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Affirmative Action and Discrimination

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GIRARDEAU A. SPANN**

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INTRODUCTION

The contemporary debate about race in the United States is perplexing. Each side seems genuinely to feel distressed at the demands being made by the other. Racial minorities point to Dred Scott's\(^1\) insistence on racial castes, Plessy's\(^2\) endorsement of official segregation, and Brown's\(^3\) reluctance to remedy unlawful discrimination as evidence that the white majority is inevitably inclined to advance its own interests at minority expense. Minority group members, therefore, tend to argue that the only way to arrest this majoritarian inclination is through the use of race-conscious remedial programs that will ensure an equitable distribution of resources. Most members of the white majority concede past transgressions but warn of the need for fairness in fashioning remedies, asserting that members of the present majority rarely commit acts of overt discrimination, and that members of the present minority are rarely among the actual victims of past discrimination. Members of the white majority, therefore, tend to argue that the only way to end racial discrimination is through a prospective commitment to race neutrality, stressing the irony inherent in using additional acts of racial discrimination to remedy the racial discrimination of the past. Accordingly, the nation's debate about the significance of race, which began with slavery and persisted through the era of official segregation, has now converged on the contentious issue of affirmative action. Most recently, the Supreme Court has sided against racial minorities.

The Supreme Court's 1995 decision in Adarand Constructors, Inc. v. Pena\(^4\) held that federal affirmative action programs are now subject to strict scrutiny, just as state and local programs have been since 1989. This decision did not come as a surprise, because the political realignment of the Court that occurred during the Reagan and Bush Administrations made judicial invalidation of at least some affirmative action programs seem inevitable. What did come as a surprise, however, is the vision of contemporary American culture on which the Court chose to rest its ruling. Counterintuitive as it might initially seem, the Court elected to treat racial inequality in the United States

as a problem that has become atomistic rather than pervasive in nature. Consequently, the Court went on to regard continued race-conscious efforts to counteract inequality as themselves constituting acts of pervasive racial discrimination. In so doing, the Court inverted the concepts of affirmative action and discrimination so that the concept of affirmative action acquired the negative cultural attributes typically attributed to discrimination and discrimination acquired the positive attributes formerly associated with affirmative action. This vision of contemporary culture is highly artificial, and it undermines the soundness of the *Adarand* decision. Nevertheless, the Court remained committed to that artificial vision not only in *Adarand*, but in the other race cases that it decided during the 1994-95 Term as well.

Ironically, *Adarand* itself provides compelling evidence of the Supreme Court's error in asserting that the nation has now evolved to a post-discriminatory stage of development in which prospective race neutrality is appropriate. This is because the *Adarand* decision constitutes an act of official discrimination, embodying the very type of cultural inequality that the Court insists is no longer a cognizable problem. As a pragmatic matter, *Adarand* entails a diversion by the Supreme Court of societal resources from racial minorities to the white majority, and this diversion is based solely on the grounds of race. As a rhetorical matter, *Adarand* finds racial minorities to be unworthy of legal protection from the same forms of cultural discrimination that the Court holds cannot be inflicted on whites, thereby reviving the precise stigma of inferiority that *Brown* held to be the core ingredient of an equal protection violation.

Part I of this article describes the affirmative action debate: Part I(A) outlines the arguments typically made by proponents and opponents of affirmative action; Part I(B) organizes the Supreme Court's affirmative action cases by type and outcome, and identifies the voting blocs that have developed on the Court; Part I(C) discusses the legal issues that the Court has deemed significant in its affirmative action decisions, and the effect that the *Adarand* decision is likely to have on those issues.

Part II analyzes the rhetorical significance of *Adarand* and the other racial discrimination cases that the Court decided during the same Term: Part II(A) describes the *Adarand* case; Part II(B) discusses the Supreme Court's rejection of the *Adarand* presumption that racial minorities remain socially and economically disadvantaged,
arguing that this rejection constitutes a Supreme Court proclamation that the United States has now become a post-discriminatory society.

Part III analyzes the doctrinal play that permitted such a startling proclamation: Part III(A) argues that the Adarand Court has inverted the concepts of affirmative action and discrimination in order to misappropriate societal resources from racial minorities, thereby engaging in the very type of racial discrimination that the Adarand proclamation declares no longer to exist. Part III(B) then discusses the irony inherent in the Court's expansion of judicial power over the political process in an area where doctrinal incoherence makes the governing legal principle inescapably political, and suggests that the Court should defer to whatever resolution of the affirmative action debate the political process is able to achieve. The article concludes with an unsettling suspicion about the Supreme Court's likely motivation in Adarand.

The grip of the Supreme Court on the evolution of our social norms is so strong that it is difficult to imagine the operation of contemporary culture without Supreme Court oversight of our normative development. As a result, I am frequently thought to be advocating Supreme Court protection of minority interests that is more vigilant, and politically more liberal, than the protection proffered by the present Court. That is not my position, however. My position is that the issue of how societal resources should be allocated between the majority and racial minorities is an issue that is quintessentially political. It is an issue whose resolution properly belongs to a process in which the Supreme Court has no role to play, because—as Adarand demonstrates—Supreme Court involvement in that process provides an artificial boost to the interests of the white majority.

5. See, e.g., Book Note: Race for Justice, 106 Harvard L. Rev. 2015, 2018-19 (1993) (reviewing Girardeau A. Spann, Race Against the Court: The Supreme Court and Minorities in Contemporary America (1993) and stating that Spann despair the Supreme Court's reluctance to redistribute societal resources to racial minorities while failing adequately to explain where the Court derives power to reallocate societal resources). But see Spann, Race Against the Court: The Supreme Court and Minorities in Contemporary America, at 1-6, 85-86, 170-71 (1993) (asserting that to the extent possible, the Supreme Court should have no role to play in the political protection of racial minority interests).


7. Lest one conclude that I am asserting a mere ipse dixit, this argument is developed at length in Spann, supra note 5. The present discussion of Adarand and the Supreme Court's other 1994-95 Term race cases is offered as a continuation of that extended argument.
I. AFFIRMATIVE ACTION

Affirmative action—the race-conscious allocation of resources motivated by an intent to benefit racial minorities—is the hot topic in contemporary racial politics.\(^8\) Black leaders have insisted on a continued national commitment to affirmative action;\(^9\) the University of California has terminated its three decades of affirmative action in hiring and admissions;\(^10\) the State of California has begun the process of considering a ballot initiative to ban it;\(^11\) bills have been introduced in Congress to make it illegal;\(^12\) Republican presidential hopefuls have chosen to run against it;\(^13\) the Clinton Administration has chosen to "review" it,\(^14\) and then rhetorically to "reaffirm" it;\(^15\) steadfast liberal...
Democrats have loyally defended it, and the American public has become profoundly ambivalent about it. As with the defining race-relations issues for earlier generations—issues including miscegenation, integrated education, official segregation, and slavery—the Supreme Court has endeavored to determine the social acceptability of affirmative action. In seeking to make this determination, the Court has consulted the Equal Protection Clause of the Constitution, as well as federal antidiscrimination statutes such as Title VII.

The arguments favoring and opposing affirmative action are easy enough to state in ways that make them sound appealing. Because neither the Constitution nor federal statutes speak unambiguously to the issue, however, the Court has had great difficulty in its efforts to produce a stable resolution of the affirmative action controversy. Nevertheless, several subsidiary issues have emerged, some of which the Court purported to resolve in *Adarand*.

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21. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (holding that blacks are not citizens within meaning of Constitution and invalidating congressional restrictions on slavery contained in Missouri Compromise).


Affirmative Action and Discrimination

A. Arguments

The arguments favoring and opposing affirmative action are both rooted in the belief that racial discrimination is morally wrong, constitutionally impermissible under the Fifth and Fourteenth Amendments, and prohibited by federal antidiscrimination statutes such as Title VII. Although each side in the affirmative action debate claims that its position is traceable to the a priori proposition that race is virtually always an impermissible legislative classification, the two sides diverge when confronted with the problem of how to deal with the issue of past discrimination. The way that one ultimately feels about the competing arguments is likely to be determined by one's metaphysical conception of equality, and by the instrumental consequences of favoring one argument over the other.24

1. Proponents

Proponents of affirmative action begin with the proposition that racial discrimination is wrong because race is rarely, if ever, a legitimate basis on which to rest governmental classifications.25 Unfortunately, however, racial discrimination has been persistently present since the founding of the nation.26 Much of this discrimination has been officially mandated, by those laws regulating slavery27 and re-

24. I do not intend to suggest that compensation for past discrimination is the only, or even the best, potential justification for affirmative action. Some have argued that the best justification for affirmative action is the need to avoid a permanent underclass that is identified by race, regardless of the reason for the initial emergence of that underclass. Cf. Kathleen M. Sullivan, Comment: Sins of Discrimination: Last Term's Affirmative Action Cases, 100 HARV L. REV. 78, 91-98 (1986) (asserting that affirmative action is better justified as prospective effort at corrective justice than as a retrospective effort at retributive justice directed against those who are guilty of past discrimination). Nevertheless, the remedy-for-past-discrimination justification is the justification on which the Supreme Court, and most members of the public, appear to have focused.


quiring official segregation in the use of public facilities. Although the Supreme Court has been charged with the obligation of defending the rights of racial minorities, it has not always done so.

The Court upheld and protected the institution of slavery in \textit{Dred Scott v. Sandford}. And when that case was "overruled" by the Civil War and the subsequent Reconstruction amendments to the Constitution, the Court adopted narrow constructions of those amendments in \textit{The Slaughter-House Cases}, and of Reconstruction statutes in subsequent cases; and when the Court reviewed the first major piece of Reconstruction legislation in \textit{The Civil Rights Cases}, the Court held the legislation invalid. The invalidation of the Civil Rights Act of 1866 permitted Jim Crow laws to perpetuate the economic and social disadvantages of former black slaves. The Jim Crow laws matured into a regime of official segregation that the Supreme Court upheld in \textit{Plessy v. Ferguson}, which endorsed the constitutionality of separate-but-equal public facilities. During World War II, the Court again acquiesced in the country's xenophobic aggression by validating the internment of Japanese-American citizens in \textit{Korematsu v. United States}.


32. Subsequent Supreme Court decisions adopted limiting interpretations of Reconstruction statutes and amendments that were more racially motivated. \textit{See}, e.g., \textit{United States v. Harris}, 106 U.S. 629 (1882) (holding that Ku Klux Klan Act of 1871 did not permit prosecution of white lynching mob because Fourteenth Amendment did not reach private conduct); \textit{United States v. Cruikshank}, 92 U.S. 542 (1875) (criminal conspiracy provisions of Enforcement Act of 1870 did not permit prosecution for lynching blacks who were not engaged in act of petitioning federal government as required by Fourteenth Amendment); \textit{United States v. Reese}, 92 U.S. 214 (1875) (criminal prosecution under Enforcement Act of 1870 against election officials for refusing to permit blacks to vote could not be maintained because Act was not expressly limited to racially motivated election interference as required under Fifteenth Amendment). \textit{See generally STONE ET AL., supra note 31, at 483-85} (discussing limiting effect of Supreme Court Reconstruction decisions on Reconstruction statutes and amendments).


35. In fact, contrary to popular understanding, \textit{Plessy} did not actually impose a requirement that separate facilities be equal. \textit{See infra} note 284 (separate schools did not have to be equal).
States. Although the Court nominally rejected Plessy in Brown v. Board of Education by invalidating the practice of de jure segregated education, the Court delayed implementation of any meaningful remedy for Brown and ultimately interpreted Brown to permit the continued education of minority children in de facto segregated schools that were measurably inferior to the schools in which white children were educated.

This historical treatment of racial minorities as inferior has had a pervasive effect on society, causing race to remain either a conscious or an unconscious factor in virtually all societal decision making. The racial attitudes that continue to emanate from the nation’s long history of discrimination have placed racial minorities in a disadvantaged position in the competition for societal resources. As a result, minorities continue to be systematically underrepresented—relative to the percentage of the population that they comprise—in the allocation of educational, employment, and political opportunities. This underrepresentation, in turn, has caused racial minorities to have lower standards of living, poorer health, higher vulnerability to crime, and shorter life expectancies than members of the white majority.

Proponents of affirmative action contend that the only way to compensate for the historical disadvantage of racial minorities is through the prospective race-conscious allocation of educational, employment, and political resources to minorities through affirmative action programs. Mere prospective racial neutrality does not provide adequate compensation for past inequities but simply freezes the ex-

38. Brown II, 349 U.S. 294 (1955) (ordering dismantling of segregated school systems "with all deliberate speed").
39. See Milliken v. Bradley, 418 U.S. 717 (1974) (refusing to order interdistrict school desegregation involving majority-black urban and majority-white suburban schools necessary to meaningfully remedy desegregation of inner-city schools); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (upholding constitutionality of property tax-based public school financing despite drastic discrepancies in funds allocated to white and minority schools). See generally Spann, supra note 5, at 73-82 (discussing Supreme Court failure to desegregate northern schools); id. at 109, 116 (discussing Supreme Court tolerance of racially disproportionate school funding and consequent inferiority of minority schools).
41. See Spann, supra note 5, at 120-22 (discussing underrepresentation of racial minorities in allocation of societal resources).
42. See id. (discussing lower levels of health and safety to which racial minorities are vulnerable).
isting advantages that the white majority has over racial minorities.43 Once affirmative action programs have neutralized this unfair advantage, those programs can be terminated and all races can coexist on equal terms in a colorblind society.44

2. Opponents

Opponents of affirmative action also begin with the proposition that racial discrimination is wrong because race is rarely, if ever, a legitimate basis on which to rest governmental classifications.45 It is true that there have been ugly periods in American history during which the nation has failed to honor this fundamental principle of racial equality by tolerating the institutions of slavery and official segregation.46 It is also true that the Supreme Court has been implicated in unfortunate acts of racial discrimination through the issuance of decisions such as Dred Scott, Plessy and Korematsu.47 Those decisions serve as embarrassing reminders that the nation must exercise con-
stant vigilance to avoid a recurrence of the racial discrimination that characterized the dark side of the nation's history.48

The principle of racial equality reflects the need to treat people as individuals rather than as mere members of racial groups.49 Accordingly, the disadvantages that individual members of racial minority groups have suffered as a result of identifiable acts of past discrimination should be neutralized through the implementation of make-whole remedies that will fully compensate those individuals for the racial discrimination that they have been forced to endure.50 Remedies that go beyond compensation for identifiable acts of racial discrimination, however, and accord preferential treatment based on mere membership in a racial minority group, constitute the very same type of racial discrimination that caused the need for a remedy in the first place.51 In addition, such remedies harm the beneficiaries of affirmative action by promoting dependence on government largess rather than self-sufficiency, and by stigmatizing beneficiaries as undeserving of the benefits and accomplishments that they secure.52

The types of official racial discrimination that existed in the past are now unconstitutional and have been unconstitutional since 1954

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48. See Adarand, 115 S. Ct. at 2117 (holding that vigilant strict scrutiny is necessary to prevent recurrence of racial discrimination such as that wrongly tolerated in Korematsu).


50. See, e.g., Croson, 488 U.S. at 518-19 (Kennedy, J., concurring in judgment) (rule limiting racial preferences to what is necessary to compensate actual victims of discrimination is appealing); id. at 524-25 (Scalia, J., concurring in judgment) (state can use racial classifications only to compensate actual victims of state's own discrimination); cf. Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 535-45 (1986) (Rehnquist, J., dissenting) (Title VII remedies that override seniority must be limited to actual victims of discrimination); Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 500 (1986) (Rehnquist, J., dissenting); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 578-83 (1984).

51. See, e.g., Adarand, 115 S. Ct. at 2113-14 (holding that overly broad race-based remedies will foster resentment and delay the time when race will become a truly irrelevant factor); id. at 2118-19 (Scalia, J., concurring in part and concurring in judgment) (race-based remedies designed to "make up" for past discrimination reinforce racial discrimination); id. at 2119 (Thomas, J., concurring in part and concurring in judgment) (racial discrimination is immoral and unconstitutional whether invidious or benign); Croson, 488 U.S. at 524-28 (Scalia, J., concurring in part and concurring in judgment) (racial remedies that go beyond what is necessary to benefit actual victims of discrimination reinforce and perpetuate discrimination).

when the Supreme Court rejected *Plessy* in *Brown*. As a result, present affirmative action programs that divert resources from whites in order to benefit members of historically disadvantaged racial minority groups actually end up punishing innocent whites who were not the perpetrators of pre-*Brown* racial discrimination, to benefit contemporary minority group members who were not the actual victims of pre-*Brown* discrimination. Such a race-conscious allocation of societal resources produces resentment in the minds of the innocent whites who are burdened and feelings of inferiority and self-doubt in the minds of the racial minority group members who benefit from such arbitrary governmental action. This, in turn, generates friction between whites and minority groups, as well as intergroup friction between the various minority groups that must compete with each other for the resources set aside under race-based affirmative action programs. Ultimately, such frictions exacerbate rather than ameliorate race-relations problems in contemporary culture.

Opponents of affirmative action contend that toleration of affirmative action programs that go beyond what is necessary to compensate actual victims of discrimination spawns a vision of society that is highly unappealing. Individuality becomes subordinated to group identification, and the concept of merit becomes supplanted by quo-

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53. See *Brown I*, 347 U.S. 483 (1955) (overruling separate-but-equal doctrine of *Plessy*).
54. See, e.g., *Metro Broadcasting v. FCC*, 497 U.S. 547, 612-17, 621-23, 630-31 (1990) (O'Connor, J., dissenting) (objecting to over-and under-inclusiveness of remedies that do not narrowly compensate for past discrimination as impermissibly burdening innocent whites); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279-84 (1986) (opinion of Powell, J.) (opposing layoffs as an impermissible burden on innocent whites); *id.* at 294-95 (White, J., concurring in judgment) (opposing layoffs of innocent whites to benefit minorities who were not actual victims of discrimination); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 294-99 (1978) (opinion of Powell, J.) (opposing racial preferences that impermissibly burden innocent whites); cf. *Firefighters*, 478 U.S. at 535-43 (Rehnquist, J., dissenting) (Title VII remedies that override seniority must be limited to actual victims of discrimination); *Sheet Metal Workers*, 478 U.S. at 500 (Rehnquist, J., dissenting); *Stotts*, 467 U.S. at 578-83.
55. See, e.g., *Metro Broadcasting*, 497 U.S. at 603-04 (O'Connor, J., dissenting) (danger of racial classifications is that they contribute to racial hostility and reinforce stereotypes in way that stigmatizes beneficiaries); *Croson*, 488 U.S. at 493-94 (opinion of O'Connor, J.); *Bakke*, 438 U.S. at 298-99 (opinion of Powell, J.); cf. *Wygant*, 476 U.S. at 313-19 (Stevens, J., dissenting) (recognizing but rejecting stigmatization and hostility arguments); *United Jewish Orgs.*, 430 U.S. at 172-74 (Brennan, J., concurring in part).
56. See, e.g., *Adarand Constructors Inc. v. Pena*, 115 S. Ct. 2097, 2113-14 (1995) (overly broad race-based remedies will foster resentment and delay time when race will become truly irrelevant factor); *id.* at 2118-19 (Scalia, J., concurring in part and concurring in judgment) (race-based remedies designed to "make up" for past discrimination reinforce racial discrimination); *Croson*, 488 U.S. at 524-28 (racial remedies going beyond what is necessary to benefit actual victims of discrimination reinforce and perpetuate discrimination).
In the Brave New World of racial engineering, population proportionality will be politically correct, but jobs will cease to be performed by those who are best qualified to perform them. In addition, educational opportunities will cease to go to those who are best equipped to make good use of them, and political representation will be distorted by the artificial elevation of racial considerations over more substantive interests. The forced racial proportionality that exists in such a society will have been purchased at the price of internal disaffection and racial Balkanization.

3. Equipoise

The arguments favoring affirmative action and the arguments opposing it both have considerable appeal. Moreover, both sets of arguments seem equally consistent with the general principles of equality and race neutrality. If one views equality as a concept that is to be measured against a baseline established during the era of slavery or official segregation, race-conscious affirmative action seems necessary to equalize initial imbalances, thereby promoting equality more effectively than would simple prospective neutrality. If one elects, however, to establish the baseline for making equality determinations at a point after the elimination of official segregation, thereby taking pre-existing differences in the allocation of resources as a given, affirmative action seems like a racially discriminatory deviation from the

57. See, e.g., Croson, 488 U.S. at 507-08 (opinion of O'Connor, J.) (quotas reflect stereotyped thinking about racial minorities); id. at 526-27 (Scalia, J., concurring in judgment) (quotas derogate human dignity and individuality (citing Bickel, supra note 45, at 133)); Bakke, 438 U.S. at 272-75, 315-19 (opinion of Powell, J.) (permitting consideration of race but opposing quotas).
58. See generally Aldous Huxley, Brave New World (1932) (source of Brave-New-World metaphor).
59. Cf. Adarand, 115 S. Ct. at 2102-04 (describing affirmative action program as encouraging the award of construction contracts to minority subcontractors rather than to low bidders able to perform them most cheaply); Croson, 488 U.S. at 477-86 (describing minority set aside program requiring award of construction contracts to minority subcontractors rather than to low bidders able to perform them most cheaply); Wygant, 476 U.S. at 270-73 (opinion of Powell, J.) (describing affirmative action program requiring layoffs of more experienced teachers in order to retain less experienced minority teachers).
62. This is the view that has animated California's proposed anti-affirmative action initiative. See Lemann, supra note 11, at 40 (discussing proposed California anti-affirmative action initiative).
principle of prospective neutrality. As the current controversy surrounding affirmative action attests, one's stake in the outcome is likely to affect which conception of equality has the greater appeal. The intractability of the affirmative action issue, and the intensity of the political debate surrounding it, have made it difficult for the Supreme Court to achieve a satisfactory resolution of the affirmative action problem.

B. Cases

The Supreme Court has considered eighteen racial affirmative action cases since it first confronted the issue in 1974. These eighteen cases, their outcomes, and the votes of the individual justices who par-

63. See supra text accompanying notes 8-17.

Technically, the school desegregation cases that permitted race-conscious pupil assignment are affirmative action cases because of the Supreme Court's intent to benefit minority students by issuing those decisions. See, e.g., North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43,45-46 (1971) (effectively requiring race-conscious pupil assignment to remedy prior school segregation). Because those cases are not typically treated as affirmative action cases, however, they have not been included in the present compilation of statistics concerning the Court's affirmative action cases.

