a remote island.314 Consistent with the show's summer

310. See Goldin, supra note 295, at xxv-xxvii (noting that "[m]any Africans, Asians and Coloureds, particularly following the rise of Black consciousness ideologies in the early 1960s, when using racial categorisation define themselves simply as 'Black."); Leonard Thompson & Andrew Prior, South African Politics 201-09 (1982) (discussing efforts to combat apartheid through unified Black identity encompassing all non-White South African racial groups).

311. See Shelley v. Kraemer, 334 U.S. 1, 20-22 (1948) (emphasizing personal constitutional right to race-neutral treatment); see also Grutter, 539 U.S. at 326 (emphasizing need for strict scrutiny to protect personal right to race neutral treatment).

312. See e.g., Croson, 488 U.S. at 495-96 (suggesting that Black-controlled City Council sacrificed White interests in order to advance Black interests).

313. See Grutter, 539 U.S. at 329-30 (holding that pursuit of racial balance would be a "patently unconstitutional" effort to impose racial quotas).

camp heritage, the name of each tribe, of course, corresponded to a color.\textsuperscript{315} As CBS presumably intended, the racial competition idea was sufficiently striking to generate considerable public notice. Much of the ensuing controversy was based on the fear that the show would be racially divisive, with each group trying to advance its own interests at the expense of the other racial groups.\textsuperscript{316} Not surprisingly, much of the opposition came from racial minorities, whom history has taught to feel threatened by the dangers of racial confrontation.\textsuperscript{317} Ultimately, the racially segregated format was abandoned after the first two weeks of the show.\textsuperscript{318} In the midst of all the controversy, however, the one fear that I never saw expressed was the fear that the racial minority groups on the island would choose to combine forces in an effort to defeat the White group. And that strikes me as sad.

Aside from fostering racial tensions among various subcultural minority groups, the White majority has shown little interest in distinctions among racial minorities. The “one drop rule” of hypodescent cared nothing about mixed racial heritage, but viewed all people with even one drop of Black blood as Black for legal purposes relating to slavery.\textsuperscript{319} Miscegenation statutes prohibited intermarriage between Whites and members of all racial minority groups, but imposed no prohibitions whatsoever on intermarriage between racial minority group members themselves.\textsuperscript{320} And although most members of even contemporary United States culture have views about the appropriate treatment of Indians, or Asians, or Latinos, few have much inclination or ability to distinguish among the tribal or national origins of the individual members of those groups.

For many purposes, racial minority groups are largely a monolithic “other,” characterized most strongly by the fact that they are not White. But ironically, in a culture that has historically cared much more about the distinction between Whites and racial minorities than

\textsuperscript{315} See Survivor: Cook Islands, supra note 314 (describing names of tribes).
\textsuperscript{316} See Sagging “Survivor”, supra note 314; Wikipedia, supra note 314; Wyatt & Elliott, supra note 314 (discussing controversy).
\textsuperscript{317} See Survivor: Cook Islands, supra note 314 (describing call by New York City Council’s Black, Latino, and Asian Caucus for CBS to refrain from broadcasting show).
\textsuperscript{318} See Lisa de Morales, “Ugly Betty” Looks Pretty Fantastic to ABC, WASH. POST, Sept 30, 2006, at C1 (describing abandonment of initial format).
\textsuperscript{320} See Loving, 388 U.S. at 11-12 (1967) (discussing Virginia statute prohibiting miscegenation only among Whites); see also sources cited supra note 118 (discussing history of Naim v. Naim and Loving).
it has cared about distinctions among racial minority groups, racial minorities themselves have not yet been able to take advantage of their shared identity in a way that might advance their own collective interests. Whites manage to think of racial minorities as unitary for the purpose of engaging in discrimination, but racial minorities cannot seem to think of themselves as unitary for the purpose of fighting discrimination. When all is said and done, perhaps the primary advantage that the White majority has over racial minorities is its power to dictate the meaning of race in United States culture. Even at this late date, it seems that minorities continue to internalize only the racial identities that the White majority chooses to ascribe to them.

CONCLUSION

Now, as in the past, the Supreme Court continues to serve as a major impediment to the cause of racial justice in the United States. It does this by propounding normative standards of racial “equality” that have the effect of preserving the many advantages that Whites have over racial minorities in the allocation of economic, political, and social resources. Most recently, the Court has done this by creating a racial regulatory regime that is hostile to redistributive affirmative action and by intimating that even the few forms of affirmative action that are now permitted will no longer be permitted in another twenty-five years. Racial minorities, in fact, have the ability to secure meaningful concessions from the White majority by acting within the existing political process. However, a political card game in which the Supreme Court serves as the dealer, is a game that is being played with a stacked deck. Accordingly, racial minorities and others interested in racial justice can profitably spend their remaining twenty-five years trying to marginalize the Court’s role in racial policymaking.

The goal of distancing the Supreme Court from the formulation of racial policy is symmetrically desirable. Historically, the Supreme Court has taken affirmative measures to ensure political inaction when the culture has sought to remedy the problem of racial injustice. To compensate for that history, the culture should now take affirmative measures to ensure judicial inaction when the Supreme Court seeks to invalidate political remedies for the problem of racial injustice. However, the goal of relegating the Supreme Court to the passive role of observing racial policy from the sidelines may ultimately prove to be unattainable. The constitutional culture of the United States is so accustomed to delegating racial issues to the Supreme

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Court that the political culture may not be willing to do the work that is necessary to reclaim control over the formulation of racial policy. And that, in turn, may be because the political culture is not yet comfortable with the degree of actual equality that might be produced by liberating itself from the expedient racial policies of the Supreme Court.