The Court has also decided a series of statutory cases under section 5 of the Voting Rights Act of 1965, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 (1988)). See, e.g., Johnson v. De Grandy, 114 S. Ct. 2647 (1994); Holder v. Hall, 114 S. Ct. 2581 (1994); Voinovich v. Quilter, 113 S. Ct. 1149 (1993); Growe v. Emison, 113 S. Ct. 1075 (1993). Although these cases also technically constitute affirmative action cases because they decrease white voting strength in order to enhance minority voting strength, this species of Voting Rights Act cases that is decided on statutory rather than equal protection grounds is not typically viewed as involving affirmative action and has similarly been excluded from the present statistical compilation. Arguably, race-conscious districting is distinguishable from more traditional forms of affirmative action because, in the absence of intentional vote dilution, districting does not have immediately identifiable victims and does not entail any departure from a merits-based allocation system. But cf. Miller, 115 S. Ct. at 2487, 2488 (objecting to departure from traditional, race-neutral districting principles). On the other hand, Miller, Hays, Shaw, and United Jewish Organizations are Voting Rights Act cases that presented the Court with constitutional challenges under the Equal Protection Clause and thus have been included in the present statistical compilation.
Affirmative Action and Discrimination
ticipated in each case are set out in the Voting Chart included as Part I(B)(2) of this article. Of these eighteen cases, fourteen concerned constitutional challenges made to affirmative action plans under the Equal Protection Clause of the Fourteenth Amendment, or the equal protection component of the Fifth Amendment.65 The remaining four cases involved statutory challenges to affirmative action programs under Title VII.66

The affirmative action cases that the Supreme Court has considered have arisen in a variety of contexts. Eleven of the cases have involved employment, where white workers or applicants challenged affirmative action plans giving a preference to minority workers in hiring, promotions, or layoffs, or where white contractors challenged the allocation of government-funded construction contracts under minority preference or set-aside programs.67 Other challenges have been made to educational affirmative action programs designed to increase student diversity by giving admissions preferences to minority applicants,68 remedial voting rights plans designed to increase minority voting strength through the use of racially gerrymandered voting districts,69 and broadcast license programs designed to increase broadcast diversity by creating enhancements and incentives for increased minority ownership of broadcast outlets and licenses.70

The Court resolved three of the cases that it considered on justiciability grounds without addressing the merits.71 Of the remaining

65. The 14 cases raising constitutional challenges to affirmative action plans are Miller, Hays, Adarand, Shaw, Northeastern Florida, Metro Broadcasting, Croson, Paradise, Sheet Metal Workers, Wygant, Fullilove, Bakke, United Jewish Organizations, and DeFunis. See Voting Chart infra Part I(B)(2).

66. The four Title VII cases are Johnson, Firefighters, Stotts, and Weber. Of these four cases, one involved a gender-based challenge to an affirmative action plan that contained both race- and gender-based preferences. See Johnson, 480 U.S. at 625; see also Voting Chart infra Part I(B)(2).

67. The 11 cases that arose in an employment context are Adarand, Northeastern Florida, Croson, Johnson, Paradise, Firefighters, Sheet Metal Workers, Wygant, Stotts, Fullilove, and Weber. Of these 11 cases, one involved a race- and gender-based affirmative action plan that was challenged in an employment context on the grounds of unlawful gender discrimination in violation of Title VII. See Johnson, 480 U.S. at 616.

68. The two cases that arose in an educational context are Bakke and DeFunis.

69. The four cases that arose in a remedial voting rights context are Miller, Hays, Shaw, and United Jewish Organizations.

70. The one case that arose in the context of a preferential broadcast license program is Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).

71. The Court dismissed one constitutional challenge to a remedial voter redistricting plan on the grounds of standing. See United States v. Hays, 115 S. Ct. 2431 (1995). The Court dismissed one constitutional challenge to a law school affirmative action program on the grounds of mootness. See DeFunis v. Odegaard, 416 U.S. 312 (1974). In addition, the Court addressed only the issue of standing in another case that presented a constitutional challenge to a minority
fifteen cases that it did resolve on the merits, the Court upheld the challenged affirmative action plans in eight cases, and invalidated or limited the challenged plans in seven. Of the eleven constitutional cases decided on the merits, the Supreme Court upheld the challenged affirmative action plans in five cases, and invalidated the challenged plans in six. Of the four Title VII cases that the Court resolved on the merits, the Court upheld the challenged plans in three, and adopted a narrow construction of a con-

72. The 15 affirmative action cases that the Court resolved on the merits are Miller, Adarand, Shaw, Metro Broadcasting, Croson, Johnson, Paradise, Firefighters, Sheet Metal Workers, Wygant, Stotts, Fullilove, Weber, Bakke, and United Jewish Organizations. See Voting Chart infra Part I(B)(2). The affirmative action program at issue in one of these cases contained both race and gender preferences, but the Supreme Court's consideration and ultimate approval of the plan arose in the context of a gender-based Title VII challenge rather than a race-based challenge. See Johnson v. Transportation Agency, 480 U.S. 616 (1987).

73. The eight cases in which the Court upheld the challenged affirmative action plans are Metro Broadcasting, Johnson, Paradise, Firefighters, Sheet Metal Workers, Fullilove, Weber, and United Jewish Organizations. See Voting Chart infra Part I(B)(2). Of these eight cases, one involved a challenge to a race- and gender-based affirmative action plan that was upheld by the Court after a challenge that asserted unlawful gender discrimination in violation of Title VII. See Johnson, 480 U.S. at 616.

74. Of these seven cases, the Court invalidated the affirmative action programs presented to it in six. See Miller, Adarand, Shaw, Croson, Wygant, and Bakke. In the seventh case, the Court adopted a narrow interpretation of a Title VII consent decree in order to protect seniority rights found by the Court to be entitled to greater protection under Title VII than race. See Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984); see also Voting Chart infra Part I(B)(2).

75. The 11 cases decided on constitutional grounds are Miller, Adarand, Shaw, Metro Broadcasting, Croson, Paradise, Sheet Metal Workers, Wygant, Fullilove, Bakke, and United Jewish Organizations. See Voting Chart infra Part I(B)(2).

76. The five constitutional cases in which the Court upheld the challenged affirmative action plans are Metro Broadcasting, Paradise, Sheet Metal Workers, Fullilove, and United Jewish Organizations. See Voting Chart infra Part I(B)(2).

77. The six constitutional cases in which the Court invalidated the challenged affirmative action plans are Miller, Adarand, Shaw, Croson, Wygant, and Bakke. See Voting Chart, infra Part I(B)(2). Adarand has been included as a case in which the challenged affirmative action plan was invalidated because the Court applied strict scrutiny. No racial classification has withstood strict scrutiny since Korematsu, and the justices who voted to apply strict scrutiny in Adarand always vote to invalidate affirmative action plans in constitutional cases. See infra text accompanying notes 88-92 (discussing Supreme Court voting blocs on affirmative action). Nevertheless, it is technically true that the Adarand majority did not finally resolve the case, but rather remanded for further consideration under its newly adopted strict-scrutiny standard. See Adarand, 115 S. Ct. at 2118.

78. The three Title VII cases in which the Court upheld the challenged affirmative action plans are Johnson, Firefighters, and Weber. See Voting Chart infra Part I(B)(2). One of these three cases involved a challenge to a race- and gender-based affirmative action plan that was upheld by the Court after a gender-based Title VII challenge. See Johnson v. Transportation Agency, 480 U.S. 616 (1987).
sent decree that was unfavorable to the minority beneficiaries in one.79

The Court's overall record in ruling on the merits of affirmative action plans has been eight to seven in favor of affirmative action.80 Although the Court has typically rejected statutory challenges, ruling in favor of affirmative action three to one in Title VII cases,81 it has ruled against affirmative action six to five in constitutional cases.82 Of the eleven constitutional cases that the Court has decided on the merits, the Court was able to issue majority opinions in only its five most recent decisions.83 The first six constitutional cases that the Court considered were resolved by plurality opinions.84 Of the five majority opinions that the Court was able to issue,85 the four most recent were decided by votes of five to four,86 and the fourth was decided by a vote of six to three.87

79. The Court adopted a narrow construction of a Title VII consent decree in order to protect seniority rights, finding that, under Title VII, seniority rights are entitled to greater protection than is freedom from racial discrimination. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984).
80. See supra text accompanying notes 73-74; Voting Chart infra Part I(B)(2).
81. See supra text accompanying notes 78-79; Voting Chart infra Part I(B)(2).
82. See supra text accompanying notes 76-77; Voting Chart infra Part I(B)(2).
83. See Miller v. Johnson, 115 S. Ct. 2475 (1995) (majority opinion by Kennedy, J.); Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2101 (1995) (majority opinion by O'Connor, J.); Shaw v. Reno, 113 S. Ct. 2816, 2819 (1993) (majority opinion by O'Connor, J.); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 550 (1990) (majority opinion by Brennan, J.); City of Richmond v. J. A. Croson Co., 488 U.S. 469, 475 (1989) (majority opinion by O'Connor, J.). There is a sense in which Adarand is more like a plurality than a majority opinion. Justice Scalia, whose vote was necessary to the five-vote majority, signed the majority opinion, see Adarand, 115 S. Ct. at 2101 (listing votes of justices); but he joined that opinion only to the extent that it was not inconsistent with his concurring opinion. See id. at 2118 (Scalia, J. concurring in part and concurring in judgment).
84. See United States v. Paradise, 480 U.S. 149, 153 (1987) (plurality opinion of Brennan, J.); Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 424 (1986) (plurality opinion of Brennan, J.); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 268 (1986) (plurality opinion of Powell, J.); Fullilove v. Klutznick, 448 U.S. 448, 452 (1980) (plurality opinion of Burger, C.J.); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 267 (1978) (opinion of Powell, J.); United Jewish Orgs. v. Carey, 430 U.S. 144, 146 (1977) (plurality opinion of White, J.); see also Voting Chart infra Part I(B)(2). Technically, Justice Powell's opinion in Bakke was not a plurality opinion, because no other justice joined it. See Bakke, 438 U.S. at 267 (opinion of Powell, J.). Nevertheless, subsequent Supreme Court opinions have regularly treated Justice Powell's opinion as if it were a plurality opinion that stated a widely held rationale for the Bakke Court's decision. See, e.g., Miller, 115 S. Ct. at 2482 (same) (citing opinion of Powell, J., in Bakke as authoritative); Adarand, 115 S. Ct. at 2108, 2111 (same); Croson, 488 U.S. at 493-94, 496-98 (plurality opinion of O'Connor, J.) (same).
85. The five most recent cases, which the Supreme Court was able to resolve with majority opinions, were Miller, Adarand, Shaw, Metro Broadcasting, and Croson. See Voting Chart infra Part I(B)(2).
86. The four five-to-four decisions were Miller, Adarand, Shaw, and Metro Broadcasting. See Voting Chart infra Part I(B)(2).
87. The one six-to-three decision was Croson. See Voting Chart infra Part I(B)(2).
1. Voting Blocs

However tentative the approach taken by the Court as a whole has been, the views of most justices on affirmative action have been very consistent. Individual Supreme Court justices have tended to vote in affirmative action cases in ways that correlate with their own overall political views. Accordingly, conservative justices have typically voted against affirmative action programs, and liberal justices have typically voted in favor of affirmative action. A five-justice conservative block has formed, comprised of justices who, with only one exception, have never voted to uphold an affirmative action plan in a case that the Court has decided on constitutional grounds. The members of this conservative bloc are Chief Justice Rehnquist, and Justices O’Connor, Scalia, Kennedy, and Thomas. Similarly, a

88. Chief Justice Rehnquist voted against the affirmative action plans at issue in ten affirmative action cases that were decided on constitutional grounds. See Miller v. Johnson, 115 S. Ct. 2475, 2482 (1995) (joining majority opinion); Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 2101 (1995) (joining majority opinion); Shaw v. Reno, 113 S. Ct. 2816, 2819 (1993) (joining majority opinion); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 602 (1990) (O’Connor, J., dissenting, joined by Rehnquist, C.J.); City of Richmond v. J. A. Croson Co., 488 U.S. 469, 476 (1989) (joining majority opinion); Paradise, 480 U.S. at 196 (O’Connor, J., dissenting, joined by Rehnquist, C.J.); Sheet Metal Workers, 478 U.S. at 500 (Rehnquist, J., dissenting); Wygant, 476 U.S. at 268 (1986) (opinion of Powell, J., joined by Rehnquist, J.); Fullilove, 488 U.S. at 522 (opinion of Stewart, J., joined by Rehnquist, C.J.); Bakke, 438 U.S. at 408 (opinion of Stevens, J., joined by Rehnquist, J.); see also Voting Chart infra Part I(B)(2). The only arguable exception to Chief Justice Rehnquist’s perfect voting record against affirmative action is his 1977 vote in one Voting Rights Act case to uphold a New York redistricting plan that was designed to enhance black voting strength by diluting the voting strength of Hasidic Jews. However, then Associate Justice Rehnquist may have viewed that dispute as a contest between affirmative action for blacks and affirmative action for Hasidic Jews. See United Jewish Orgs., 430 U.S. at 147 (opinion of White, J., joined by Rehnquist, J.).

89. Justice O’Connor participated in, and voted against the affirmative action plans at issue in, eight affirmative action cases that were decided on constitutional grounds. See Miller, 115 S. Ct. at 2497 (O’Connor, J., concurring); Adarand, 115 S. Ct. at 2101 (author of majority opinion); Shaw, 113 S. Ct. at 2819 (author of majority opinion); Metro Broadcasting, 497 U.S. at 602 (O’Connor, J., dissenting); Croson, 488 U.S. at 476 (author of majority opinion); Paradise, 480 U.S. at 196 (O’Connor, J., dissenting); Sheet Metal Workers, 478 U.S. at 489 (O’Connor, J., concurring in part and dissenting in part); Wygant, 476 U.S. at 284 (O’Connor, J., concurring in part and concurring in judgment); see also Voting Chart infra Part I(B)(2).

90. Justice Scalia participated in, and voted against the affirmative action plans at issue in, six affirmative action cases that were decided on constitutional grounds. See Miller, 115 S. Ct. at 2497 (joining majority opinion); Adarand, 115 S. Ct. at 2118 (Scalia, J., concurring in part and concurring in judgment); Shaw, 113 S. Ct. at 2819 (joining majority opinion); Metro Broadcasting, 497 U.S. at 602, 631 (O’Connor, J., dissenting, joined by Scalia, J., and Kennedy, J., dissenting, joined by Scalia, J.); Croson, 488 U.S. at 520 (Scalia, J., concurring in judgment); Paradise, 480 U.S. at 196 (O’Connor, J., dissenting, joined by Scalia, J.); see also Voting Chart infra Part I(B)(2).

91. Justice Kennedy participated in, and voted against the affirmative action plans at issue in, five affirmative action cases that were decided on constitutional grounds. See Miller, 115 S. Ct. at 2482 (majority opinion); Adarand, 115 S. Ct. at 2101 (joining majority opinion); Shaw, 113 S. Ct. at 2819 (joining majority opinion); Metro Broadcasting, 497 U.S. at 631 (Kennedy, J.,
three-justice liberal bloc existed for many years consisting of justices who had always voted to uphold the affirmative action plans at issue in cases that the Court resolved on constitutional grounds. The members of this liberal bloc were Justices Brennan,\(^9\) Marshall,\(^9\) and Blackmun.\(^9\)

The three justices in the liberal bloc are now retired from the Court.\(^9\) All five justices in the conservative bloc, however, are presently serving on the Court.\(^9\) In addition to these five conservative-bloc justices, the four remaining justices presently sitting on the
Supreme Court are Justices Stevens, Souter, Ginsburg, and Breyer.\textsuperscript{98} The affirmative action votes of Justice Stevens have varied over the cases in which he has participated.\textsuperscript{99} Justices Souter,\textsuperscript{100} Ginsburg,\textsuperscript{101} and Breyer\textsuperscript{102} have voted to uphold each affirmative action program that they considered in a constitutional case, but each Justice has participated in only two or three decisions. Accordingly, the present Court contains a solid five-justice majority that has consistently opposed affirmative action on constitutional grounds and an emerging minority of three or four justices who ordinarily reject constitutional challenges to affirmative action.

2. Affirmative Action Voting Chart

The voting chart below shows how individual Supreme Court justices voted in the significant affirmative action cases on which they sat.

\textsuperscript{98} See GUNTHER, supra note 96, at B-7 (specifying terms of Justices Stevens and Souter); SCHAUER, supra note 97, at 452 (specifying terms of Justices Ginsburg and Breyer).

\textsuperscript{99} Justice Stevens participated in eleven affirmative action cases that were decided on constitutional grounds. He voted in favor of the affirmative action plans at issue in eight of these cases. See Miller v. Johnson, 115 S. Ct. 2475, 2497 (1995) (Stevens, J., dissenting); Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2120 (1995) (Stevens, J., dissenting); Shaw, 113 S. Ct. at 2834 (White, J., dissenting, joined by Stevens, J.); Metro Broadcasting, 497 U.S. at 601 (Stevens, J., concurring); Paradise, 480 U.S. at 189 (1987) (Stevens, J., concurring in judgment); Sheet Metal Workers, 478 U.S. at 426 (1986) (joining majority opinion); Wygant, 476 U.S. at 313 (Stevens, J., dissenting); United Jewish Orgs., 430 U.S. at 147 (opinion of White, J., joined by Stevens, J.). He voted against the affirmative action plans at issue in three cases. See Croson, 488 U.S. at 469 (joining majority opinion); Fullilove, 448 U.S. at 532 (Stevens, J., dissenting); Bakke, 438 U.S. at 408 (Stevens, J., concurring in judgment in part and dissenting in part); see also Voting Chart infra Part I(B)(2).

\textsuperscript{100} Justice Souter participated in three affirmative action cases that were decided on constitutional grounds, and he voted in favor of the affirmative action plans at issue in all three cases. See Miller, 115 S. Ct. at 2499 (Ginsburg, J., dissenting, joined by Souter, J.); Adarand, 115 S. Ct. at 2131 (Souter, J., dissenting); Shaw, 113 S. Ct. at 2845 (Souter, J., dissenting); see also Voting Chart infra Part I(B)(2).

\textsuperscript{101} Justice Ginsburg participated in two affirmative action cases that were decided on constitutional grounds, and she voted to uphold the affirmative action plans at issue in both of those cases. See Miller, 115 S. Ct. at 2499 (Ginsburg, J., dissenting); Adarand, 115 S. Ct. at 2134 (Ginsburg, J., dissenting); see also Voting Chart infra Part I(B)(2).

\textsuperscript{102} Justice Breyer participated in two affirmative action cases that were decided on constitutional grounds, and he voted to uphold the affirmative action plans at issue in both of those cases. See Miller, 115 S. Ct. at 2499 (Ginsburg, J., dissenting, joined by Breyer, J.); Adarand, 115 S. Ct. at 2131 (Souter, J., dissenting, joined by Breyer, J.); id. at 2134 (Ginsburg, J., dissenting, joined by Breyer, J.); see also Voting Chart infra Part I(B)(2).
# Affirmative Action and Discrimination

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**TITLE VII**

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| Stotts (1994) | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - |
| Firefighters (1986) | + | + | + | + | + | + | + | + | + | + | + | + | + | + | + | + | + | + | + | + |
| Johnson (1987) | + | + | + | + | + | + | + | + | + | + | + | + | + | + | + | + | + | + | + | + |

(+) Vote upholding program at issue (-) Vote invalidating program at issue (o) Did not participate in decision

No entry indicates that a Justice was not on the Court when a case was decided.

The names of Justices presently sitting on the Court are printed in **LARGE** type.

## C. Issues

Although the Supreme Court has addressed the issue of affirmative action in eighteen race cases, it has had great difficulty determining when affirmative action programs are constitutionally and statutorily permissible. Those eighteen cases have, however, dis-

103. See supra note 64 (listing Court's 18 racial affirmative action cases).
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cussed three sets of issues that appear relevant to the lawfulness of affirmative action. First, the Court has focused most heavily on the standard of review that is to be applied to affirmative action programs, whether the standard of review varies with the federal or local nature of the affirmative action program in question, and whether the strict scrutiny standard that it now applies to all racial affirmative action programs can ever be satisfied. Second, the Court has debated what justifications are adequate for affirmative action, what findings are necessary to substantiate those justifications, and whether set asides and quotas constitute permissible means of pursuing the otherwise permissible goals of an affirmative action program. Third, the Court has discussed the levels of stigmatization and racial stereotyping entailed in a program, as well as the burden that a program imposes on innocent whites. The magnitude of permissible burdens may vary with whether an affirmative action plan is public or private, and with whether it is voluntary or court-ordered. The Court's most recent decision in Adarand has nominally resolved some, but not all, of these issues. The doctrinally nebulous nature of the issues, however, makes any resolution tentative and highly dependent upon the Court's personnel at particular points in time.

1. Standard of Review

The issue that has attracted the most attention in Supreme Court affirmative action cases has been the appropriate standard of review. Because racial affirmative action programs employ race-based classifications to make resource allocation decisions, they are arguably subject to strict judicial scrutiny under Korematsu v. United States, which holds that racial classifications are "immediately suspect" and subjects them to "the most rigid scrutiny." However, because affirmative action programs are benign rather than invidious, in that they are intended to promote equality by neutralizing the effects of prior discrimination, they should arguably be exempt from the strict scrutiny to which racial classifications that burden racial minorities are subject. The standard-of-review issue may well be dispositive, because since

104. See Korematsu v. United States, 323 U.S. 214, 216 (1944). The test traditionally required under the strict scrutiny standard is that, in order to be valid, the classification under review must advance a compelling state interest and must be necessary to the advancement of that interest. See Loving v. Virginia, 388 U.S. 1, 11 (1967); cf. Korematsu v. United States, 323 U.S. 214, 216 (1944).
the Korematsu decision, no racial classification has withstood strict scrutiny by the Supreme Court.105

The Court began considering the affirmative action issue in 1974106 but was unable to achieve majority agreement on an appropriate standard of review until its 1989 decision in City of Richmond v. J.A. Croson Co.107 In an opinion by Justice O'Connor, the Court held that strict scrutiny applied to a municipal affirmative action program that set aside thirty percent of the municipality's government contracting funds for minority construction contractors.108 Four justices believed that it was inappropriate to apply strict scrutiny to benign affirmative action programs.109 Justice O'Connor limited her opinion to state and local affirmative action programs because a 1980 Supreme Court decision, Fullilove v. Klutznick,110 had previously upheld the constitutionality of a virtually identical federal set-aside program.111
Justice O’Connor’s *Croson* opinion distinguished *Fullilove* on the grounds that Congress possessed special powers under section 5 of the Fourteenth Amendment to remedy racial discrimination that state and local legislatures did not possess.\(^{112}\)

Notwithstanding *Croson*, the Court’s 1990 decision in *Metro Broadcasting v. FCC*\(^{113}\) upheld the constitutionality of two FCC minority preference plans that had been designed to increase broadcast diversity.\(^{114}\) *Metro Broadcasting* held that only intermediate scrutiny applied to federal affirmative action programs—or more specifically, to affirmative action plans authorized by Congress in the exercise of its power to remedy discrimination under section 5 of the Fourteenth Amendment.\(^{115}\) Justice Brennan’s majority opinion distinguished *Croson* as involving a local rather than a congressional affirmative action program\(^ {116}\)—just as Justice O’Connor’s *Croson* opinion had invoked that factor as a basis for distinguishing *Fullilove*.\(^ {117}\) Realistically, the justices seem simply to have been voting in accordance with their political views about affirmative action.\(^ {118}\) Only Justice White actually believed that the distinction between congressional and local affirmative action programs was important.\(^ {119}\)
Adarand overruled Metro Broadcasting and established a single strict scrutiny standard of review for all affirmative action programs, whether congressional or local in nature.\textsuperscript{120} Justice O’Connor’s majority opinion simply extended the reasoning that she had adopted in Croson.\textsuperscript{121} Although this seems at least superficially to have settled the standard-of-review issue, four justices dissented in Adarand, arguing that congressional affirmative action plans are entitled to greater deference than local plans.\textsuperscript{122} Moreover, Adarand has left it unclear whether the strict scrutiny the majority envisions is fatal scrutiny.

All nine of the justices who participated in the Adarand decision appear to view strict scrutiny as permitting some forms of affirmative action. Justice O’Connor’s majority opinion—joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas—expressly states that strict scrutiny is not “fatal in fact,”\textsuperscript{123} but is intended merely to insure that affirmative action programs are benign rather than invidious.\textsuperscript{124} In addition, Justice Stevens points out that the majority purported to adopt the concept of strict scrutiny articulated by Justice Powell in Regents of the University of California v. Bakke,\textsuperscript{125} a case invalidating a racial preference in a medical school admissions

\textit{Metro Broadcasting}, 497 U.S. at 550 (Justices White and Stevens joined the majority opinion holding that the FCC policies did not violate the Equal Protection Clause) with Croson, 488 U.S. at 475 (Justices White and Stevens joined the majority opinion holding that the city’s plan violated the Equal Protection Clause). Justice Stevens tended to focus on the presence or absence of legislative findings of prospective benefit in determining the validity of an affirmative action plan. See \textit{Metro Broadcasting}, 497 U.S. at 601-02 (Stevens, J., concurring) (focusing on prospective benefit of racial classification); Fullilove v. Klutznick 488 U.S. 488, 511-12 (1980) (Stevens, J., concurring in part and concurring in judgment) (same).


\textsuperscript{121} See id. at 2110-11 (discussing \textit{Croson}).

\textsuperscript{122} The four dissenters in \textit{Adarand} were Justices Stevens, Souter, Ginsburg, and Breyer. See id. at 2123-26 (Stevens, J., dissenting, joined by Ginsburg, J.) (Congress is entitled to special deference); id. at 2132-34 (Souter, J., dissenting, joined by Ginsburg and Breyer, J.J.) (\textit{Fullilove} deference to Congress controls); id. at 2134, 2136 (Ginsburg, J., dissenting, joined by Breyer, J.) (Congress is entitled to deference, and a non-fatal standard of review is appropriate). Ironically, now that \textit{Metro Broadcasting} has been overruled, the four dissenters may have actually come to believe in the importance of a distinction between federal and local affirmative action programs.

\textsuperscript{123} See id. at 2114, 2117 (“[W]e wish to dispel the notion that strict scrutiny is ‘strict in theory but fatal in fact.’”). Justice O’Connor reiterated this point in Missouri v. Jenkins, 115 S. Ct. 2038 (1995), a school desegregation case that was decided the same day as \textit{Adarand}. See Jenkins, 115 S. Ct. at 2061 (O’Connor, J., concurring) (“But it is not true that strict scrutiny is ‘strict in theory, but fatal in fact.’”).

\textsuperscript{124} See \textit{Adarand}, 115 S. Ct. at 2112, 2113 (explaining that the purpose of strict scrutiny is to ascertain whether affirmative action is legitimate).

program—which Justice Powell found to have been satisfied in \textit{Fullilove}.

And Justice Souter believed that the affirmative action program at issue in \textit{Adarand} was adequate to survive the majority's strict scrutiny on remand. Justice Ginsburg, however, believed that strict scrutiny is fatal for invidious racial classifications but not for benign classifications in affirmative action programs. Justice Breyer joined the dissents of both Justices Souter and Ginsburg.

Although the five justices in the \textit{Adarand} majority signed Justice O'Connor's majority opinion stating that strict scrutiny was not necessarily fatal scrutiny, there is some reason to be skeptical about the degree of their commitment to this principle. Justice Scalia seems to have rejected the suggestion that an affirmative action program could ever survive strict scrutiny. He expressly limited the degree to which he was joining the majority opinion by including the unusual proviso that he was willing to "join the opinion of the Court . . . except insofar as it may be inconsistent with" the views expressed in his concurrence. His concurrence goes on to assert that the desire to remedy the effects of past discrimination could never constitute a compelling governmental interest. In addition, Justice Scalia has in the past favored limiting affirmative action to the actual victims of discrimination — a limitation that does not recognize the legitimacy of race-based affirmative action at all. Justice Kennedy has also been receptive to the actual-victim limitation, and Chief Justice Rehnquist has en-

\begin{itemize}
\item[126.] See \textit{Bakke}, 438 U.S. at 272-81 (opinion of Powell, J.) (describing admissions program for University of California at Davis medical school, which reserved 16 of 100 seats in entering class for disadvantaged minority applicants).
\item[127.] See \textit{Adarand}, 115 S. Ct. 2128 (Stevens, J., dissenting, joined by Ginsburg, J.) (discussing Justice Powell's positions in \textit{Bakke} and \textit{Fullilove}); cf. \textit{id.} at 2120-21 n.1 (objecting to term "strict scrutiny" on grounds that it has traditionally been understood to be fatal).
\item[128.] See \textit{id.} at 2132-34 (Souter, J., dissenting, joined by Ginsburg and Breyer, JJ.) (arguing that the \textit{Adarand} program was still controlled by \textit{Fullilove}).
\item[129.] See \textit{id.} at 2136 (Ginsburg, J., dissenting, joined by Breyer, J.) (distinguishing between invidious and benign racial classifications under a strict scrutiny standard of review).
\item[130.] See \textit{id.} at 2132-34 (Souter, J., dissenting, joined by Breyer, J.); \textit{id.} at 2136 (Ginsburg, J., dissenting, joined by Breyer, J.)
\item[131.] See \textit{id.} at 2118-19 (Scalia, J., concurring in part and concurring in judgment).
\item[132.] See \textit{id.} at 2118-19 (Scalia, J., concurring in part and concurring in judgment) ("[I]t is unlikely, if not impossible, that the challenged program would survive under this understanding of strict scrutiny.").
\item[133.] See \textit{City of Richmond v. J.A. Croson Co.}, 488 U.S. 469, 524-25 (1989) (Scalia, J., concurring in judgment) (state can use racial classifications only to compensate actual victims of state's own discrimination).
\item[134.] See \textit{id.} at 518-19 (Kennedy, J., concurring in judgment) (finding rule limiting racial preferences to what is necessary to compensate actual victims of discrimination appealing).
\end{itemize}
dorsed this limitation in Title VII cases.\textsuperscript{135} Justice Thomas forcefully asserted in \textit{Adarand} that all racial classifications were immoral, whether invidious or benign, terming affirmative action “racial paternalism.”\textsuperscript{136} In \textit{Missouri v. Jenkins},\textsuperscript{137} however, which was decided the same day as \textit{Adarand}, Justice Thomas expressed a certain fondness for historically black schools.\textsuperscript{138} This might cause him to view strict scrutiny as less than fatal if necessary to permit the voluntary maintenance of historically black schools in black neighborhoods.\textsuperscript{139}

It may turn out that after \textit{Adarand}, strict scrutiny will remain “fatal in fact” because a majority of the Court will never find an affirmative action program adequate to meet the strict scrutiny standards that are theoretically capable of being satisfied. This would be consistent with the history of equal protection jurisprudence since \textit{Korematsu}, and it would satisfy the draconian pronouncements of Justices Scalia and Thomas. Because the program at issue in \textit{Adarand} is a mild one, consisting ultimately of only a rebuttable presumption that minority contractors are disadvantaged,\textsuperscript{140} the fate of \textit{Adarand} on remand may be telling. If the \textit{Adarand} program is invalidated, its invalidation will serve as a strong indication that the Court’s holding is indeed sweeping, and that Justice O’Connor is mistaken in her assertion that strict scrutiny will not always be fatal scrutiny.

Assuming, however, that Justice O’Connor is sincere in her assertion that strict scrutiny is not fatal scrutiny,\textsuperscript{141} her vote, plus the votes of the four \textit{Adarand} dissenters, may provide a bare majority to uphold

\begin{itemize}
  \item \textsuperscript{135} See Local 93, Int’l Ass’n of Firefighters v. City of Cleveland, 478 U.S. 561, 535-45 (1986) (Rehnquist, J., dissenting) (contending that Title VII remedies that override seniority must be limited to actual victims of discrimination); Local 28, Sheet Metal Workers Int’l Ass’n v. EEOC, 478 U.S. 421, 500 (1986) (Rehnquist, J., dissenting); Firefighter Local Union No. 1784 v. Stotts, 467 U.S. 561, 578-83 (majority opinion of White, J., joined by Rehnquist, J.).
  \item \textsuperscript{136} See Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2119 (1995) (Thomas, J., concurring) (asserting that there exists no “racial paternalism” exception to principle of equal protection).
  \item \textsuperscript{137} Missouri v. Jenkins, 115 S. Ct. 2038 (1995).
  \item \textsuperscript{138} \textit{See Jenkins}, 115 S. Ct. 2065 (“Despite their origins in ‘the shameful history of state-enforced segregation,’ these [historically black] institutions can be ‘both a source of pride to blacks who have attended them and a source of hope to black families who want the benefits of . . . learning for their children.’” (quoting United States v. Fordice, 112 S. Ct. 2727, 2746 (1992) (Thomas, J., concurring)); \textit{see generally Jenkins}, 115 S. Ct. at 2064-66 (discussing benefits of historically black schools).
  \item \textsuperscript{139} \textit{See Jenkins}, 115 S. Ct. at 2065-66 (expressing the view that historically black schools in black neighborhoods are not unconstitutional).
  \item \textsuperscript{140} This aspect of the \textit{Adarand} decision is discussed more fully in Part II(B) infra.
  \item \textsuperscript{141} Note that like the other justices in the \textit{Adarand} majority, Justice O’Connor has never voted to uphold an affirmative action program in a constitutional case. \textit{See supra} note 89 (enumerating votes of Justice O’Connor in constitutional affirmative action cases).
\end{itemize}
at least some affirmative action programs. In fact, it may be that the *Adarand* majority's conception of strict scrutiny will turn out to be the functional equivalent of *Metro Broadcasting*'s intermediate scrutiny, and that the ultimate significance of *Adarand* will be more rhetorical than substantive. It may also turn out that in practice the Court will give more deference to Congress than it gives to state and local legislatures, thereby ironically preserving the operative distinction between *Croson* and *Metro Broadcasting* that *Adarand* nominally overruled.\(^1\)\(^4\)\(^2\) Because *Adarand* was a five-to-four decision, resolution of this issue may remain tentative, shifting with subsequent Supreme Court appointments.

2. Justifications, Findings, and Quotas

If *Adarand* is ultimately interpreted to permit some affirmative action programs to survive strict scrutiny, it remains unclear what justifications for affirmative action the Court will recognize as legitimate. In the past, the Court has distinguished between two types of justifications and has treated them differently. The Court held in *Croson* that when strict scrutiny applies, permissible affirmative action is limited to that which is necessary to remedy particularized acts of past discrimination, and is not available merely to remedy the effects of general societal discrimination that has caused the underrepresentation of racial minorities in particular occupations or social roles.\(^1\)\(^4\)\(^3\) However, in *Metro Broadcasting*, the Court held that the pursuit of prospective diversity was a permissible goal for a congressional affirmative action program.\(^1\)\(^4\)\(^4\) The prospective-diversity justification upheld in *Metro Broadcasting* is very similar to the general-societal-discrimination justification that the Court rejected in *Croson*, in that it de-emphasizes the importance of particularized acts of past discrimination and permits affirmative action addressed to the underrepresentation of minorities in particular aspects of the culture. But, *Metro Broadcasting*

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3. *See Metro Broadcasting*, 497 U.S. at 566-68 (recognizing broadcast diversity as permissible goal for affirmative action).
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was decided under the relatively more tolerant standard of intermediate scrutiny\(^{145}\) that the Court expressly rejected in *Adarand*.\(^{146}\)

*Adarand* notwithstanding, it is uncertain how meaningful the general-societal-discrimination restriction will prove to be. It is likely that the four dissenters in *Adarand* would permit an affirmative action plan that they found otherwise acceptable to be justified on the grounds that it sought to remedy general societal discrimination. Justice Stevens voted to uphold the FCC prospective diversity plan in *Metro Broadcasting*,\(^{147}\) and he has often stated his preference for prospective benefit over identifiable past discrimination as a justification for affirmative action.\(^{148}\) Justice Ginsburg joined the opinion of Justice Stevens expressing this preference in *Adarand*.\(^{149}\) The tone of Justice Souter’s dissenting opinion in *Adarand* suggests receptivity to prospective benefit as a justification for affirmative action in its emphasis on the need to eliminate forces that “skew the operation of public systems” and its insistence that the prospectively oriented *Fullilove* decision controlled the affirmative action program at issue in *Adarand*.\(^{150}\) Justice Breyer, too, may be receptive to the prospective benefit justification for affirmative action, as evidenced by his decision to join Justice Souter’s dissent, which Justice Ginsburg also joined.\(^{151}\)

In addition to the *Adarand* dissenters, even Justice O’Connor—the author of the *Adarand* and *Croson* majority opinions and of the primary *Metro Broadcasting* dissent—has recognized the legitimacy of using prospective diversity as a justification for affirmative action in educational contexts.\(^{152}\) Justice O’Connor also appears to believe, however, that there is a distinction between the permissible promotion of prospective diversity and the impermissible effort to remedy general societal discrimination.\(^{153}\) What this shows is not so much that

\(^{145}\) See id. at 564-65 (applying intermediate scrutiny).

\(^{146}\) See *Adarand*, 115 S. Ct. at 2112-13 (overruling *Metro Broadcasting* with respect to its standard of review).

\(^{147}\) See *Metro Broadcasting*, 497 U.S. at 601-02 (Stevens, J., concurring).

\(^{148}\) See, e.g., *Adarand*, 115 S. Ct. at 2127-28 (Stevens, J., dissenting); *Metro Broadcasting*, 497 U.S. at 601-02 (Stevens, J., concurring); *Wygant*, 476 U.S. at 313 (Stevens, J., dissenting).

\(^{149}\) See *Adarand*, 115 S. Ct. at 2120 (Stevens, J., dissenting, joined by Ginsburg, J.).

\(^{150}\) See id. at 2133-34 (Souter, J., dissenting). Note, however, that Justice Souter also described his concerns as being relevant to the provision of a remedy for past discrimination. See id. at 2133-34.

\(^{151}\) See id. at 2131 (Souter, J., dissenting, joined by Ginsburg and Breyer, J.J.).


\(^{153}\) See id. at 288 n.* (characterizing “role model” justification for affirmative action as relevant to general societal discrimination rather than to prospective diversity).
Justice O'Connor may change her mind on the remedy-for-past-dis-

crimination versus general-societal-discrimination issue, but that the

issue is more rhetorical than substantive. An affirmative action pro-

gram can be characterized as serving either justification without much
difficulty. Accordingly, Justice O'Connor was able to characterize the

Fullilove set-aside plan as a program designed to remedy past discrim-

ination, while characterizing the seemingly indistinguishable Croson

set-aside plan as a program designed to remedy general societal dis-

154 In thus characterizing these two programs, Justice O'Connor credited congressional findings of past discrimination that are notoriously cursory,155 and disregarded the well-known history of past discrimination in Richmond, Virginia.156

Closely related to the issue of what goals constitute legitimate justifications for affirmative action is the issue of what findings are required for an affirmative action plan to be valid. If affirmative action is to be limited to the provision of narrow remedies for identifiable acts of prior discrimination, the Court must know both that there were such acts of prior discrimination and how widespread the past discrimination was to ensure that a remedy is sufficiently narrow.157

The Supreme Court has frequently addressed the need for formal findings of past discrimination, but the actual importance of formal findings is difficult to assess. In Croson, the Court relied heavily on both the absence of reliable findings of past discrimination and the absence of narrow tailoring in invalidating the Richmond set-aside plan.158 Moreover, the Metro Broadcasting case stressed the presence of congressional findings in upholding the FCC affirmative action

154. Compare City of Richmond v. J.A. Croson Co., 488 U.S. 469, 488-89 (1989) (characterizing the Fullilove plan as a remedy for past discrimination) with id. at 498-99 (finding that the Croson plan was a remedy for general societal discrimination).

155. See Fullilove v. Klutznick, 448 U.S. 448, 548-54 (Stevens, J., dissenting) (criticizing congressional findings).

156. See Croson, 488 U.S. at 498-506 (finding insufficient evidence of discrimination in Richmond construction trades); cf. id. at 561 (Blackmun, J., dissenting) (emphasizing that Richmond was the "cradle of the Old Confederacy"); id. at 528 (Marshall, J., dissenting) (emphasizing that Richmond was the capital of the Confederacy).

157. See Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2112, 2113-14 (1995) (citing Croson, 488 U.S. at 493 (opinion of O'Conner, J.) (contending that strict scrutiny is needed to distinguish benign from illegitimate discrimination and to ensure tight "fit" between prior discrimination and remedy)).

158. See Croson, 488 U.S. at 493 (opinion of O'Connor, J.) (contending that strict scrutiny is needed to distinguish benign from illegitimate discrimination and to ensure a tight "fit" between prior discrimination and remedy).
plans at issue in that case.\textsuperscript{159} This suggests that the presence or absence of reliable findings may continue to be dispositive. The Court, however, was unreceptive to the evidence of extensive congressional deliberations that was before it in \textit{Adarand},\textsuperscript{160} yet it had been quite deferential to the cursory congressional consideration that occurred in \textit{Fullilove}.\textsuperscript{161} In addition, the findings in \textit{Metro Broadcasting}, whose existence the Court stressed so heavily in upholding the FCC broadcast-diversity affirmative action plans, ultimately prove to be rather chimerical.\textsuperscript{162} This suggests that findings are less relevant as an actual basis for decision than they are as a post-hoc justification for judicial outcomes that have been reached on other grounds. Justice Powell,

\footnotesize{\textsuperscript{159} See Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 566-84 (1990) (discussing congressional findings).

\textsuperscript{160} See \textit{Adarand}, 115 S. Ct. at 2130, 2130 n.18 (Stevens, J., dissenting) (describing the congressional deliberations preceding adoption of affirmative action program at issue in \textit{Adarand}).


\textsuperscript{162} The FCC affirmative action programs that Justice Brennan found to have been authorized by Congress in \textit{Metro Broadcasting} were actually programs that had been developed by the FCC. See \textit{Metro Broadcasting}, 497 U.S. at 569-71. As political controversy concerning affirmative action increased during the Reagan Administration, Congress failed to enact pending legislation that would have codified the FCC programs. It was able only to adopt a series of appropriations riders that preserved the status quo while Congress continued to debate the affirmative action issue. See id. at 559 n.8, 572-79. Judge Williams termed the appropriations riders "a kind of mental standstill" when \textit{Metro Broadcasting} was before the Court of Appeals, see Winter Park Comm’s v. FCC, 873 F.2d 347, 364 (D.C. Cir. 1989) (Williams, J., concurring in part and dissenting in part), although Justice Brennan disagreed with this characterization in his \textit{Metro Broadcasting} majority opinion. See \textit{Metro Broadcasting}, 497 U.S. at 578 n.29 (appropriations riders were not mere “mental standstill”). Not only was the program more an FCC program than a program authorized by Congress in the exercise of its powers under section 5 of the Fourteenth Amendment, but the FCC program had ceased even to be supported by the FCC. During the Reagan Administration, the FCC shifted policy and wished to abandon the FCC affirmative action programs that had been implemented during the Carter Administration, citing doubts about the FCC’s jurisdiction to engage in such affirmative action. See id. at 558-61, 576-77 (discussing FCC inquiry into validity of its own minority preference programs); see also \textit{Winter Park}, 873 F.2d at 350-51. However, the United States Court of Appeals for the District of Columbia Circuit declined to cooperate with the Reagan FCC strategy for curtailing affirmative action and held that the FCC did in fact possess the requisite jurisdiction. See Steele v. FCC, 770 F.2d 1192, 1196 (D.C. Cir. 1985); \textit{Metro Broadcasting}, 497 U.S. at 559 n.8. Accordingly, the FCC programs could be deemed judicially authorized programs as readily as they can be deemed congressionally authorized programs. The FCC was opposed to them, and Congress lacked the votes needed to codify them. Only the D.C. Circuit favored them. Ultimately, the deference to Congress that Justice Brennan purported to be exhibiting in \textit{Metro Broadcasting} may really have been deference to the D.C. Circuit. Congress has now repealed the FCC distress sale program. See Deduction for Health Insurance Costs of Self-Employed Individuals, Pub. L. 104-7, § 2, 109 Stat. 93-94 (1995); and in the wake of the \textit{Adarand} decision, the FCC has begun to substitute race-neutral disadvantaged-applicant programs for its minority preference programs. \textit{Race- and Gender-Based Provisions for the Auctioning of C Block Broadcast Personal Communications Service Licensees, Elimination}, 60 Fed. Reg. 34200, 34202, 34205 (FCC 1995) (Further Notice of Proposed Rulemaking, in light of \textit{Adarand}, to amend 47 CFR, Parts 20 & 24, by eliminating race and gender preferences in FCC cellular spectrum auction program).}
who was the Court’s strongest proponent of formal findings\textsuperscript{163} is no longer on the Court.\textsuperscript{164} Moreover, Justice O’Connor—who wrote the majority opinions in \textit{Adarand} and \textit{Croson}, and the primary dissent in \textit{Metro Broadcasting}—has in the past stated that formal findings are unnecessary.\textsuperscript{165} Because the entities that adopt affirmative action programs in the wake of recent Supreme Court decisions will be on notice to buttress their programs with elaborate findings, the significance of findings in future cases may well dissipate.\textsuperscript{166}

Assuming that some remedial affirmative action programs will be upheld if they are accompanied by adequate findings of particularized past discrimination, the degree to which the Court will permit the use of racial quotas remains another unresolved issue. “Quota” has, of course, become the pejorative term of choice for political opponents of affirmative action.\textsuperscript{167} But quotas have proven to be judicially unpopular as well. In his \textit{Adarand} dissent, Justice Stevens justified voting in favor of the \textit{Adarand} preference despite voting against the \textit{Fullilove} set aside on the grounds that \textit{Fullilove} involved a numerical quota whereas \textit{Adarand} did not.\textsuperscript{168} The \textit{Croson} Court viewed quotas as undesirable because they treat citizens as mere members of a group rather than as individuals.\textsuperscript{169} Further, even the \textit{Metro Broadcasting
majority felt compelled to assert that the preferences and set asides that it was upholding did not constitute quotas. Nevertheless, the Court has been willing to uphold racial quotas on several occasions; and despite the Court's contrary assurances, the "distress sale" set-aside that the Court upheld in Metro Broadcasting appears to have been a quota in every meaningful sense of the term.

The Supreme Court's sometime aversion to quotas is traceable to Justice Powell's opinion in Bakke, where the Court invalidated a sixteen-percent minority preference in a medical school admissions program but nevertheless upheld the use of race as a permissible basis for affirmative action in appropriate cases. Justice Powell opposed ring in judgment) (opposing affirmative action not necessary to compensate actual victims of discrimination, and opposing quotas).

170. See Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 599 (1990). Justices Brennan and Marshall also attempted to recast the Court's general opposition to quotas as opposition to "quota[s] in the invidious sense of a ceiling" that is imposed on minority participation. See Fullilove, 448 U.S. at 521 (Marshall, J., concurring in judgment) (quoting Bakke, 438 U.S. at 375 (opinion of Brennan, J.).

171. The Court upheld the "distress sale" program in Metro Broadcasting, which the dissent characterized as a rigid quota and a 100% set-aside, Metro Broadcasting, 497 U.S. at 650 (O'Connor, J., dissenting), although the majority rejected that characterization. See id. at 599. But cf. Adarand, 115 S. Ct. at 2112-13 (overruling another aspect of Metro Broadcasting, relating to standard of review). In addition, the Court upheld quotas in United States v. Paradise, 480 U.S. 149, 153-66 (1987) (opinion of Brennan, J.), Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 426-40 (1986), and Fullilove, 448 U.S. at 453-54, 468-72 (opinion of Burger, C.J.). But see Sheet Metal Workers, 478 U.S. at 475-81 (opinion of Brennan, J.) (characterizing hiring goals as benchmarks rather than quotas). The Court also upheld the percentage targets used as the basis for the reapportionment plan in United Jewish Orgs. v. Carey, 430 U.S. 144, 155-62 (1977) (opinion of White, J., joined by Stevens, Brennan, and Blackmun, JJ.); id. at 171-79 (Brennan J., concurring in part). It may be that United Jewish Organizations was tacitly overruled in Miller, which reached the opposite result under very similar facts. Whether this seems true or not depends upon how seriously one takes Justice Kennedy's efforts in Miller to distinguish United Jewish Organizations. See infra text accompanying notes 311-13 (discussing distinction between Miller, Shaw, and United Jewish Organizations).

172. Compare Metro Broadcasting, 497 U.S. at 599 (rejecting characterization of "distress sale" program as quota) with id. at 624 (O'Connor, J., dissenting) (characterizing "distress sale" program as quota).


174. A five-justice majority voted to invalidate the particular plan that was before the Court in Bakke, while a different five-justice majority voted to uphold the use of racial preferences in appropriate circumstances. Four justices—Chief Justice Burger, and Justices Stevens, Stewart and Rehnquist—declined to reach the constitutional question, finding that the Davis plan violated Title VI of the Civil Rights Act of 1964, which prohibits federally funded programs from excluding or denying benefits to any person on the grounds of race. See Bakke, 438 U.S. at 412-21 (Stevens, J., concurring in judgment in part and dissenting in part, joined by Burger, C.J., and Stewart and Rehnquist, J.J.). These four justices would have sidestepped the constitutional issue, finding that it was not properly before the Court. See id. at 411-12. The fifth vote to invalidate the plan was provided by Justice Powell, who would have invalidated it on equal protection grounds. See id. at 305-20 (opinion of Powell, J.). Because Justice Powell found the Title VI prohibition to be coextensive with that of the Equal Protection Clause, he found it necessary to reach the constitutional issue. See id. at 281-87. Four justices—Justice Brennan, White, Mar-
rigid quotas but approved of the consideration of race as a factor, favorably citing the Harvard College admissions criteria. Presumably, such opposition to quotas is based upon their mechanistic inflexibility and their potential to generate divisive resentment, both of which may decrease as consideration of race becomes less visible. Nevertheless, both proponents and targets of affirmative action may well secretly favor quotas because they are administratively convenient. Quotas clearly convey the degree of minority representation that is appropriate in particular circumstances, and they provide a safe harbor from potential liability for racial discrimination. Yet quotas also constitute a blatant admission that race is an important social category, thereby belying the aspirational claim that the United States is a colorblind nation. Once again, characterization of an affirmative action program as involving a disfavored quota or a permissible guideline that treats race as a factor is likely to be determined by how a justice otherwise feels about the desirability of the particular affirmative action program at issue.

3. Stigmas, Stereotypes, and Burdens

The question of whether an affirmative action plan stigmatizes or stereotypes either its intended beneficiaries or the innocent whites who are forced to bear its burden is a question that the Supreme Court discusses in virtually all of its affirmative action decisions. Nevertheless, this too appears to be an issue that is of rhetorical, rather than operative, importance. The general stigmatization argument is that affirmative action will ultimately backfire: it will brand

shall, and Blackmun—believed that the preference was valid as a racial classification designed to remedy disadvantages imposed upon minorities by past societal discrimination. See id. at 324-26, 355-62 (opinion of Brennan, J., concurring in judgment in part and dissenting in part, joined by White, Marshall, and Blackmun, J.J.). Because, like Justice Powell, these four justices found the scope of the Title VI prohibition to be coextensive with the Equal Protection Clause, they too deemed it necessary to reach the constitutional issue. See id. Justice White believed that Title VI gave no cause of action to private litigants to enforce its funding restrictions. See id. at 379-87 (opinion of White, J.).

175. See id. at 315-20 (opinion of Powell, J.) (approving of the Harvard plan).

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the intended beneficiaries of an affirmative action plan as inferior because of their inability to compete successfully on the merits; and it will fuel latent racial tensions as innocent whites come to resent having to bear the burdens of affirmative action. A version of this argument was first articulated by Justice Douglas in DeFunis v. Odegaard\(^{177}\) and then reasserted, by Justice Brennan in United Jewish Organizations v. Carey\(^{178}\) and by Justice Powell in Bakke.\(^{179}\) The argument has not been asserted in a case in which it appears to have been dispositive.\(^{180}\) Moreover, to the extent that stigmatization is deemed to be synonymous with racial stereotyping, the Metro Broadcasting Court’s acceptance of both the proffered broadcast diversity rationale and the asserted nexus that exists between station ownership and broadcast diversity seems to have constituted acceptance of a relatively high degree of racial stereotyping.\(^{181}\) In theory, an affirmative action plan can also be invalidated because of the manner in which it

\(^{177}\) DeFunis, 416 U.S. at 340-41 (Douglas, J., dissenting).

\(^{178}\) United Jewish Orgs., 430 U.S. at 172-74 (Brennan, J., concurring in part); see also Bakke, 438 U.S. at 358-62 (opinion of Brennan, J.).

\(^{179}\) See Bakke, 438 U.S. at 298-99 (opinion of Powell, J.).

\(^{180}\) Note, for example, that Justice O’Connor referred to, but the Court did not rely upon, the general stigmatization argument in her opinion invalidating the Richmond set-aside plan in Croson, see Croson, 488 U.S. at 493-94 (opinion of O’Connor, J.) (discussing stigmatization in dicta rather than holding, in a portion of the opinion joined only by Chief Justice Rehnquist and Justices White and Kennedy), or in her opinion dissenting from the Court’s opinion upholding the FCC plans in Metro Broadcasting. See Metro Broadcasting, 497 U.S. at 603-04 (O’Connor J., dissenting) (discussing stigmatization and racial stereotyping in dissent). Moreover, Justice Stevens, who is sensitive to the stigmatization argument, chose not to accept that argument as a basis for invalidating the preferential teacher layoff plan in Wygant. See Wygant, 476 U.S. at 313-19 (Stevens, J., dissenting). In Adarand, Justice O’Connor argued that strict scrutiny was necessary to distinguish legitimate affirmative action programs from illegitimate racial stereotyping, but she did not place any particular stress on the danger of stigmatization. See Adarand, 115 S. Ct. at 2112, (quoting Croson, 488 U.S. at 493 (plurality opinion of O’Connor, J.) (discussing need for strict scrutiny)).

\(^{181}\) See Metro Broadcasting, 497 U.S. at 566-79 (minority ownership will promote broadcast diversity). But see id. at 579-84 (holding that an acceptance of a nexus between broadcast ownership and broadcast diversity does not constitute racial stereotyping).
stigmatizes whites.\textsuperscript{182} Again, however, no plan has actually been found invalid because of the imposition of such a stigma.\textsuperscript{183}

The degree of burden that an affirmative action plan places on innocent whites is likely to be a significant factor.\textsuperscript{184} \textit{Metro Broadcasting} upheld a plan that interfered only with the prospective expectations of innocent whites and did not burden whites with any change in the status quo,\textsuperscript{185} while \textit{Wygant v. Board of Education}, invalidated a plan that called for the layoff of white teachers rather than minority teachers with less seniority.\textsuperscript{186} Although the distinction between frustrated expectations and reduction of the status quo may not ultimately have much meaning,\textsuperscript{187} some justices have treated it as outcome-de-
Among currently sitting justices, Chief Justice Rehnquist has viewed the distinction as dispositive, and Justice O'Connor has endorsed the distinction without endorsing its dispositive character. In addition, the Court's Title VII affirmative action cases indicate that the Court is quite attentive to both the nature and scope of the burden imposed upon innocent whites, including whether the burden is voluntarily assumed or court-imposed.

It is unclear whether the court will ultimately prove more receptive to voluntary or court-ordered affirmative action plans. The Court's Title VII cases state that, for statutory purposes, voluntary affirmative action plans can be implemented free from restrictions that would apply to court-ordered plans. The issue is most likely to

it is probably true that deterioration of the status quo is psychologically viewed as more serious than lost expectations. See, e.g., Lon L. Fuller & William R. Perdue, Jr., The Reliance Interest in Contract Damages I, 46 Yale L.J. 52, 53-57 (1936) (asserting that under "ordinary standards of justice," restitution and reliance claims are stronger than lost expectation claims). Nevertheless, although differential levels of reliance might arguably accompany the two types of deprivations, reliance would seem to be unjustifiable whenever there is advance notice of a future deprivation, as there is under most affirmative action plans. Moreover, it is unclear why the legislature should not be able to conclude that the public interest in promoting affirmative action outweighs the public interest in protecting the reliance of its citizens.

188. Several justices have stressed their opposition to the use of layoffs, as opposed to prospective hiring goals, in affirmative action plans. See, e.g., Wygant, 476 U.S. at 294-95 (White, J., concurring in judgment); id. at 282-84 (opinion of Powell, J., joined by Burger, C.J., and Rehnquist, J.); cf. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 574-76 (1984); (majority opinion of White, J., joined by Burger, C.J., and Powell, Rehnquist, and O'Connor, JJ.) (arguing in favor of protecting seniority). But see Firefighters, 478 U.S. at 531-35 (White, J., dissenting) (arguing that Title VII precludes prospective race-conscious promotions when not necessary to benefit actual victims of discrimination); id. at 555-45 (Rehnquist, J., dissenting); see also Weber, 443 U.S. at 208 (majority opinion of Brennan, J., joined by Stewart, White, Marshall, and Blackmun, JJ.) (emphasizing that preferential training plan did not require discharge of white workers).

189. See Firefighters, 478 U.S. at 535-45 (Rehnquist, J., dissenting) (arguing that Title VII precludes prospective race-conscious promotions when not necessary to benefit actual victims of discrimination); Wygant, 476 U.S. at 282-84 (opinion of Powell, J., joined by Rehnquist, C.J.) (expressing aversion to layoffs); cf. Stotts, 467 U.S. at 574-76; (majority opinion of White, J., joined by Rehnquist, J.) (arguing in favor of protecting seniority under Title VII).

190. See Wygant, 476 U.S. at 293-94 (O'Connor, J., concurring) (discussing layoff provisions and hiring goals).

191. See Johnson v. Transportation Agency, 480 U.S. 616, 637-40 (1987) (considering burden on innocent whites); Firefighters, 478 U.S. at 515-24 (remedial powers of court in approving burdens contained in voluntary consent decree are broader than court's power to issue remedy itself); Weber, 443 U.S. at 208-09 (Title VII permits voluntary affirmative action plans that do not unnecessarily trammel interest of whites); see also Wygant, 476 U.S. at 317-18 (Stevens, J., dissenting) (emphasizing the fact that the burden on whites was voluntarily assumed through full participation in procedures by which the plan was adopted).

192. See Johnson, 480 U.S. at 632-33 (voluntary affirmative action plan can be adopted without prima facie showing of past discrimination under Title VII); Firefighters, 478 U.S. at 515-30 (court-approved consent decree can exceed scope of permissible court-ordered remedies under Title VII); Weber, 443 U.S. at 208-09 (adjudicated Title VII violation is not a prerequisite to voluntary affirmative action plan as it would be for court-imposed remedy).
be relevant with respect to the burden borne by innocent whites. If a burden has been voluntarily assumed, it may be acceptable without evidence of prior discrimination or narrow tailoring even though a court could not have imposed that burden as part of a remedial order in the absence of such a voluntary assumption.¹⁹³

The voluntary affirmative action issue is directly related to the often-imposed requirement that the affirmative action plan be justified as a remedy for part discrimination. If it turns out that acceptable affirmative action in particular contexts is limited to plans that seek to remedy the effects of past discrimination,¹⁹⁴ evidence of past discrimination may be required before voluntary affirmative action is permitted. This view was rejected by the Court in *United Steelworkers of America v. Weber*,¹⁹⁵ which permitted voluntary affirmative action plans even in the absence of a showing of prior unlawful discrimination.¹⁹⁶ Nevertheless, the holding of *Weber* is rather fragile. Four justices—Chief Justice Rehnquist, and Justices White, O'Connor, and Scalia—have expressed the view that *Weber* was incorrectly decided and that voluntary affirmative action should not be permitted in the absence of grounds for court-ordered affirmative action.¹⁹⁷ In addition, Justices Kennedy and Thomas, who were not on the Court when *Weber* was decided, have never voted in favor of an affirmative action program.¹⁹⁸ This creates a five-justice majority—consisting of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas—who may be willing to disallow the voluntary affirmative action that the Supreme Court authorized in *Weber*. Moreover, these are the same five justices who comprised the majority in *Adarand*,¹⁹⁹ and their willingness to overrule *Metro Broadcasting*²⁰⁰ indicates that they

¹⁹³. See *Wygant*, 476 U.S. at 317-18 (Stevens, J., dissenting) (emphasizing that the burden on whites was voluntarily assumed by full participation in adoption procedure).

¹⁹⁴. See supra text accompanying notes 143-166 (discussing permissible justification for affirmative action).


¹⁹⁶. See *Weber*, 443 U.S. at 208-09 (holding that prior unlawful discrimination not precondition to voluntary affirmative action); see also *Johnson*, 480 U.S. at 632-33 (extending *Weber* to municipal employers).

¹⁹⁷. See *Johnson*, 480 U.S. at 647-57 (O'Connor, J., concurring in judgment); id. at 669-77 (Scalia, J., dissenting, joined by Rehnquist, C.J., and White, J.).

¹⁹⁸. See supra text accompanying notes 91-95 (listing votes of justices in affirmative action cases).


²⁰⁰. See id. at 2112-13 (overruling *Metro Broadcasting*).
may also be willing to overrule Weber. In fact, it may be that Adarand itself renders unconstitutional any reading of Title VII that does not insist on demonstrable prior discrimination as a prerequisite to voluntary affirmative action. In addition, to the extent that Weber was rooted in the belief that affirmative action is subject to less demanding scrutiny because of its benign nature, Weber seems to be in direct conflict with the Adarand holding that the benign nature of affirmative action does not provide immunity from strict scrutiny.

Finally, it is interesting to note that the Court first flirted with and then rejected the notion that no race-conscious burden could ever be imposed upon innocent whites unless necessary to provide a remedy to an actual victim of discrimination. An actual-victim limitation

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201. For the general views of Justices O'Connor and Kennedy on the doctrine of stare decisis, see id. at 2114-17. It is not clear what inference should be drawn from the refusal of Chief Justice Rehnquist and Justices Scalia and Thomas to join the stare decisis portion of Justice O'Connor's opinion in Adarand, but it is likely that those three justices are more rather than less willing to overrule cases than are Justices O'Connor and Kennedy. Both Justices O'Connor and Kennedy were unwilling to overrule Roe v. Wade in the joint opinion that they authored with Justice Souter in Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791, 2804 (1992). This was true despite their political opposition to abortion. See Adarand, 115 S. Ct. at 2116 (explaining the decision not to overrule Roe in Casey). Justice O'Connor has in the past stated that she disagrees with the holding of Weber but that it is now so well settled that she would not overrule it. See Johnson, 480 U.S. at 647-48. That statement, however, was made in 1987, prior to Justice O'Connor's opinions in Adarand, Metro Broadcasting, and Croson; and it is not clear that she will continue to embrace the position that she adopted in Johnson.

202. The financial incentive at issue in Adarand encouraged private parties to consider race in the selection of subcontractors. See Adarand, 115 S. Ct. at 2102-04 (describing Adarand's affirmative action program). If such official encouragement of private race-consciousness in the absence of a demonstrated need to remedy prior discrimination violates the Equal Protection Clause in the Adarand bidding context, see id. at 25-26 (requiring strict scrutiny of Adarand financial incentive plan), it may be that the similar official encouragement to engage in race-conscious employment decisions in order to avoid a potential Title VII violation would also violate the Equal Protection Clause—at least in the absence of a showing that such race consciousness was a narrowly tailored remedy for past discrimination. This is an issue that the Supreme Court did not address in Weber. See United Steel Workers of Am. v. Weber, 443 U.S. 193, 208-09 (1979) (declining to demarcate line between permissible and impermissible voluntary affirmative action plans).

203. See Weber, 443 U.S. at 200-04, 208-09 (focusing on benign nature of affirmative action plan at issue).

204. See Adarand, 115 S. Ct. at 15-22.

205. See Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 515-28 (1986) (authorizing use of race-conscious remedies in Title VII consent decree when not necessary to provide remedy to actual victims of discrimination); Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 471-75 (1986) (opinion of Brennan, J., joined by Marshall, Blackmun and Stevens, JJ.) (arguing that Title VII authorized court to order race-conscious remedies not intended to provide make-whole relief to actual victims of discrimination); id. at 483-84 (Powell, J., concurring in part and concurring in judgment) (arguing that Title VII authorized court to order race-conscious remedies not intended to provide make-whole relief to actual victims of discrimination, at least where defendant's conduct was egregious). But see Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 578-83 (1984) (suggesting that race-conscious Title VII remedies are limited to actual victims of discrimination).
would constitute a rejection of the concept of affirmative action. It would rely solely on tort-type remedies to compensate victims of discrimination, without any effort to overcome the limitations of the tort system in dealing with widespread undifferentiated injuries. Nevertheless, at least two justices currently on the Court appear to approve of the actual-victim limitation: Justices Rehnquist and Scalia. In addition, up to three other justices—Justices O'Connor, Kennedy, and Thomas—may come to adopt the actual-victim view, as evidenced by the fact that they always vote against affirmative action.

4. The Doctrinal Effect of Adarand

Justice O'Connor's majority opinion in Adarand makes it clear that strict scrutiny now applies to all race-based affirmative action programs, whether federal, state, or local. It is less clear, however, whether the Adarand escalation from intermediate to strict scrutiny for congressional programs—and the analogous Croson escalation for state and local programs—will have any significant doctrinal effect. As has been discussed, if strict scrutiny remains "fatal in fact," this escalated scrutiny will indeed prove to be significant in those cases to which it applies. It will be outcome determinative, and affirmative action initiatives such as the Metro Broadcasting preference and the Fullilove set aside will no longer be constitutional. However, Justice O'Connor's assurance that strict scrutiny is no longer fatal scrutiny,
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raises the possibility that at least five members of the present Court will vote to uphold some affirmative action programs under Adarand's new strict scrutiny standard.\(^{213}\) Regardless of what strict scrutiny comes to mean, however, it is likely that many existing affirmative action programs can be restructured so that they will remain constitutionally permissible even after Adarand and Croson.

The strict scrutiny that the Supreme Court invoked in Adarand and Croson applies only to affirmative action programs that intentionally utilize racial classifications to advance their objectives.\(^ {214}\) This is because under Washington v. Davis,\(^ {215}\) the Equal Protection Clause prohibits only intentional discrimination; it does not prohibit the use of race-neutral classifications that have an unintended racially disparate impact.\(^ {216}\) Typically, pre-Adarand affirmative action programs contained explicit racial preferences, thereby providing strong evidence of intentional discrimination within the meaning of Washington v. Davis.\(^ {217}\) Yet, if those programs are restructured in a way that accords preferential treatment to individuals on the basis of social or economic disadvantage, without explicit reference to race, those pro-

\(^{213}\) See supra text accompanying notes 120-42 (discussing whether Adarand strict scrutiny is fatal in fact).

\(^{214}\) The Supreme Court has held that gender-based classifications are subject to intermediate scrutiny rather than the strict scrutiny that is normally applied to race-based classifications. See Craig v. Boren, 429 U.S. 190 (1976). As a result, Adarand does not require the application of strict scrutiny to gender-based affirmative action programs as it does for race-based programs. Justice Stevens pointed out in his Adarand dissent that this creates the perverse result of making it easier under the Equal Protection Clause to adopt a valid gender affirmative action plan than it is to adopt a valid racial affirmative action plan, even though the primary purpose of the Equal protection Clause was to end the history of discrimination against blacks. See Adarand, 115 S. Ct. at 2122 (Stevens, J., dissenting). This anomaly takes on added potential significance when one recalls that Justice O'Connor—the author of the majority opinion in Adarand—has never voted to uphold a non-judicial race-based affirmative action program on the merits. The only affirmative action program that she has voted to uphold on the merits was presented to the Court as a gender-based program. See Johnson v. Transportation Agency, 480 U.S. 616, 647 (1987) (O'Connor, J., concurring in judgment).


grams should not be subject to heightened scrutiny under the Equal Protection Clause, because they will not utilize racial classifications.

Restructuring a race-based affirmative action program to be a disadvantage-based program will inevitably have a racially disparate impact, because racial minorities are disproportionately represented among those who suffer social and economic disadvantage.\textsuperscript{218} In \textit{Personnel Administrator v. Feeney},\textsuperscript{219} however, the Supreme Court held that mere knowledge of such disparate impact was not sufficient to establish the type of intentional discrimination that \textit{Washington v. Davis} demands to trigger strict scrutiny under the Equal Protection Clause. \textit{Feeney} held that the intent necessary for an equal protection violation was "because of" actuating intent, not merely "in spite of" tolerance of a known consequence.\textsuperscript{220} It would seem to follow, therefore, that a restructured affirmative action plan that was genuinely intended to aid those who are socially or economically disadvantaged would be constitutional despite its racially disparate impact, while a plan that was drafted in race-neutral terms relating to "disadvantage," but that was really intended to aid minorities because of their race, would not be constitutional. Most intentional efforts to aid racial minorities stem from the disproportionate levels of disadvantage being suffered by racial minorities. Accordingly, most affirmative action plans can honestly be described as plans that rest on an intent that is constitutionally permissible under \textit{Washington v. Davis} and \textit{Feeney}. Indeed, the long history of the disadvantages suffered by racial minorities in the United States is central to what it means to be a racial minority in the United States. It is what accounts for the cultural significance of race, and it is what makes race different from eye color or hair color. As a result, it is not clear that the contending conceptions of intent that arguably lie beneath a disparate-impact classification are metaphysically different in the context of race.\textsuperscript{221} It is clear, however,

\begin{itemize}
\item \textsuperscript{218} Although restructured programs are likely to have a racially disparate impact, it is also likely that, in absolute terms, many such programs will provide more benefits to whites than to racial minorities.
\item \textsuperscript{219} Personnel Adm'r v. Feeney, 442 U.S. 256, 278-80 (1979).
\item \textsuperscript{220} See \textit{id.} Although \textit{Feeney} was a gender discrimination case, \textit{see id.} at 261-64 (describing gender-based challenge to veterans preference program), its required proof of intent seems equally applicable to racial discrimination.
\item \textsuperscript{221} The difference between discriminatory intent and discriminatory effect is ultimately problematic. See \textit{infra} note 320 (discussing difference between discriminatory intent and effect).
\end{itemize}
that most affirmative action programs can, with sincerity, be recast as programs that are designed to assist disadvantaged individuals. 222

Title VII poses a special problem for affirmative action plans that are restructured to be race-neutral. In Griggs v. Duke Power Co., 223 the Supreme Court held that Title VII—unlike the Equal Protection Clause—does prohibit the use of classifications that have a racially disparate impact. As a result, it might be that a restructured, race-neutral affirmative action program that did not violate the Equal Protection Clause of the Constitution would nevertheless violate Title VII. Such a result, however, seems ultimately unsound.

The Supreme Court held in Weber 224 that race-conscious affirmative action programs do not violate Title VII. It would seem to follow, therefore, that race neutral affirmative action programs with a racially disparate impact would also be valid under Title VII. The problem is that the reasoning of Weber is in tension with the reasoning of Adarand. In Weber, the Court concluded that the benign nature of affirmative action was a sufficient justification for the racially disparate impact of an affirmative action program that did not excessively burden whites. 225 As has been discussed, 226 it may be that the Weber reading of Title VII does not survive Adarand, precisely because the present Court no longer views the distinction between benign and invidious discrimination as dispositive. It is more likely, however, that Title VII will be construed to permit affirmative action programs that are permissible under the equal protection clause.

To the extent that affirmative action programs are congressional programs—such as the programs at issue in Adarand, Metro Broadcasting and Fullilove—they should be valid under Title VII because it is difficult to conclude that Congress intended Title VII to invalidate its own programs. To the extent that state and local programs mirror

222. Affirmative action is sometimes criticized as benefiting those racial minorities who are relatively prosperous rather than those racial minorities who are disadvantaged. At any given level of socio-economic accomplishment, however, it seems clear that racial minorities are disadvantaged relative to whites at that same level of accomplishment. Accordingly, this objection to affirmative action confuses affirmative action programs with subsistence income redistribution programs. If affirmative action is viewed as a remedy for racial discrimination, it would not seem to matter whether the beneficiaries of an affirmative action program are indigent or wealthy.


226. See supra text accompanying notes 194-204 (discussing the impact of Adarand on Weber).
congressional programs in the way that the Croson set aside mirrored the Fullilove set aside, it is similarly difficult to conclude that Congress intended Title VII to invalidate those programs, precisely because of their similarity to the congressional programs. To the extent that affirmative action programs are private, voluntary programs to which the Equal Protection Clause does not apply, the Weber Court’s finding that Congress did not intend Title VII to preclude such programs would still seem to be controlling. If the Supreme Court did not interpret Title VII in these ways, Congress could amend the statute, in a way that it cannot amend the Equal Protection Clause, to permit the desired degree of affirmative action. It is only if the Supreme Court is willing to hold that a Weber-type reading of Title VII—a reading that allows benign affirmative action—is itself a violation of the Equal Protection Clause that restructured programs would be invalid. Such a holding, however, would be a peculiar contortion of the Equal Protection Clause. The Supreme Court would be substituting a disparate impact standard, in the context of affirmative action, for the Washington v. Davis intentional discrimination standard, on which it insisted in the context of invidious discrimination. It is difficult to see how the constitutional standard applied to a discrimination remedy could properly be more demanding than the standard applied to the discrimination itself.

The uncertainty that surrounds Justice O’Connor’s new strict scrutiny makes it difficult to predict what doctrinal impact Adarand will ultimately have. If strict scrutiny results in the unsalvageable invalidation of affirmative action programs that were valid prior to Adarand, the doctrinal effect of the decision will have been significant. If, however, Adarand strict scrutiny turns out to be largely a replication of pre-Adarand intermediate scrutiny,227 or if pre-Adarand affirmative action programs can be salvaged by restructuring them as race-neutral programs, the doctrinal effect of the case will prove to be negligible. Regardless of the doctrinal effect that Adarand ultimately has, the case has already had a significant rhetorical effect. Adarand signifies a political alignment of the Supreme Court with the increasingly conservative mood of the nation concerning the issue of affirmative action.228 Whether this constitutes appropriate or inappropriate

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227. See supra text accompanying notes 141-42 (suggesting that non-fatal strict scrutiny may be the functional equivalent of intermediate scrutiny).

228. As has been noted, the increasing conservatism of the American public seems to rest on a deep ambivalence about affirmative action. The American public seems to favor some ill-de-
conduct on the part of the Supreme Court is infinitely debatable. But what is clear is that the Adarand majority—like a significant segment of the electorate—has a conception of contemporary race relations in the United States that is difficult to defend.

II. DISCRIMINATION

The Supreme Court's decision in Adarand effectively proclaims that the history of pervasive racial discrimination in the United States has now come to an end, thereby rendering continued use of affirmative action remedies for such discrimination inappropriate. The Court still professes to recognize a compelling governmental interest in the provision of remedies for past discrimination, but that recognition has now become more hypothetical than authentic. In the Court's view, present instances of racial injustice are either isolated acts of unlawful discrimination, for which isolated remedies are preferable to systemic affirmative action, or they are the effects of general societal discrimination, which is too subtle and diffuse to be legally cognizable. This is an artificial view, born of extravagant commitment to doctrinal abstraction and considered indifference to actual experience. Nevertheless, the Court's depiction of contemporary culture as having evolved to a post-discriminatory stage of social development not only serves as the basis for the Adarand decision, but it also underlies the other race cases that the Court decided during its 1994 Term. The Court has seemingly determined that resolution of the nation's continuing race-relations problems lies beyond the responsibility and the competence of government, and that efforts to address those problems are both unnecessary and unconstitutional.

A. Adarand

The facts of the Adarand case are straightforward. A private general contractor was awarded a prime contract by the Department of Transportation to construct a highway in Colorado. The prime contractor selected a Latino subcontractor to perform certain guardrail work for the highway project, even though that subcontractor had submitted the second lowest bid for the work, rather than the lowest bid. The prime contractor selected this contractor because a provi-
sion in its contract with the Department of Transportation provided for a bonus to the prime contractor equal to ten percent of the value of any subcontracts that the prime contractor awarded to a subcontractor certified by a specified state or federal agency as being socially and economically disadvantaged. The bonus was subject to certain specified ceilings. Because the Latino subcontractor was certified as disadvantaged and the lowest bidder was not, the bonus enabled the general contractor to earn more money by awarding the guardrail contract to the Latino subcontractor.230

The Department of Transportation in its prime contract included this bonus provision pursuant to federal statutes and agency regulations that required most federal agency contracts to include such clauses as a means of assisting disadvantaged small businesses.231 The Small Business Act232 established a national policy of assisting small business enterprises, including small businesses that were owned and controlled by socially and economically disadvantaged individuals. The Act defined "socially disadvantaged individuals" as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities,"233 and it defined "economically disadvantaged individuals" as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged."234 The Act set a goal of awarding to such disadvantaged enterprises "not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year."235

In addition, the Surface Transportation and Uniform Relocation Assistance Act of 1987236—the statute under which the contract at issue in Adarand was awarded—required that at least ten percent of the federal highway funds appropriated by that Act go to enterprises

231. See id. at 2102 (recognizing general federal contracting requirement).
235. Id. (quoting 15 U.S.C. § 644(g)(1)). The five percent minimum applicable to all affected federal programs is stated to be a goal rather than a requirement. See id.
owned and controlled by socially and economically disadvantaged individuals. The Surface Transportation Act adopted the definitions of social and economic disadvantage that were contained in the Small Business Act. The Surface Transportation Act also provided a mechanism for state agencies to certify small business concerns as disadvantaged, thereby supplementing the Small Business Act mechanisms for federal agency certification.

Nothing in the affirmative action programs for socially and economically disadvantaged small businesses that has been described thus far poses any equal protection problem. Equal protection difficulties are raised by the fact that both the Small Business Act and the Surface Transportation Act presume that racial minorities are disadvantaged. The Small Business Act requires federal prime contracts to state that "[t]he contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities or any other individual found to be disadvantaged by the [Small Business] Administration." The Surface Transportation Act also adopts the Small Business Act presumption. The presumptions of minority disadvantage were not conclusive, but rather were rebuttable presumptions. Individuals who were not members of the enumerated groups could nevertheless prove that they were entitled to certification as disadvantaged, and third parties such as disappointed bidders could present evidence to rebut the presumption of disadvantage for particular individuals who were members of the enumerated groups. It is only this rebuttable presumption of minority disadvantage that gives rise to equal protection concerns.

Under the statutory scheme, both social and economic disadvantage must be established before a bonus becomes available. The rec-

238. Id. § 101(2)(A).
239. See Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2103-04 (1995) (citing 23 U.S.C. § 101(4)). The ten percent minimum applicable to Department of Transportation contracts issued under the Surface Transportation Act appears to be a statutory requirement rather than merely a goal. See id. at 2103.
240. See id. at 2102 (quoting 15 U.S.C. § 637(d)(3)(C)(ii)). Small Business Administration regulations contain additional, similar presumptions adopted by the agency to facilitate implementation of the Small Business Act. See id. at 2102-03 (citing regulations).
241. See id. at 2103 (quoting 23 U.S.C. § 101(2)(B)). The Surface Transportation Act also adds that "women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection." See id. (quoting 23 U.S.C. § 101(2)(B)).
242. See id. at 2103-04 (presumption of disadvantage was rebuttable (citing 49 C.F.R. § 23.69 (1994))).
ord in Adarand does not disclose the degree to which the statutory presumption, as opposed to direct proof, was responsible for certification of the Latino subcontractor as disadvantaged. Nevertheless, the disappointed low bidder filed suit in federal district court challenging the constitutionality of the affirmative action incentive program that had cost it the desired guardrail subcontract. The United States District Court for the District of Colorado and the United States Court of Appeals for the Tenth Circuit rejected the challenge and upheld the affirmative action program on the government’s motion for summary judgment, after applying an intermediate-scrutiny standard of review. Although the essence of the challenge in the lower courts concerned only the power of an agency to exceed congressional affirmative action goals without specific findings of discrimination, the Supreme Court used the case as an opportunity to announce a new standard of strict scrutiny for congressionally authorized affirmative action programs, and seemingly to invalidate a central aspect of the program at issue in Adarand. Even if the Adarand program is itself upheld on remand, the Supreme Court presumably intended to preclude some affirmative action programs that were permissible under the intermediate scrutiny standard that the Court overruled.

B. Presumption

The feature of the affirmative action program at issue in Adarand that made it constitutionally suspect was the presence of the rebuttable presumption that racial minorities are socially and economically

243. See id. at 2103, 2118 (application of presumption unclear). Presumably, this is one of the issues that the lower courts will have to clarify on remand. See id. at 2118.

244. See id. at 2104 (citing Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240 (D. Colo. 1992), aff’d, 16 F.3d 1537, 1547 (10th Cir. 1995)).

245. See id. at 2131 (Souter, J., dissenting) (describing challenges to findings in lower courts). In fact, after the case was argued in the Supreme Court, there was speculation that the Court would have to dispose of the case on justifiability grounds because it could not appropriately address the merits of the affirmative action presumption. See Linda Greenhouse, Detours on the Road to Legal Precedents, N.Y. TIMES, Feb. 12, 1995, § 4, at 3.

246. It is possible that on remand the Adarand program will be able to survive the new form of strict scrutiny that the Court states is not necessarily fatal. See Adarand, 115 S. Ct. at 2117 (asserting that strict scrutiny is not “fatal in fact”). But see supra text accompanying notes 123-142 (discussing whether strict scrutiny is “fatal in fact”).

247. In United States v. Lopez, 115 S. Ct. 1624 (1995), the same five-justice majority that decided Adarand stressed that, in order to be meaningful, a legal standard must have the capacity to invalidate some imaginable legislative enactment that fails to satisfy the standard. See id. at 1632-33.
disadvantaged.\textsuperscript{248} Because the presumption was available to minority contractors but not to white contractors, it constituted a racial classification, which the Supreme Court found to be suspect under the equal protection component of the Fifth Amendment.\textsuperscript{249} Although the congressional presumption seems to be self-evidently valid, the Court rejected this self-evident validity for constitutional purposes, thereby creating an artificial disjunction between the world of ordinary experience and the world that is relevant to constitutional analysis. In fact, it is precisely because the statutory presumption of minority disadvantage seems so reasonable that the Supreme Court’s strict scrutiny of that presumption seems so striking. In essence, the Supreme Court appears to have held in \textit{Adarand} that it is unconstitutional to believe that racial minorities continue to be socially and economically disadvantaged in contemporary culture.

A legal presumption is an evidentiary short cut. It is a generalization about the world that enables a legal fact finder to infer a factual conclusion from a proven premise with which the conclusion is highly correlated.\textsuperscript{250} When the correlation is very high, the presumption is sometimes deemed conclusive or irrebuttable.\textsuperscript{251} Realistically, such irrebuttable presumptions reflect more than the mere belief in a high correlation between premise and conclusion. Irrebuttable presumptions also reflect a policy preference in favor of attaching a legal consequence to the premise conduct even in those marginal cases where the premise and the conclusion do not correlate.\textsuperscript{252}

When the correlation between premise and conclusion is less high, or the policy preference underlying a presumption is less strong, the presumption may be rebuttable rather than conclusive. This means that proof of the premise will permit inference of the conclusion, but that additional factual evidence will be considered in determining whether the premise actually correlates with the conclusion in that particular case, notwithstanding the correlation that is believed to exist in the general case.\textsuperscript{253} Where a presumption is rebuttable rather than conclusive, the presumption does not constitute a rule of deci-


\textsuperscript{249} See \textit{id.} at 2112-13 (holding strict scrutiny applicable).


\textsuperscript{251} See \textit{id.} at § 342 (discussing conclusive presumptions).

\textsuperscript{252} See \textit{id.} at §§ 342, 343 (discussing reasons for creation of presumptions).

\textsuperscript{253} See \textit{id.} at §§ 342, 344 (discussing effect of presumptions in civil cases).
sion, but merely constitutes a rule governing the burden of proof. The rebuttable presumption, however, can still be dispositive in those cases where the relevant factual issue is by its nature incapable of proof.

The Adarand decision involved a congressional presumption of minority disadvantage embodied in the Small Business and Surface Transportation Acts, which the Supreme Court held to be constitutionally suspect. The presumption reasoned from the premise of racial minority status to the conclusion of social and economic disadvantage by relying on both the history of past discrimination to which minorities have been subject, and the present skew in the distribution of societal resources that disfavors racial minorities. It was a rebuttable presumption, rooted in particular beliefs about the causal connection between the history of racial discrimination in the United States and the lingering effects of past discrimination in contemporary culture.

In civil cases that are governed by the preponderance standard of proof, a presumption is valid as a matter of evidentiary law so long as the connection between the premise and the conclusion is more likely to be true than false. That standard certainly seems to be satisfied with respect to the congressional presumption of minority disadvantage. In terms of factual correlation, there is nothing controversial about the presumption. Members of racial minority groups are statistically worse off than whites at every socio-economic level. Even Justice O'Connor's majority opinion recognized the "unfortunate reality" that there presently remain lingering effects of past discrimina-

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254. See id.
255. See id.
256. See supra text accompanying notes 234-36.
258. This is the relevance of the extensive legislative history to which Justice Stevens referred, that caused him to vote in favor of the Adarand preference even though he had voted against the minority preference in Fullilove. See id. at 2130 (Stevens, J., dissenting) (citing legislative history).
259. See 2 STRONG ET AL., supra note 244, §§ 342, 344 (discussing effect of presumptions in civil cases).
260. See id. at 2135-36 (Ginsburg, J., dissenting) (citing advantages that whites have over racial minorities in the distribution of societal resources). See generally, Spann, supra note 5, at 120-24 (discussing the statistical disadvantage of racial minorities with respect to matters including income, employment, health, crime, and political power).
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Affirmative Action and Discrimination, and Justice Ginsburg offered additional elaboration on the subtle forms of discrimination that continue to plague racial minorities. Moreover, because the presumption was rebuttable, it could be displaced in particular cases by evidence that particular instances of minority disadvantage were not the result of past discrimination but resulted from some other cause. Technically, the congressional presumption did nothing more than allocate the initial burden of proof with respect to the issue of minority disadvantage; and in so doing, it easily seems to satisfy the evidentiary criteria for a valid presumption.

Controversy concerning the congressional presumption stems not from its evidentiary nature but from its policy implications. The connection between past discrimination and present disadvantage, while undeniable in the abstract, is something that is often incapable of direct proof in particular cases, because the diverse effects of past discrimination have generalized throughout the society in ways that are pervasive yet undifferentiated. It is typically impossible to prove which individual acts of prior discrimination are responsible for which particular instances of present disadvantage. As a result, the congressional presumption, while technically doing nothing more than allocating the initial burden of proof with respect to the issue of social and economic disadvantage, has substantive impact, because the allocation of the burden of proof will often be dispositive. In adopting its presumption, therefore, Congress was adopting a legislative policy with respect to that class of cases in which direct proof of discrimination-produced minority disadvantage was unavailable. In such cases, Congress chose to recognize and attempt to remedy the continuing effects of what the Supreme Court has denominated "general societal discrimination."

When the congressional presumption is viewed in this light, the Supreme Court’s actions in Adarand become doctrinally curious. There is no basis for rejecting the congressional presumption on evi-

261. See Adarand, 115 S. Ct. at 2117 (“The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.”).

262. See id. at 2135-36 (Ginsburg, J., dissenting) (noting subtle forms of discrimination to which racial minorities remain subject).

dentary grounds, because the correlation between minority status and present disadvantage is high enough to satisfy the preponderance standard that applies in a civil affirmative action case. Accordingly, what the Supreme Court must have been doing in *Adarand* was rejecting the congressional policy preference favoring affirmative action in cases where particularized proof is unavailable. In essence, the Supreme Court replaced the congressionally adopted rebuttable presumption that minorities are disadvantaged in general-societal-discrimination cases with an irrebuttable presumption of its own that minorities are *not* disadvantaged in such cases. The Supreme Court's presumption is irrebuttable precisely because the Court refuses to recognize general societal discrimination as legally relevant.²⁶⁴ Although the Court disagreed with the legislative policy preference that was embodied in the congressional presumption, Supreme Court disagreement should be inconsequential. The policy preference underlying the congressional presumption is legislative rather than judicial in nature; it concerns the politically appropriate allocation of societal resources, which is an issue over which the politically accountable Congress has greater relative institutional competence than the politically insulated Supreme Court.

The reason that the Supreme Court rejected the congressional presumption is that the Court has adopted a theoretical vision of the world, where racial minorities are *not* disadvantaged. In an abstract doctrinal sense, the repeal of segregation laws, and the concomitant enactment of antidiscrimination laws, transformed the United States from a discriminatory culture into a post-discriminatory culture. Because the culture is now officially race-neutral, there can no longer exist in the United States any general societal discrimination of sufficient magnitude to be legally cognizable. And although bad actors may still commit occasional acts of unlawful discrimination,²⁶⁵ those are discrete, individualized acts in which the society at large shares no culpability. Indeed, the society at large cannot be implicated in those acts, precisely because the society at large has made them unlawful. To the extent that lingering effects of past discrimination persist into the present,²⁶⁶ those effects are too subtle, and their connection with

²⁶⁴. See cases cited *supra* note 263 (illustrating the Supreme Court's refusal to recognize the relevance of general societal discrimination).

²⁶⁵. See *Adarand*, 115 S. Ct. at 2117 (conceding the continued existence of racial discrimination).

²⁶⁶. See id. (conceding the existence of lingering effects of past discrimination).
past discrimination too attenuated, to serve as the basis for legal recognition in the absence of some connection to a more particularized act of discrimination. To the extent that purely private conduct is responsible for minority disadvantage, such conduct is not unconstitutional and at times is even protected by the associational safeguards of the Constitution.267 Accordingly, affirmative action intended to remedy general societal discrimination is inappropriate—because there is no longer any general societal discrimination to remedy.268

This formalist vision of the world is, of course, artificial, and its contrast to the non-abstract world of actual resource allocation is jarring. The continuing statistical disadvantage of racial minorities in almost every area of social and economic life makes the artificiality of the Supreme Court’s formal vision starkly apparent.269 Moreover, the Court’s vision feels contrived. It is precisely the same elevation of form and disregard of substance that permitted the Court in Plessy to conclude that separate-but-equal public facilities did not violate the Equal Protection Clause of the Fourteenth Amendment, even though the statute at issue in Plessy had both a discriminatory purpose and effect.270

If Congress had adopted the presumption of minority disadvantage when it adopted the Fourteenth Amendment in 1868,271 the Court presumably would not have questioned the validity of the congressional presumption.272 The Civil War would recently have ended, slavery would recently have been abolished, and Congress would have adopted a series of Reconstruction statutes and constitutional amend-

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267. See NAACP v. Alabama, 357 U.S. 449, 460-63 (1958) (holding that freedom of association is protected by the First and Fourteenth Amendments to the Constitution).
268. See cases cited supra note 263 (citing cases stating that affirmative action is unavailable to remedy general societal discrimination).
269. See supra note 260 (discussing statistical disparities between minorities and whites).
270. See Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding racially segregated public facilities under separate-but-equal doctrine). But see id. at 557-64 (Harlan, J., dissenting) (noting actual discriminatory purpose of statute at issue).
271. U.S. Const. amend. XIV (prohibiting states from denying to any person the equal protection of the laws).
272. In fact, the legislative history of the Reconstruction legislation that was enacted contemporaneously with the Fourteenth Amendment did contain such presumptions. See Eric Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 753, 755-83 (1985) (discussing the legislative history of Reconstruction legislation). The contending positions in the congressional debates that surrounded the Reconstruction legislation were strikingly similar to the contemporary debate surrounding affirmative action. See id at 755. Nevertheless, the Supreme Court did not question the validity of the presumptions of racial disadvantage on which the Reconstruction legislation was based, even in the process of narrowly construing and ultimately invalidating portions of that legislation. See cases cited supra notes 31-33 (discussing cases limiting and invalidating Reconstruction statutes and amendments).
ments designed to eliminate the vestiges of slavery by guaranteeing formal legal equity.\textsuperscript{273} It is difficult to see how the presumption at issue in \textit{Adarand} differs in any qualitative respect from an 1868 presumption. Although the social and economic condition of racial minorities has improved since 1868, minorities are far from achieving parity with whites. All that has changed since 1868 is the degree of minority disadvantage, not its existence. Accordingly, even a theoretical vision of contemporary culture as free from general societal discrimination is difficult to accept.

Nevertheless, the Supreme Court adhered to this formal vision of the United States as a post-discriminatory culture in its other 1994 Term racial discrimination cases. In \textit{Adarand}, the Court's post-discriminatory vision was readily apparent, because the Court simply told Congress that Congress was not permitted to view contemporary culture as racially discriminatory. That was the effect of holding the congressional presumption of minority disadvantage subject to strict scrutiny, rather than simply deferring to the legislative findings of Congress as the Supreme Court typically does.\textsuperscript{274} In the Court's other 1994 Term race decisions, this formal vision of post-discriminatory cultural evolution was less explicit, but equally present beneath the surface of the Court's decisions.

\textit{Missouri v. Jenkins},\textsuperscript{275} handed down the same day as \textit{Adarand}, was another five-to-four decision, with the same alignment of justices in the majority and dissent. In \textit{Jenkins}, the Supreme Court held that the district court lacked the authority to order certain school desegregation remedies for the Kansas City, Missouri, school district, which prior to the 1954 decision in \textit{Brown} had been officially segregated by operation of state law.\textsuperscript{276} Because there were too few white students living in the urban Kansas City school district to permit meaningful integration, the district court had ordered the establishment of magnet programs designed to attract white students from the suburbs and the continuance of remedial programs designed to improve the under-av-

\textsuperscript{273} See SPArN, supra note 5, at 42-43 (setting out a chronology of the Civil War and subsequent Reconstruction statues and amendments).

\textsuperscript{274} See STONE ET AL., supra note 31, at 536-41 (explaining why the Supreme Court typically must defer to congressional policy determinations).


\textsuperscript{276} See id. at 2052 n.6 (prior to 1954, Missouri law required segregated schools); id. at 2074 (Souter, J., dissenting) (outlining history of state-mandated segregation of Missouri schools).
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average achievement levels of students in the inner-city district. The Supreme Court majority opinion, written by Chief Justice Rehnquist, held these remedies to be beyond the scope of the district court’s authority, because the district court had pursued an improper goal. Chief Justice Rehnquist first emphasized that a school desegregation plan should not have the goal of seeking to remedy general societal discrimination. He then went on to stress that the presence of one-race schools in the Kansas City district did not preclude the district from being formally desegregated, and thereby from achieving the unitary status required by Brown, even though those schools remained segregated in fact. The presence or absence of school desegregation—just like the presence or absence of minority disadvantage in Adarand—was determined by formal legal considerations rather than by empirical experience.

The Jenkins majority opinion also held that the district court’s effort to attract white students from the suburbs in order to achieve actual desegregation in the inner-city schools was improper, because the suburban schools were not guilty of past de jure segregation, and interdistrict remedies could not be ordered in the absence of an interdistrict constitutional violation. In addition, the majority held

277. See id. at 2042-45 (describing desegregation plan). The magnet programs were also designed to attract students from private schools in the inner city. See id. at 2083 n.4 (Souter, J., dissenting).

278. Chief Justice Rehnquist cited Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22-23 (1971), for the proposition that school desegregation remedies should not seek to achieve the broader social purpose of eliminating other forms of societal discrimination. See Jenkins, 115 S. Ct. at 2048; see also id. at 2060 (O’Connor, J., concurring) (agreeing that school desegregation plan should not seek to remedy general societal discrimination); id. at 2073 (Thomas, J., concurring) (school desegregation plan should not seek to remedy discrimination that does not violate Constitution).

279. See Jenkins, 115 S. Ct. at 2048 (“We also rejected ‘[t]he suggestion . . . that schools which have a majority of Negro students are not “desegregated,” whatever the makeup of the school district’s population and however neutrally the district lines have been drawn and administered.’” (quoting Freeman v. Pitts, 503 U.S. 467, 474 (1992)) (ellipsis in original)).

280. See id. at 2048, 2051-52 (citing Milliken v. Bradley, 418 U.S. 717, 746-47 (1974) (Milliken I) (holding interdistrict remedy improper in the absence of interdistrict constitutional violation)). The majority and the dissent engaged in a vigorous debate about whether the effort to attract white students from the suburbs through the use of magnet programs was an impermissible effort to implement an interdistrict remedy indirectly, see id. at 2051-52, or a permissible effort to remedy the effects of intradistrict segregation that had mere incidental effects on suburban schools outside of the inner-city district. See id. at 2087-88 (Souter, J., dissenting). The majority asserted that the answer depended on whether white flight to the suburbs was caused by prior de jure segregation, which would make interdistrict effects permissible under Hills v. Gautreaux, 425 U.S. 284 (1975), or by the threat of desegregation after Brown, which would make interdistrict effects impermissible. See Jenkins, 115 S. Ct. at 2052-54. Justice Souter sensibly pointed out that the distinction was meaningless, because segregation had caused the need for a desegregation remedy, making both segregation and the ensuing threat of desegregation joint

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that the district court could not continue to require state funding of remedial programs to counteract the underachievement of minority students that had existed since the era of pre-Brown segregation. Remedial programs could not be continued indefinitely simply because of continued underachievement by minority students.281 Finally, the opinion suggested that the Kansas City school district may have become at least partially unitary under Brown, as construed by Freeman v. Pitts,282 thereby making the relinquishment of district court jurisdiction and the restoration of local control appropriate.283

The holding in Jenkins is noteworthy for both its artificiality and its circularity. Prior to Brown, the Missouri schools were segregated by state law.284 This meant that the inner-city schools were de jure segregated, because race-conscious pupil assignment had been required in order to comply with the state segregation laws. Race-conscious pupil assignment had not been necessary in the white suburbs, however, because residential discrimination meant that minority students did not live in the white suburbs.285 After Brown, white students fled to the de facto segregated suburban schools in order to escape the inner-city desegregation required by Brown.286 This left too few white students to permit meaningful desegregation of the inner-city schools.287 However, interdistrict desegregation remedies that included the white suburban schools were impermissible because the de facto segregated suburban schools were never de jure segr-
gated, and were therefore unitary under Brown.\textsuperscript{288} Moreover, the one-race inner-city schools were now as integrated as they could be, given the lack of white students remaining in the inner-city. As a result, the inner-city schools could now be considered formally desegregated, entitling the inner-city schools to unitary status under Brown as well.\textsuperscript{289} Accordingly, the pre-Brown dual school system in Kansas City had now been replaced with a post-Brown school system that could be unitary even though the racial complexion of both the inner-city and suburban schools remained the same.

What the Supreme Court did in Jenkins was to validate the constitutionality of the very separate-but-equal schools that it had invalidated in Brown—it replicated the one-hundred-year-old, discredited decision that it had first rendered in Plessy. In Jenkins, one-race white schools and one-race minority schools could both be declared desegregated, because there need no longer be a correspondence between the world of empirical experience and the world of doctrinal formality in which Supreme Court adjudication occurs. The only significant difference that exists between the one-race schools that the Court permitted in Jenkins and the one-race schools that were permissible under the separate-but-equal principle of Plessy is that the separate schools in Jenkins no longer have to be equal.\textsuperscript{290} Thus, the Court held, in effect, that the district court was not authorized to continue state-funded remedial programs to compensate for the underachievement of inner-city students. Now, not only do the Kansas City schools remain segregated, but the education that the inner-city schools offer to minority students is inferior to the education offered to white students in the suburbs. Nevertheless, the Supreme Court still seems to view the schools as equal, with no lingering effects of past discrimination.\textsuperscript{291}

\begin{itemize}
\item \textsuperscript{288} See \textit{id.} at 2051-52 (interdistrict remedy inappropriate in absence of interdistrict violation).
\item \textsuperscript{289} See \textit{id.} at 2048 (one-race schools can nevertheless be unitary). The Supreme Court did not actually reach the question of whether the inner-city schools had become unitary, but remanded for a determination of this question after suggesting that they may have achieved unitary status. See \textit{id.} at 2055-56 (suggesting achievement of at least partial unitary status).
\item \textsuperscript{290} A close reading of \textit{Plessy} and subsequent decisions reveals that even under \textit{Plessy}, separate public facilities did not have to be equal in order to be constitutionally permissible. See \textit{Stone et al.}, supra note 31, at 490-92 (discussing the absence of an equality requirement in \textit{Plessy}).
\item \textsuperscript{291} The fact that Justice Thomas favors this result is saddening. It is understandable that Justice Thomas would find value in the preservation of historically black schools. See Jenkins, 115 S. Ct. at 2061-62, 2065 (rejecting the suggestion that black institutions are inherently inferior, and finding value in historically black schools). It is, however, disheartening that he would acquiesce in a holding that perpetuated the historical under-funding of such schools, thereby guaranteeing the very inequality that he so strenuously resists. For an argument that the effect, if not
\end{itemize}
A similar vision of post-discriminatory culture appears to have motivated the Supreme Court's denial of certiorari in *Kirwan v. Podberesky*, where the Court permitted to stand a lower court decision that invalidated a University of Maryland scholarship program for black students. The program was challenged on constitutional grounds by a Latino student who was ineligible for the program because of the program's racial restriction. Although the Supreme Court does not normally write opinions accompanying its denials of certiorari, the Fourth Circuit opinion that the Supreme Court left standing held that there were insufficient lingering effects of Maryland's past de jure segregation to permit the program to withstand the strict scrutiny required under *Croson*. The district court found four present effects of the University's prior discrimination: the University's poor reputation in the black community; the underrepresentation of blacks in the student population; the low retention and graduation rates of black students who did enroll; and the perceived hostile atmosphere on campus toward black students. The Court of Appeals rejected these four findings, repeatedly rebuking the district court for attempting to remedy general societal discrimination. Unlike the district court, the Fourth Circuit had learned from the Supreme Court that general societal discrimination is not legally cognizable.

In *Miller v. Johnson*, decided a few weeks after *Adarand*, the Court held, with the same five-to-four *Adarand* split, that a new congressional voting district in Georgia was unconstitutionally apportioned because race had been the "predominant" factor in drawing

district lines intended to enhance minority voting strength.\textsuperscript{299} Applying the Court's 1993 decision in \textit{Shaw v. Reno},\textsuperscript{300} Justice Kennedy's majority opinion in \textit{Miller} held that when "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," the legislature's apportionment plan was subject to strict scrutiny.\textsuperscript{301} Under the facts of \textit{Miller}, strict scrutiny could not be satisfied because the Georgia legislature's goal of receiving preclearance from the United States Department of Justice under the Voting Rights Act was not a compelling state interest, and the Justice Department policy of maximizing the number of majority-minority voting districts in states covered by the Act was not a narrowly tailored effort to eliminate the effects of past discrimination.\textsuperscript{302} Justice Kennedy's opinion was careful to distinguish the \textit{Shaw}-based claim that it was considering in \textit{Miller} from a more typical vote-dilution claim. The \textit{Shaw}-based claim in \textit{Miller} was not based on a reduction in the relative strength of the plaintiffs' votes, but rather was simply a claim that the plaintiffs had a constitutional right not to be assigned to voting districts on the basis of race—just as they had a right not to be assigned to a public school on the basis of race.\textsuperscript{303} Justice Kennedy relied upon this distinction to avoid

\textsuperscript{299} Id. at 2490.
\textsuperscript{300} Shaw v. Reno, 113 S. Ct. 2816 (1993).
\textsuperscript{301} See Miller, 115 S. Ct. at 2488, 2490 (adopting "predominant factor" test). The Court also held that a district's bizarre shape, the focus of attention in \textit{Shaw}, was not a requirement for strict scrutiny but was only one of a variety of forms of evidence that could be relied on to show that race was a motivating factor. See \textit{id.} at 2488. The same day that \textit{Miller} was decided, the Supreme Court also summarily affirmed a three-judge district court decision upholding a 1992 California reapportionment plan that created a number of majority-minority voting districts. The district court had distinguished \textit{Shaw} on the grounds that race was only one of a number of factors that had motivated adoption of the California plan. See \textit{DeWitt v. Wilson}, 115 S. Ct. 2673 (1995), aff'g 856 F. Supp. 1409 (E.D. Cal. 1994) (three-judge court).
\textsuperscript{302} See Miller, 115 S. Ct. at 2491-92. The Court found that the Justice Department policy of maximizing the number of majority-minority voting districts was not compelled by the Voting Rights Act. See \textit{id.} It did not reach the question of whether compliance with an actual requirement of the Act would constitute a sufficiently compelling state interest to survive strict scrutiny. See \textit{id.} at 2493. The Court did, however, note the tension between the race-consciousness of the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment. See \textit{id.}
\textsuperscript{303} See \textit{id.} at 2485-86 (viewing \textit{Shaw} claim as the same as claim of segregation in public facilities). In fact, Justice Kennedy's characterization of \textit{Miller} as a racially motivated voter assignment case is inaccurate in a way that is quite revealing. The plaintiffs in \textit{Miller} were not assigned to an election district based upon their race. Rather, the five white plaintiffs lived in the majority-black Eleventh Voting District before adoption of the challenged reapportionment plan and continued to live in the Eleventh District, which remained majority-black, after adoption of the plan. Under the challenged plan, some black voters were eliminated from the Eleventh District and other black voters were added, but the plaintiffs were not reassigned. See \textit{id.} at 2483-85 (describing reapportionment plan). Therefore, any injury suffered by the white plaintiffs must have resulted not from their assignment to an election district, but from the fact that the Elev-
the seemingly contrary precedential effect of *United Jewish Organizations*,\(^{304}\) which had upheld the constitutionality of a similarly motivated redistricting plan in New York.\(^{305}\)

A curious aspect of the *Miller* decision is its holding that race is a constitutionally permissible factor in legislative apportionment considerations, but that once race becomes the predominant factor, consideration of race becomes unconstitutional.\(^{306}\) If some consideration of race is constitutional why is not all consideration of race constitutional? The answer cannot be that the Supreme Court is simply striking a different balance when race is predominant than it strikes when race is subordinate. Any Supreme Court balancing that may be appropriate occurs after strict scrutiny has been triggered.\(^{307}\) The "predominance" inquiry, however, goes to the analytically prior issue of whether such strict-scrutiny balancing will even take place.\(^{308}\)

The 14th District was racially gerrymandered to produce a black member of Congress. However, in order to view this as an injury to the white plaintiffs the Court would have to view the political preferences of individual voters as being racially determined—which, as Justice Stevens emphasized in his dissent, is the precise view that the Court so strenuously rejected as the basis for its *Miller* decision. See id at 2497-98 (Stevens, J., dissenting) (majority's theory of injury suffers from same racial stereotyping that majority opinion purports to abhor).


305. See *Miller*, 115 S. Ct. at 2487-88 (distinguishing *United Jewish Organizations*). In her dissenting opinion, Justice Ginsburg argued that *United Jewish Organizations* was best understood as a Shaw-type voter apportionment challenge rather than as a vote-dilution case, because the plaintiffs in *United Jewish Organizations* had made no claim of vote dilution. See id. at 2505 n.11 (Ginsburg, J., dissenting). The distinction between a Shaw-based voter assignment claim and a traditional vote-dilution claim also seems to have been the basis for the *Miller* Court's grant of standing to the white plaintiffs who challenged the Georgia apportionment scheme, despite the Court's denial of standing the same day to similar plaintiffs challenging a similar Louisiana apportionment scheme in United States v. Hays, 115 S. Ct. 2431 (1995). In *Hays*, the plaintiffs were challenging the apportionment of a voting district that was not the district in which they themselves resided. See *Miller*, 115 S. Ct. at 2485 (citing *Hays*); see also *Hays*, 115 S. Ct. 2436 (distinguishing between voters who live within and without challenged voting district for purposes of standing); cf. id. at 2439-40 (Stevens, J., concurring) (plaintiffs lack standing because they have not alleged and proven vote dilution).

306. The Court noted in *Miller* that "[w]here these [traditional districting principles] or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can 'defeat a claim that a district has been gerrymandered on racial lines.'" *Miller*, 115 S. Ct. at 2488 (quoting Shaw v. Reno, 113 S. Ct. 2816, 2827 (1993)).

307. See id. at 2482 (strict scrutiny is intended to determine if racial classifications are justifiable); see also *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2113-14 (1995) (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion of O'Connor, J.) (purpose of strict scrutiny is to distinguish benign from invidious racial classifications)).

308. See *Miller*, 115 S. Ct. at 2488 (predominant racial motivation is threshold requirement); cf. id. at 2497 (O'Connor, J., concurring) (maintaining that Shaw's high "predominance" threshold is required in order to avoid challenges to the vast majority of existing congressional districts). Note that in this regard, *Adarand* may be inconsistent with *Miller*. Because the presumption of minority disadvantage in *Adarand* was a rebuttable presumption, see *Adarand*, 115 S. Ct. at 2102-04 (describing presumptions), race may not have been the predominant factor in designing the affirmative action program in *Adarand*. Rather, economic and social disadvan-
What the Court seems to be doing with its “predominance” threshold is permitting the consideration of race as a factor in reapportionment so long as racial considerations will not be dispositive. If racial considerations prove to be outcome-determinative, however, they will be disallowed by the Court as having predominated the other factors that have traditionally entered into legislative apportionment deliberations. The Court enumerates several such traditional factors “including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests,” as factors that cannot be predominated by race. That is simply a way of saying that race can be taken into account so long as taking race into account does not matter. But once race does begin to matter, the consideration of race becomes unconstitutional. This view is consistent with the Supreme Court’s general Adarand declaration that cognizable racial discrimination in contemporary culture has now come to an end.

If voting discrimination still existed in the United States, it would be appropriate for racial considerations to be dispositive in remedial redistricting plans. Indeed, that is precisely the theory on which the Voting Rights Act is based. But the Supreme Court’s emphasis on the Act as a mechanism for prohibiting “retrogression” presupposes that present levels of voting discrimination are sufficiently low that they do not call for remedial action. If voting discrimination remained a present problem, it would have made sense to construe the Act to permit affirmative efforts to eliminate that discrimination—efforts like the Justice Department policy favoring maximization of majority-minority districts. The Court, however, was able to invalidate the Justice Department policy precisely because, in the Court’s view, there is no present voting discrimination problem. Minority voters do not need enhanced voting strength any more than minority college stu-

tage may have been the predominant factors. See id. (noting that the presumption was intended to facilitate identification of contractors who were socially and economically disadvantaged).

309. I am not sure what I mean by “outcome determinative” in the apportionment context, where racial factors might have a minor effect on the location of a particular district line or a major effect on which candidate gets elected. I suppose that what I ultimately mean by “outcome determinative” is an effect that the Supreme Court deems to be more significant than is appropriate.

310. See Miller, 115 S. Ct. at 2488 (enumerating typical apportionment factors).

311. See id. (holding that traditional apportionment principles cannot be supplanted by race).

312. See id. at 2493 (stating that the purpose of the Voting Rights Act is to prevent retrogression to the era of voting discrimination).

313. See id.
students need scholarships, minority public school students need remedial education, or minority contractors need government contracts. If there is any lingering voter discrimination in Georgia, it is—once again—simply general societal discrimination that is too subtle to be legally cognizable.

Perhaps the most artificial aspect of the *Miller* decision is its view of racial minorities as sufficiently assimilated into the white majority culture that they lack shared minority interests. One of the traditional apportionment factors that the Supreme Court held could not be subordinated to race was "communities defined by actual shared interests." Racial interests are obviously among the most potent and most cohesive political interests that there are in contemporary United States politics. Why, then, cannot racial groups constitute "communities defined by actual shared interests" that can legitimately be considered in drawing district lines? The Supreme Court's answer is that the act of presuming that racial minority group members share similar political interests constitutes the very sort of racial stereotyping that the Equal Protection Clause prohibits. This stereotyping in turn treats citizens as mere members of a group, rather than as individuals, and thereby violates the Equal Protection Clause of the Fourteenth Amendment. Accordingly, in *Miller* the Supreme Court was confronted with a choice between reinforcing abstract racial stereotypes while enhancing actual minority voting strength, or resisting abstract racial stereotypes while diluting actual minority voting strength. The Court held that the Constitution permitted this choice to be made only one way: actual political strength had to be sacrificed in favor of resistance to abstract racial stereotyping. Once again, the Supreme Court read the Constitution to govern a hypothetical world that does

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314. See id. at 2488 (enumerating typical apportionment factors).
315. See id. at 2504-05 (Ginsburg, J., dissenting) (discussing political cohesiveness of ethnic groups and the tradition of drawing voting districts along ethnic lines).
316. The Supreme Court makes numerous references to impermissible stereotyping in the *Miller* opinion. See id. at 2486-87, 2490, 2494. Justice Stevens points out, however, that the majority's reasoning is circular because the conclusion that white voters are harmed by majority-minority districts depends upon the same stereotypes about racial cohesion and identity of political interest that the majority refuses to accept when such stereotyping would help minority rather than white voters. See id. at 2498 (Stevens, J., dissenting) (describing circular stereotyping necessary to uphold standing of plaintiffs).
317. See id. at 2485-86 (requiring government to treat citizens as individuals rather than as simply members of a racial group). In her dissent, Justice Ginsburg argued that voter apportionment is inherently a group phenomenon in which individual merit or achievement is irrelevant. See id. at 2505-06 (Ginsburg, J., dissenting).
not correspond to the actual world in which racial discrimination is concrete rather than merely theoretical.\textsuperscript{318}

The Fourteenth Amendment was enacted after the Civil War in order to ensure that Congress possessed the constitutional authority to eliminate the vestiges of racial discrimination against blacks who had systematically been disadvantaged by state laws and official practices that treated blacks as inferior.\textsuperscript{319} Congress, and ultimately the states themselves, began to implement the goals of the Fourteenth Amendment by enacting affirmative action legislation intended to remedy the effects of prior discrimination. Ironically, the Supreme Court has now begun to use the Fourteenth Amendment as the basis for invalidating the very types of remedial actions that the Fourteenth Amendment was adopted to permit. The Court has justified this reconstruction of the Fourteenth Amendment by declaring that the era of racial discrimination in the United States has come to an end. Any remaining effects of prior discrimination are simply attributable to general societal discrimination, which is too diffuse and subtle to warrant legal recognition. The Court made this declaration explicitly in \textit{Adarand}, by reading the Fourteenth Amendment to preclude Congress from presuming that racial minorities remain socially and economically disadvantaged. The Court then reinforced its declaration in the other race cases that it decided the same Term, by invalidating affirmative action programs that would seem unobjectionable as efforts to ameliorate the effects of past discrimination. Although the Court's declaration seems jarringly artificial when juxtaposed to the world of everyday experience—a world on which racial discrimination remains rampant—the Court was able to offer its artificial characterization of contemporary culture with a doctrinal straight face by inverting the legal concepts of affirmative action and discrimination.

III. AFFIRMATIVE ACTION AND DISCRIMINATION

The Supreme Court's proclamation in \textit{Adarand}, that the history of pervasive racial discrimination in the United States has now come to an end, rests on a confusion inherent in the related concepts of affirmative action and discrimination. The Supreme Court exploited

\textsuperscript{318} In her dissenting opinion, Justice Ginsburg traces the history of voting discrimination in a way that highlights the gap between the majority's theoretical word and the actual world of black voters in Georgia. See id. at 4738 (Ginsburg, J., dissenting).

\textsuperscript{319} See \textit{STONE ET AL.}, supra note 31, at 481-88 (discussing the purpose of the Fourteenth Amendment).
that confusion in a way that permitted it to invert the concepts of affirmative action and discrimination so that each acquired the connotations previously associated with the other. This inversion then enabled the Court to appropriate societal resources allocated by the political process to racial minorities and reallocate them to the white majority—solely on the grounds of race. Moreover, this judicial elevation of the interests of whites over the interests of racial minorities stigmatizes racial minorities in the precise way that Brown declares to be unconstitutionally discriminatory. In short, the Supreme Court's rejection of the Adarand presumption itself constituted an act of racial discrimination sufficient to establish the validity of the presumption that the Court rejects.

The structural consequence of the Supreme Court's ruling in Adarand has been to shift the locus of power in the formulation of race-relations policy from the politically accountable branches of government to the politically less-accountable Supreme Court. This is consistent with an increase in judicial activism that the present Supreme Court has exhibited in other substantive areas as well. Race-relations issues, however, are ultimately governed by standards that are political rather than judicial in nature. As a result, the Supreme Court's decision in Adarand has ironically implicated the Court in the undemocratic usurpation of legislative power.

A. Inversion

The concepts of affirmative action and discrimination are closely related. Affirmative action makes benign use of race-based classifications to offset the effects of past discrimination, and to promote prospective racial equality. Racial discrimination makes invidious use of race-based classifications to replicate the effects of past discrimination and to promote prospective racial inequality. Both entail the conscious use of race; both rest on the assumption that race is relevant in

320. Affirmative action is almost always intentional, whereas discrimination can consist of intentional racial differentiation or unintentional racially disparate impact. Compare Washington v. Davis, 426 U.S. 229, 238-48 (1976) (requiring intentional discrimination for constitutional violation) with Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (finding disparate impact sufficient to establish Title VII violation). For present purposes, the term "discrimination" is used to mean intentional discrimination, because the Supreme Court has held that intentional discrimination is what is relevant to constitutional analysis under the Equal Protection Clause. See Washington v. Davis, 426 U.S. at 238-48. Ultimately, however, the distinction between discriminatory intent and disparate impact breaks down, because discriminatory intent can be inferred from known, or even unknown, disparate impact. See Spann, supra note 5, at 37-41 (discussing the distinction between discriminatory intent and discriminatory effect).
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contemporary culture; and both reject the view that race neutrality is an appropriate mechanism for resource allocation. Affirmative action and discrimination differ only in their motives. The goal of affirmative action is ultimate racial equality, and the goal of racial discrimination is ultimate racial subordination. But, because ultimate goals are easily camouflaged, it can often be difficult to distinguish affirmative action from discrimination. And to the extent that goals can be unstable and motives can be mixed, there may sometimes be no difference between affirmative action and discrimination at all.\(^{321}\)

The Supreme Court has declined to treat motive as relevant in its affirmative action cases, thereby disregarding the only distinction that exists between affirmative action and discrimination. Justice O'Connor's opinion in *Adarand* emphatically rejects the argument that constitutional scrutiny of racial classifications should vary with the benign or invidious nature of the classification at issue, applying strict scrutiny to both types of classifications.\(^{322}\) Motive is, therefore, irrelevant to the level of scrutiny that the Court will apply in a racial classification case. To the extent that strict scrutiny remains fatal in equal protection cases, as it has been since the Court's 1944 decision in *Korematsu*,\(^{323}\) motive is also irrelevant to the outcome in a racial classification case.

Justice O'Connor has stated that motive is relevant, and that the very purpose of applying strict scrutiny is to determine whether a racial classification is, in fact, benign or whether it is motivated by illegitimate notions of racial inferiority.\(^{324}\) This assertion, however, seems disingenuous. Justice O'Connor and the other members of the

\(^{321}\) It is logically possible to favor racial separation without favoring racial stratification or subordination. Indeed, this is the nominal position that the Supreme Court adopted in *Plessy*. See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding racially segregated public facilities under separate-but-equal doctrine). It is unlikely, however, that this position has many actual, as opposed to rhetorical, adherents. The sincerity of this position was questioned even in *Plessy* itself. See id. at 557-64 (Harlan, J., dissenting) (pointing out the actual discriminatory purpose of the statute at issue). It is also possible to argue that the effect rather than the motive of a racial classification should be what distinguishes racial discrimination from affirmative action. *Washington v. Davis*, however, seems to preclude such an approach, and the distinction between intent and effect ultimately seems untenable. See *supra* note 320 (discussing *Washington v. Davis* and the difference between discriminatory intent and effect).

\(^{322}\) See *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2111-12 (1995) (imposing a requirement of "consistency" in strict-scrutiny standard of review, regardless of benign or invidious nature of racial classification).

\(^{323}\) See *supra* Part I(C)(1) (discussing the standard of review).

\(^{324}\) See *Adarand*, 115 S. Ct. at 2112, 2113-14 (citing *City of Richmond v. J.A. Croson*, 488 U.S. 469, 493 (1989) (plurality opinion of O'Connor, J.)) (holding that strict scrutiny is needed to distinguish benign from illegitimate classifications).
Adarand majority virtually always vote to invalidate an affirmative action program if they reach the merits of the constitutional issues presented by that program.325 This means that any motive that might be relevant in theory has never been relevant in fact. Moreover, Justice O’Connor has endorsed the proposition that “more than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system.”326

The strict scrutiny standard that Justice O’Connor elaborates similarly has nothing to do with motive. Justice O’Connor’s strict scrutiny requires a compelling state interest and a narrowly tailored remedy.327 Justice O’Connor now believes that only the goal of providing a remedy for identifiable prior discrimination can constitute a compelling state interest, and that only discrete discriminatory acts, rather than general societal discrimination, can qualify as “prior discrimination” under this standard.328 In addition, Justice O’Connor has insisted on an extremely tight fit between the identifiable prior discrimination and the remedy at issue to satisfy the narrow-tailoring requirement.329

325. See supra notes 88-92 and accompanying text (setting out affirmative action voting records of Justices in Adarand majority). Justice O’Connor somewhat misleadingly creates the impression that she approved of the affirmative action program that the Court upheld in United States v. Paradise. See Adarand, 115 S. Ct. at 2135-36. In fact, she voted to invalidate the affirmative action program at issue in that case. See United States v. Paradise, 480 U.S. 149, 196-201 (1987) (O’Connor, J., dissenting).

326. See Adarand, 115 S. Ct. at 2112 (quoting Drew S. Days, Fullilove, 96 YALE L.J. 453, 485 (1987)).

327. See Adarand, 115 S. Ct. at 2113 (defining the strict scrutiny standard).


329. See Adarand, 115 S. Ct. at 2118; Metro Broadcasting, 497 U.S. at 610-12, 613-14 (O’Connor, J., dissenting); Croson, 488 U.S. at 499-504; Wygant, 476 U.S. 293-94 (O’Connor, J., concurring in part and concurring in judgment). The narrow tailoring test used by the Court has been quite stringent. For example, in discussing whether a 30% minority set aside of municipal construction funds was narrowly enough tailored to the scope of past discrimination in Croson, Justice O’Connor ignored a factual finding that the population of the City of Richmond was 50% minority, but only 0.67% of the construction contracts had been awarded to minority firms. She viewed the disparity as irrelevant because there had been no showing of how many minority contractors were qualified to be awarded construction contracts. See Croson, 488 U.S. at 499-504. She also deemed “unsupported” the assumption that white prime contractors in Richmond, Virginia would have discriminated against minority firms. See id. at 503-04. Similarly, in Wygant, Justice O’Connor disregarded a showing of racial disparities between the minority student population and the number of minority teachers in the school district, asserting that the appropriate comparison was between the number of minority teachers and the number of qualified minorities in the teaching pool. See Wygant, 476 U.S. at 293-94 (O’Connor, J., concurring in part and
This means that the narrow-tailoring requirement cannot be satisfied by a remedy that is intended to redress pervasive discrimination rather than isolated discriminatory acts, because such a remedy would cross the line into the realm of prohibited remedies for general societal discrimination.\textsuperscript{330}

In adopting Justice O'Connor's strict scrutiny, what the Court has done is adopt a policy disfavoring affirmative action, preferring instead reliance on discrete remedies for isolated acts of discrimination.\textsuperscript{331} Whatever the merits or shortcomings of such a policy, the policy has nothing whatsoever to do with the intent of the racial classification being scrutinized. Accordingly, Justice Stevens criticized the \textit{Adarand} majority for not distinguishing between a benign "desire to foster equality in society" and an invidious "engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority."\textsuperscript{332} He characterized Justice O'Connor's opinion as being unable to detect "the difference between a 'No Trespassing' sign and a welcome mat."\textsuperscript{333}

Once the Supreme Court made the intent of a racial classification legally irrelevant, it eliminated the only difference that exists between affirmative action and discrimination. This left the Court free to characterize racial classifications in any way that it deemed expedient, without the need to have its characterization correspond to any referent other than the Court's own preferences. Operating in this unconstrained doctrinal environment, the Court has chosen to invert the distinction that is typically thought to exist between affirmative action and discrimination. With a sleight of hand reminiscent of postmodern


\textsuperscript{331} But see \textit{Wygant}, 476 U.S. at 287 (O'Connor, J., concurring in part and concurring in judgment) ("[I]t is agreed that a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored,' or 'substantially related,' to the correction of prior discrimination."). Justice O'Connor now seems to have abandoned this view, as she abandoned her earlier view that prospective diversity could constitute a compelling state interest. \textit{See id.} at 286 (stating that the goal of promoting prospective racial diversity can constitute a compelling state interest).

\textsuperscript{332} \textit{See Adarand}, 115 S. Ct. at 2120 (Stevens, J., dissenting).

\textsuperscript{333} \textit{See id.} at 2121 (Stevens, J., dissenting).
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deconstruction,334 the Court severed the negative, invidious connotations typically associated with the concept of racial discrimination and re-associated them with affirmative action; and it severed the positive, remedial connotations typically associated with the concept of affirmative action and re-associated them with racial discrimination. Stated more simply, the Court transformed “good” affirmative action into “bad” racial discrimination, and “bad” racial discrimination into “good” affirmative action.

Using the definitions of affirmative action and discrimination set out above,335 it is possible to highlight the Supreme Court’s inversion of affirmative action and discrimination. In the past, affirmative action has been viewed by the Court as good: Affirmative action uses race-based classifications to offset the effects of past discrimination, thereby promoting prospective racial equality. Similarly, racial discrimination has been viewed by the Court as bad: Racial discrimination makes invidious use of race-based classifications in order to replicate the effects of former de jure discrimination, thereby promoting prospective racial inequality. According to the present Supreme Court majority, however, it is really affirmative action that is bad and racial discrimination that is good. The Court’s reasoning seems to go something like this:

Contrary to common understanding, affirmative action entails the invidious use of race-based classifications in order to replicate the effects of past discrimination. Although affirmative action is typically viewed as benign, it actually consists of the self-serving appropriation by racial minorities of societal resources that would otherwise go to innocent whites. The Croson thirty-percent set-aside program for minority construction contractors for instance, illustrates that when racial minorities acquire political power, as they did in gaining control of the Richmond City Council, they will use that power to claim resources to which they would not be entitled through normal market allocations undistorted by minority political intervention.336 And even when affirmative action programs are adopted by majority-controlled political bodies, such as the

334. For a description and illustration of deconstruction entailing the inversion of hierarchies, see SPANN, supra note 5, at 58-82.
335. See supra text accompanying notes 320-21.
336. Cf. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495-96 (1989) (opinion of O’Connor, J.) (noting that minorities controlled the Richmond City Council that adopted the minority set-aside program); id. at 523-24 (Scalia J., concurring in judgment) (stating that the dominant political group in Richmond adopted the affirmative action program to benefit its own members).
Adarand minority preference program that was adopted by Congress, those programs still distort normal market allocations in response to the exertion of minority political power. Although racial minorities may not be able to control the United States Congress, they do possess sufficient political power to compel occasional legislative concessions from Congress. As public choice theory predicts, Congress makes these concessions because the political power of the minority special interest lobby outweighs the political power of the individual white victims who are disadvantaged by minority preference plans. That is why it is essential to extend the Equal Protection Clause to members of the white majority, despite its genesis in the protection of former black slaves. As the language of the Equal Protection Clause makes clear, the equal protection guarantee extends to individuals, not simply to groups that have historically been victims of discrimination. Accordingly, affirmative action can be seen to possess the undesirable qualities typically associated with racial discrimination. All that changes is the race of the victim against whom the discrimination is directed.

Opposition to affirmative action is often characterized as a form of perpetuated racial discrimination because opponents are willing to freeze the illegitimate gains that whites have made over minorities as a result of past racial discrimination. In fact, it can be argued that insistence on the race neutrality that opponents of affirmative action favor actually promotes the use of hidden racial classifications that are embedded in the status quo. For example, if schoolteacher seniority of the type that was at issue in Wygant correlates with race because of

337. Stated briefly, “public choice theory” is a political economics theory positing that, because of “free rider” problems, governmental decision making will tend to favor special interest groups rather than the more diffuse majority interest. Under this view, an affirmative action program that benefited racial minority special interests would stand a better chance of enactment than a majoritarian effort to prevent enactment of the special interest program. For a general discussion of public choice theory, see William Eskridge & Philip Frickey, Case and Materials on Legislation: Statutes and the Creation of Public Policy 367-98 (1988).

338. “No State shall ... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.


disparities in seniority caused by past discrimination in teacher hiring, use of the purportedly neutral standard of seniority to make layoffs, without any correction for past discrimination, actually constitutes use of the racial categories with which seniority correlates. Whether intentionally or incidentally, seniority becomes a surrogate for race, and the allocation of layoffs on the basis of seniority becomes a racially discriminatory allocation.\textsuperscript{341} The Supreme Court's reasoning in inverting this argument seems to go something like this:

If opposition to affirmative action does constitute a form of perpetuated racial discrimination, it is a benign rather than an invidious form of discrimination. It makes beneficial use of whatever race-based classifications may be submerged in the status quo in order to offset the discrimination against whites that has become prevalent with the emergence of affirmative action racial preferences. If compensation for past discrimination is the justification for affirmative action programs that punish whites, those programs are tolerable only when the victim and the perpetrator of a discriminatory act can be identified. The use of affirmative action to remedy general societal discrimination in the absence of an identifiable perpetrator and victim violates the equal protection rights of the innocent whites who are burdened in order to advance the interests of racial minority group members who were not themselves the direct victims of discrimination.\textsuperscript{342} Opposition to affirmative action, therefore, promotes racial equality by precluding minorities from taking advantage of whites who are denied access to affirmative action resources solely because of their race,\textsuperscript{343} and by refusing to reinforce race-conscious modes of thought that will continue to exacerbate racial

\textsuperscript{341} One who is tempted to argue that seniority is the operative basis for the discrimination, and that the racially disparate impact is merely incidental—an argument that the Supreme Court appears to have endorsed in Personnel Adm'r v. Feeney, 442 U.S. 256, 278-80 (1979) (holding that intent necessary for equal protection violation is "because of" actuating intent, not merely "in spite of" tolerance of a known consequence)—should remember that the concept of seniority is almost always tainted by past racial discrimination. Ignoring this fact does not make the taint less real; it merely makes the taint something that is being ignored.

\textsuperscript{342} See Croson, 488 U.S. at 518-19 (Kennedy, J., concurring in part and concurring in judgment) (agreeing that the rule limiting racial preferences to what is necessary to compensate actual victims of discrimination is appealing); \textit{id.} at 524-25 (Scalia, J., concurring in judgment) (state can use racial classifications only to compensate actual victims of state's own discrimination); cf. Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 535-45 (1986) (Rehnquist, J., dissenting) (Title VII remedies that override seniority must be limited to actual victims of discrimination); Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 500 (1986) (Rehnquist, J., dissenting); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 578-83 (1984).

\textsuperscript{343} Cf. Croson, 488 U.S. at 495-96 (opinion of O'Connor, J.) (minorities controlled Richmond City Council that adopted minority set-aside program); \textit{id.} at 523-24 (Scalia J., concurring in judgment) (dominant political group in Richmond adopted affirmative action program to benefit its own members).
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tensions. Accordingly, any perpetuated discrimination that may be inherent in one's opposition to affirmative action can be seen to possess the benign qualities that have mistakenly been associated with affirmative action programs in the past. Prospective race neutrality is the "affirmative action" remedy for the victims of past affirmative action. All that changes is the race of the beneficiary toward whom the affirmative action is directed.

That the concepts of affirmative action and discrimination, once detached from the distinguishing feature of motive, became free-floating and subject to inversion does not alone have much significance. Legal doctrine is often indeterminate, requiring a judicial infusion of normative content before the doctrine can be found to generate a result. What is significant, however, is that the Court chose to invert the concepts of affirmative action and discrimination in the course of proclaiming that pervasive racial discrimination had become a relic of the past. This juxtaposition is significant because the Court's inversion of affirmative action and discrimination itself constitutes an act of pervasive racial discrimination of the very type that the Court found no longer to exist.

The effect of the Court's inversion of affirmative action and discrimination in Adarand was to make race-based affirmative action constitutionally suspect and subject to strict scrutiny in the same way that racial discrimination traditionally has been. Accordingly, at least some race-based affirmative action programs will turn out to be unconstitutional as a result of the Adarand inversion. If strict scrutiny remains fatal after Adarand, the number of unconstitutional affirmative action programs will be large. If strict scrutiny turns out to be capable of satisfaction, the number of unconstitutional programs will be smaller, consisting only of those programs that are unable to satisfy


345. See generally Spann, supra note 5 (arguing that institutional considerations compel the Supreme Court to give normative content to indeterminate legal doctrines in a way that reflects majoritarian preferences).

346. It may be possible to circumvent the effect of Adarand by restructuring race-based affirmative action programs to be race-neutral, disadvantage-based programs. See supra Part (I)(C)(4) (discussing the possible restructuring of affirmative action programs in light of Adarand).
the exacting standards of strict scrutiny. In either event, the consequence of *Adarand* will necessarily be to divert some societal resources from racial minorities to whites. The racial minorities who would have received societal resources under an affirmative action program that *Adarand* invalidates will no longer receive them; they will instead go to members of the white majority.

This diversion of resources from racial minorities to whites that *Adarand* effectuates is good, old-fashioned racial discrimination, pure and simple. It disadvantages racial minorities to advance the interests of whites. It does so through the use of an explicit racial classification that distinguishes affirmative action programs from other resource allocation programs. It is the product of an official government body taking an official government action, with full knowledge of the adverse impact that its action will have on the interests of racial minorities. It inflicts a type of harm on racial minorities that, by design and effect, is both widespread and pervasive. And it ultimately stigmatizes racial minorities in a way that brands them as inferior to whites.

I have characterized the invalidation of an affirmative action program as the diversion of societal resources from racial minorities to the white majority. One could dispute this characterization, arguing that the Supreme Court's invalidation of an affirmative action program *terminates* the diversion from whites to racial minorities of the societal resources encompassed by the plan. This raises the issue of what constitutes the proper baseline for determining entitlement to a

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347. See supra text accompanying notes 123-42 (discussing whether strict scrutiny remains fatal after *Adarand*).

348. The Court's affirmative action classification is strikingly similar to the racial classification prohibiting miscegenation that the Supreme Court held unconstitutional in *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (invalidating Virginia miscegenation statute on equal protection grounds, and stating that "[t]here can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race."). One could argue that the Supreme Court's special treatment of racial affirmative action plans constitutes discrimination on the basis of affirmative action rather than discrimination on the basis of race, because it applies to all racial affirmative action plans regardless of which race is benefited and which is burdened. This argument, however, ignores the fact that the Supreme Court is treating racial affirmative action plans different from nonracial affirmative action plans. The Court is, therefore, discriminating against racial classifications, even if it is not discriminating against particular racial groups. One might be tempted to argue that the equal protection principle does not prohibit discrimination against racial classifications, but *Loving*’s invalidation of miscegenation statutes seems squarely to reject such an argument. See id. Although the actual miscegenation statute before the Court in *Loving* prohibited intermarriage with whites but not intermarriage not involving whites, the Court declined to seize upon this basis for characterizing the Virginia statute as an impermissible racial classification. See id. at 12 n.11. The Court's argument appears to be that, even when all races are treated equally, the equal protection principle is still offended by treating the category of race different from other social organizing categories. See id.
societal resource under some "natural" state of affairs, before any artificial distortion of that natural state has occurred. If the baseline to be used is the resource allocation that existed before enactment of the affirmative action program at issue, then the affirmative action program does indeed divert resources from whites to racial minorities, and the Supreme Court's invalidation of that plan restores the original allocation. However, if the baseline selected is the resource allocation that exists after enactment of the affirmative action program, then the Supreme Court's invalidation upsets that allocation and constitutes a diversion of resources from racial minorities to whites. More subtly, if the proper baseline is the current allocation of resources, the Supreme Court's invalidation of an affirmative action program constitutes an effort to preserve that natural state and to prevent a usurpation of resources by racial minorities. However, if the proper baseline is some hypothetical allocation of resources that would have existed in the absence of slavery and the nation's history of official segregation, then the Supreme Court's invalidation of an affirmative action program constitutes Supreme Court interference with an effort to approximate a natural state of affairs, and is therefore subject to characterization as a diversion of resources from racial minorities to whites.

There is, of course, no "correct" characterization of the Supreme Court's invalidation of an affirmative action program, because the act of selecting an appropriate baseline is ultimately the act of asserting a normative preference. Nevertheless, the arguments favoring a baseline that encompasses a politically adopted affirmative action program seem persuasive. In a democracy, we typically believe that decisions concerning normative preferences should be made by politically accountable government representatives. It follows that when Congress or the President, or a state legislative or executive body, chooses to adopt an affirmative action program, that program should be viewed as establishing the "natural" baseline for the allocation of societal resources against which judicial interventions should be measured. Accordingly, Supreme Court invalidation of such a program should be viewed both as judicial interference with the political process, and as a countermajoritarian diversion of resources from racial minorities to the white majority.349

349. There is one way that the Supreme Court could persuasively escape the indictment that it was undemocratically diverting resources from racial minorities to the majority when it invalidated an affirmative action program. If the Court's action could somehow be shown to have
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The Supreme Court's decision in *Adarand* constitutes an act of pervasive racial discrimination for yet another reason. It stigmatizes racial minorities in the way that *Brown v. Board of Education* held to be a core violation of the Equal Protection Clause. *Brown* is a controversial case whose substitution of a desegregation principle for the separate-but-equal principle of *Plessy* is doctrinally difficult to explain.\(^\text{350}\) The most viable explanation for the decision, however, is that the holding in *Brown* is about avoiding the racial stigma that many view as inherent in official segregation.\(^\text{351}\) Whether or not such a stigma is implicit in segregated education, it is certainly implicit in a Supreme Court decision to make legal protections available to whites when it simultaneously makes analogous protections unavailable to racial minorities.

The proper baseline for determining the "natural" allocation of resources in society may not be clear; affirmative action may constitute discrimination against whites, or the invalidation of affirmative action may constitute discrimination against racial minorities. But one thing is clear: The baseline issue is doctrinally ambiguous and uncertain. In the midst of such ambiguous uncertainty, one would normally expect the Supreme Court to err on the side of protecting racial minorities, for a number of reasons. First, the primary justification for contemporary judicial review has been the protection of minority rights,\(^\text{352}\) not majority rights.\(^\text{353}\) In addition, the greater relative political power that the white majority has over racial minorities suggests

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\(350\). *Brown* is difficult to defend on either doctrinal or policy grounds. See Spann, supra note 5, at 70-82, 105-10 (discussing doctrinal and policy difficulties surrounding *Brown*). The substitution of formally-desegregated-but-empirically-segregated schools for separate-but-equal schools has been especially controversial because of the inferior minority educational opportunities that seem to have ensued. See id. at 110-18 (discussing shortcomings of school desegregation as means of improving the quality of minority student education).


\(352\). See United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (positing Supreme Court duty to protect "discrete and insular" minorities); see generally Ely, supra note 29, at 155-60 (discussing representation-reinforcement theory of judicial review as means of protecting racial minorities).

\(353\). Although public choice theory is premised upon the belief that judicial review should protect the majority from special interests, this theory has been unable to supplant the represen-
that the white majority is more likely to be taking advantage of racial minorities than racial minorities are to be taking advantage of the white majority. Moreover, this theoretical observation has been borne out empirically; the history of racial discrimination in the United States indicates that whites have posed a much greater danger to racial minorities than racial minorities have posed to whites. Nevertheless, in a doctrinal environment where the baseline issue is at best in equipoise, the Supreme Court has chosen to draw the baseline in a way that favors the white majority at the expense of racial minorities.

In so doing, the Supreme Court has chosen to make available to the white majority judicial protections from affirmative action but to deny to racial minorities judicial protection from perpetuated discrimination—even though any racial animus entailed in these two forms of differentiation seems precisely analogous. As a result, the Court's decision to extend judicial protection to whites while denying the same protection to racial minorities discounts the interests of racial minorities in the classic way that legislatures discount minority interests when they enact discriminatory legislation. Whether acting through malice or submission to racial stereotyping, the Court has chosen to value members of the white majority more highly than members of racial minority groups. Stated more directly, when the Supreme Court was asked to decide who most deserved the class of societal resources encompassed by the range of affirmative action programs that will be invalidated under *Adarand*, the Court chose the white majority as more deserving than racial minorities. And in so doing, the Court stigmatized racial minorities as second class citizens in precisely the way that *Brown* held to be unconstitutional under the equal protection principle.

In sum, the Supreme Court's inversion of the concepts of affirmative action and discrimination enabled the Court to invalidate some as-yet unspecified number of future race-based affirmative action programs. This was an official act of pervasive racial discrimination that both diverted resources from racial minorities to the white majority and stigmatized racial minorities as inferior to whites. The Supreme Court's act of racial discrimination is made painfully derisive by the
tation-reinforcement theory as the prevailing justification for judicial review. See generally Es-
kridge & Frickey, supra note 337, at 367-98.
354. See Ely, supra note 29, at 155-60 (discussing legislative discounting of racial minority interests resulting from racial stereotyping and generalizations).
fact it occurred in the course of a Supreme Court proclamation that such official acts of pervasive racial discrimination no longer exist in contemporary culture. This is one respect in which *Adarand* is self-contradictory, but it is not the only respect. Ironically, *Adarand* is also a judicially activist decision issued by a Supreme Court that condemns judicial activism.

B. Irony

The Supreme Court’s decision in *Adarand* expands judicial power in the formulation of race-relations policy. It does so by replacing the traditional strict-scrutiny standard of judicial review, which had always been fatal in equal protection cases, with a new version of strict scrutiny that a majority of the Court states is not necessarily fatal. This means that the ultimate validity of any affirmative action program will be determined by the discretionary preferences of the Court. This shift in the power to make race-relations policy from the representative branches of government to the Supreme Court constitutes a form of judicial activism that is mirrored in other decisions by the present Court, and which has traditionally been identified with the doctrine of judicial restraint. The Court’s expansion of judicial power is particularly ironic because it has occurred in a doctrinal context in which the governing principle is political rather than judicial in nature. As a result, the formulation of race-relations policy by the Supreme Court seems both undemocratic and illegitimate.

*Adarand* holds that all racial classifications, including benign affirmative action programs, are subject to strict judicial scrutiny under the Equal Protection Clause of the Fourteenth Amendment, or the equal protection component of the Fifth Amendment, whether they are federal, state, or local programs. To satisfy strict scrutiny, a racial classification must advance a compelling governmental interest and be narrowly tailored to the advancement of that interest. The Court first held that strict scrutiny applied to racial classifications during World War II, when it applied strict scrutiny to the racial classifications that the federal government had used to impose curfew and

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355. See *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2112-13 (1995) (applying strict scrutiny to all racial classifications); see also id. at 2107-08 (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954) for the proposition that the Fifth Amendment contains an equal protection component that applies to the federal government).

356. See id. at 2107-08.

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exclusion orders on Japanese-American citizens. Nevertheless, in the midst of the wartime hysteria that followed the Japanese bombing of Pearl Harbor, the Court upheld the constitutionality of those classifications, notwithstanding the strict scrutiny to which they had been subjected. Since that time, however, the Supreme Court has never upheld the constitutionality of a racial classification that it subjected to strict scrutiny, thereby prompting Justice Marshall to term strict scrutiny “strict in theory, but fatal in fact.” Before Adarand, therefore, strict scrutiny was a determinate constitutional standard. Although there could be uncertainty about whether strict scrutiny applied, once it was determined that strict scrutiny did apply, the racial classification at issue was held to be unconstitutional in violation of the Equal Protection Clause.

Adarand has, at least nominally, given new content to the old strict scrutiny standard. Although the language of the strict scrutiny test remains the same, Justice O’Connor’s opinion in Adarand emphasizes that strict scrutiny should no longer be viewed as “fatal in fact.” As a result, the new strict scrutiny test increases the amount

357. See Korematsu v. United States, 323 U.S. 214, 216 (1944) (deeming racial classifications “immediately suspect” and applying “most rigid scrutiny”); cf. Hirabayashi v. United States, 320 U.S. 81 (1943) (terming classifications based upon ancestry to be “by their nature odious to a free people whose institutions are founded upon the doctrine of equality”); see also Adarand, 115 S. Ct. at 2106-08 (discussing Korematsu and Hirabayashi).

358. See Korematsu, 323 U.S. at 219-20 (upholding exclusion order after strict scrutiny as proper exercise of wartime authority); cf. Hirabayashi, 320 U.S. at 100-02 (upholding curfew after nominal reasonableness scrutiny as proper exercise of wartime authority); see also Adarand, 115 S. Ct. at 2106-08 (discussing Korematsu and Hirabayashi). Korematsu and Hirabayashi are now generally regarded as the products of wartime hysteria, and the results reached in those cases are widely discredited. See, e.g., Adarand, 115 S. Ct. 2097, 2106, 2117 (criticizing result in Korematsu); id. at 2121 (Stevens, J. dissenting) (criticizing the results in Korematsu and Hirabayashi); STONE ET AL., supra note 31, at 572.

359. See Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment) (strict scrutiny is “strict in theory, but fatal in fact”); see also STONE ET AL., supra note 31, at 572 (Korematsu is the last case in which the Supreme Court upheld a racial classification after the application strict scrutiny, and the decision has been widely criticized).

360. See supra Part I(C)(1) (discussing the Court’s difficulty in arriving at the appropriate standard of review for affirmative action).

361. See Adarand, 115 S. Ct. at 2117 (“[W]e wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’”)). Upholding a racial classification despite having strictly scrutinized it now appears to be an option for the Court. Justice Scalia was one of the five justices who signed this portion of Justice O’Connor’s opinion, see id. at 2101 (listing votes of justices), but he joined Justice O’Connor’s opinion “except insofar as it may be inconsistent with” the views expressed in his concurrence. See id. at 2118 (Scalia, J., concurring in part and concurring in judgment). Justice Scalia’s concurrence went on to stress that “[i]n my view, government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction.” See id. at 2118 (Scalia, J., concurring in part and concurring in judgment). Even if Justice Scalia still believes that strict scrutiny is fatal in fact, however, the Adarand dissenters appear willing to uphold otherwise acceptable affirmative
of discretion that the Supreme Court possesses in ruling on the validity of affirmative action programs. Note that this increase in Supreme Court discretion exists even if it turns out that the Supreme Court never upholds an affirmative action program under the new non-fatal standard. Justice O’Connor’s mere statement in Adarand that strict scrutiny is no longer fatal gives the Court the option of upholding a program whenever it wishes to do so.

The old strict scrutiny test gave the Court limited discretion. In state and local affirmative action cases, the Court’s primary responsibility was to determine what the standard of review would be. This was a relatively mechanical task. Under the rule that the Court evolved in Fullilove, Croson, and Metro Broadcasting, strict scrutiny applied to local programs adopted by states and municipalities, and intermediate scrutiny applied to federal programs adopted by Congress. Accordingly, the Court had only to characterize an affirmative action program as congressional or local in order to determine the appropriate standard of review. Because the applicable standard of review was determined by the type of the program at issue, the Court had limited discretion in characterizing the program. Because the strict scrutiny that applied to local programs was fatal, characterization of a program largely ended the case.

The Court had considerably more discretion in ruling on congressional programs. The intermediate scrutiny test that applied to those programs required the Court to determine whether a congressional program was “substantially” related to an “important” government interest. Under the new, non-fatal strict scrutiny standard, the Supreme Court has the same sort of discretion in ruling on all affirmative action programs that it had in ruling on congressional programs under the old intermediate scrutiny standard. Now, it is never sufficient for the Court to make a status determination of the type that used to be dispositive in local cases. Rather, the Court must now always make a determination about how “compelling” a governmental

362. See supra text accompanying notes 123-142 (discussing various positions of justices on the question of whether strict scrutiny is necessarily fatal).
363. See Adarand, 115 S. Ct. at 2117 (holding that strict scrutiny is not fatal in fact).
364. See id. at 2108-12 (discussing the evolution of affirmative action standards of review); see also supra Part I(C)(1) (discussing the standard of review).
interest is, and how "narrowly tailored" a program is to that interest.\textsuperscript{366} Such determinations are obviously very subjective, leaving considerable latitude for judicial discretion. That means that the Court now has broader discretion in ruling on affirmative action than it had prior to the \textit{Adarand} decision.\textsuperscript{367}

This expansion of judicial power over the formulation of race-relations policy corresponds to similar expansions of judicial power by the present Supreme Court that have occurred in other areas. In \textit{United States v. Lopez},\textsuperscript{368} the Court changed the operative test for determining the scope of congressional power under the Constitution to regulate interstate commerce.\textsuperscript{369} Since 1937 the Supreme Court had upheld all challenged exercises of congressional authority under the Commerce Clause.\textsuperscript{370} Although the linguistic test for determining the scope of the commerce power was whether the activity being regulated "affected" or "substantially affected" interstate commerce, the outcome had always been the same,\textsuperscript{371} just as the outcome in strict scrutiny equal protection cases had always been the same before \textit{Adarand}.\textsuperscript{372} This fifty-eight year history of uniform deferential interpretation of the commerce power occurred because in the decades preceding that uniform test, the Court had been unable to formulate a workable standard for Commerce Clause interpretation that stopped short of total deference.\textsuperscript{373} Nevertheless, in \textit{Lopez} the same five-to-four Court that decided \textit{Adarand} held that the Commerce Clause did not authorize Congress to criminalize possession of a gun in a school zone, because such possession had an insufficient connection to interstate commerce.\textsuperscript{374} As a result, it is no longer clear what the scope of

\begin{itemize}
  \item \textsuperscript{366} See \textit{Adarand}, 115 S. Ct. at 2113 (describing the strict scrutiny test).
  \item \textsuperscript{367} Ironically, there is a sense in which the Supreme Court's abandonment of fatal strict scrutiny may have increased the Supreme Court's formal power, while actually \textit{decreasing} its operational power. Because strict scrutiny is no longer necessarily fatal, strict scrutiny has become less determinate, and therefore, a less useful tool for Supreme Court supervision of lower court behavior. Now, the Supreme Court will have to grant review in order to reverse lower court decisions upholding affirmative action programs of which the Court disapproves, whereas those decisions might never have been rendered under a fatal strict-scrutiny standard.
  \item \textsuperscript{368} United States v. Lopez. 115 S. Ct. 1624 (1995).
  \item \textsuperscript{369} The Constitution gives Congress the power to regulate interstate commerce. See \textit{U.S. Const.} art. 1, § 8, cl. 3.
  \item \textsuperscript{370} See \textit{Lopez}, 115 S. Ct. at 1627-29 (discussing the Commerce Clause cases decided since 1937).
  \item \textsuperscript{371} See \textit{id}.
  \item \textsuperscript{372} See \textit{supra} text accompanying notes 359-60 (describing the old strict scrutiny test).
  \item \textsuperscript{373} See \textit{Lopez}, 115 S. Ct. at 1652-53 (Souter, J., dissenting) (discussing the early commerce clause cases).
  \item \textsuperscript{374} See \textit{id}. at 1626 (stating facts and holding).
\end{itemize}
congressional power is under the Commerce Clause. The Supreme Court will have to make this determination by ascertaining what "substantially affects" interstate commerce in particular cases. The Court's well-known decision reaffirming a modified right to abortion in Planned Parenthood of Southeastern Pennsylvania v. Casey also entailed an expansion of judicial policymaking power. Before Casey, the Supreme Court's 1973 decision in Roe v. Wade recognized a right to abortion that was governed by a viability standard that was typically implemented through a relatively mechanical trimester test. In Casey, however, the joint opinion of Justices O'Connor, Kennedy, and Souter rejected the trimester framework in favor of a more nebulous "undue burden" test, thereby expanding the role for the judiciary to play in the regulation of abortion. Likewise, the Court's most recent decisions under the Establishment Clause of the First Amendment have apparently rejected the traditional three-part test of Lemon v. Kurtzman, but curiously have not substituted a replacement test. As a result, the Supreme Court has granted itself very broad discretionary power, because it is simply announcing results without articulating a governing test. In its recent voting rights cases, the Court has also increased the scope of its discretionary power. In Shaw, the Court created a new cause of action for

375. Cf. id. at 1633 (noting but minimizing the significance of the uncertainty inherent in the Court's new test).

376. See id. at 1630 (adopting "substantially affects" test for scope of congressional commerce power). Professor Powell has stressed that the Framers' federalism goals, which the Supreme Court claimed to be pursuing in Lopez, cannot be realized through interpretation of the Commerce Clause alone and has demonstrated how the Lopez majority's endorsement of a broad congressional spending power is inconsistent with the concept of federalism on which the Lopez decision purports to rest. See H. Jefferson Powell, Enumerated Means and Unlimited Ends, 94 Mich. L. Rev. 651 (1995).


379. See id. at 162-66 (adopting the trimester test).

380. See Casey, 112 S. Ct. at 2816-17 (substituting the "undue burden" test for the trimester framework).


383. Cf. Redrup v. New York, 386 U.S. 767 (1967) (First Amendment obscenity case in which the Supreme Court was unable to articulate definition of obscenity to which a majority of the Court could subscribe, spawning a series of per curiam reversals whenever five members of the Court deemed the speech at issue not to be obscene). See generally Stone et al., supra note 31, at 1211 (describing Redrup procedure).
Affirmative Action and Discrimination

racially motivated assignment to a voting district, thereby creating a new opportunity for judicial intervention into the voter apportionment process. And in *Miller*, the Court held that the new cause of action existed only where racial considerations "predominate," thereby giving the Court broad discretion in the regulation of this new cause of action. As *Jenkins* indicates, the Court's recent school desegregation cases have introduced the concept of a partially unitary school system that can be deemed "desegregated" even though it is all black and its students have lower achievement levels than white students.

The Court's recent fondness for broad discretionary power is noteworthy because it comes from a politically conservative Court that is generally associated with a commitment to judicial restraint. Political conservatives are thought to favor judicial restraint precisely because judicial policymaking is viewed as less defensible than policymaking by politically accountable bodies. Accordingly, political conservatives tend to be strict constructionists, in the belief that close adherence to the text of the Constitution or the intent of the Framers will minimize the need for judicial discretion, which can degenerate into judicial policymaking. Justice Scalia has even opposed judicial

384. See supra text accompanying notes 300-01 (discussing *Shaw*).
385. See supra text accompanying notes 298-99 (discussing *Miller*).
386. See supra text accompanying notes 275-77 (discussing *Jenkins*).
389. See Graglia, supra note 388, at 631-37 (arguing that liberal judicial activism has resulted in Supreme Court's adoption of policy preferences that are not contained in Constitution); Horwitz, supra note 388, at 32-41 (noting the difficulty faced by the post-Warren conservative Supreme Court in overruling liberal Warren Court precedents without losing its legitimacy); Christopher E. Smith & Avis A. Jones, *The Rehnquist Court's Activism and the Risk of Injustice*, 26 CONN. L. REV. 53-59 (1993) (discussing judicial activism and judicial restraint); cf. William Wayne Justice, *The Two Faces of Judicial Activism*, 61 F.W. L. REV. 11 (1987) (discussing feder-
recourse to legislative history when statutory language is clear, to minimize opportunities for judicial discretion.\textsuperscript{390} Many commentators have recognized that political conservatives can meaningfully be characterized as proponents of judicial activism when they advocate judicial invalidation of a policy choice made by the political branches.\textsuperscript{391} Others have questioned the utility of terms such as judicial activism and judicial restraint because of the imprecision of those terms and their susceptibility to manipulation.\textsuperscript{392} Nevertheless, it is striking that recent increases in Supreme Court discretion have come from justices who often pride themselves on their judicial restraint.\textsuperscript{393}

The Court’s recent fondness for broad discretionary power is also noteworthy because of the very limited doctrinal guidance that the Court will have in interpreting the imprecise language that is the source of its discretionary power. Reasonable people can differ in their opinions about what is “compelling” and what constitutes “narrow tailoring,” and there is no objective standard that can be consulted in order to ascertain the meaning of those terms. As is frequently the case, the linguistic terms themselves do little to convey a determinate meaning. In such circumstances, legal doctrine typically relies upon some form of functional analysis to deal with the problem

\textsuperscript{390} See, e.g., Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527-30 (1989) (Scalia, J., concurring in judgment) (objecting to use of legislative history); INS v. Cardoza-Fonseca, 480 U.S. 421, 452-55 (1987) (Scalia, J., concurring in judgment); Hirschey v. FERC, 777 F.2d. 1, 6-8 (D.C. Cir. 1985) (Scalia, J., concurring); cf. Horwitz, supra note 388, at 95 (discussing other aspects of Justice Scalia’s aversion to judicial activism); Smith & Jones, supra note 389, at 56 (discussing Justice Scalia’s views on judicial restraint).

\textsuperscript{391} See Justice, supra note 389, at 6 (discussing political activism of the Rehnquist Court despite its identification as a conservative Court favoring judicial restraint); Smith & Jones, supra note 389, at 53-58, 62-66, 76-77; Mark V. Tushnet, Comment on Archibald Cox, The Role of the Supreme Court, Judicial Activism or Self-Restraint, 47 Md. L. Rev. 147, 148-50 (1987) (arguing that judicial activism need not be limited to liberals); see also Biskupic, supra note 387, at C1 (discussing the judicial activism of a politically conservative Supreme Court); Greenhouse, supra note 387, § 4, at 1; O’Brien, supra note 387, at 2; Rosen, supra note 387, at 12; Schwartz, supra note 387, at 25.

\textsuperscript{392} See Tushnet, supra note 391, at 147, 153 (linguistic terms used by the Court have too many meanings to be useful for other than political purposes); Justice, supra note 389, at 3-5, 13 (judicial activism consists of something to which one is politically opposed).

\textsuperscript{393} See Smith & Jones, supra note 389, at 53-58, 62-66, 76-77 (noting disjunction between Rehnquist Court’s purported judicial restraint and its actual judicial activism); see also Biskupic, supra note 387, at C1 (discussing judicial activism of politically conservative Supreme Court); Greenhouse, supra note 387, § 4, at 1; O’Brien, supra note 387, at 2; Rosen, supra note 387, at 12; Schwartz, supra note 387, at 25.
of linguistic indeterminacy. Linguistic ambiguities are resolved in a manner that best advances the purpose of the legal provision under consideration. In the context of affirmative action, however, not even the doctrinal function that the strict scrutiny standard is intended to serve offers any assistance in giving that standard meaning. This is because the Supreme Court’s affirmative action decisions are not sufficiently coherent to permit any governing principle to emerge. Rather, the Court’s cases are internally inconsistent and externally conflicting.

There are two fundamental problems with the Supreme Court’s affirmative action jurisprudence that make the Court’s decisions difficult to defend. First, the Court has never adequately explained why the Equal Protection Clause, which is the basis for the Supreme Court’s constitutional scrutiny of affirmative action programs, should apply to whites claiming governmental discrimination in a white-majority country. Although there is nothing in the language of the Fourteenth Amendment to prevent such an application, neither the intent of the Framers, nor the prevailing representation-reinforcement theory of judicial review would permit an extension of the equal protection guarantee to whites in such circumstances, because whites are neither former black slaves nor members of a politically underrepresented, discrete and insular minority group.

Second, the Court’s frequently repeated insistence that the equal protection guarantee applies to individuals and not to groups is less than self-evidently correct in the context of racial discrimination, because racial discrimination is inherently directed at groups rather than at individu-

394. See, e.g., Church of Holy Trinity v. United States, 143 U.S. 457, 459 (1892) (broad statutory language should be interpreted in a manner consistent with the statutory purpose); see also Harold D. Laswell & Myres S. McDougal, Legal Education and Public Policy: Professional Training in the Public Interest, 52 YALE L.J. 203 (1943) (contending that the law should serve public policy functions); Girardeau A. Spann, Functional Analysis of the Plain-Error Rule, 71 GEO. L.J. 945, 979-82 (1983) (functional analysis is an appropriate response to doctrinal indeterminacy).

395. See SPANN, supra note 5, at 132 (arguing that it is unclear why the white majority needs Supreme Court protection from affirmative action programs adopted by the white majority).

396. “No State shall... deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1 (applying equally to all races).

397. See SPANN, supra note 5, at 132 (discussing doctrinal difficulty of extending equal protection guarantee to whites).

These are fundamental difficulties with the Court's equal protection jurisprudence that have been debated elsewhere. But, the Court's 1994 Term cases raise additional problems that make it even more difficult to view the Court's position on affirmative action as coherent.

The Supreme Court's decision in *Adarand* holds that the ten percent bonus that the federal government gives to contractors who hire minority subcontractors is constitutionally suspect, and that it violates the equal protection guarantee unless it can be shown to survive strict scrutiny. This is because the equal protection guarantee gives white subcontractors an individual right not to be discriminated against by the government on the basis of their race. But it is unclear why the bonus program in *Adarand* should be viewed as racial discrimination. Rather, it is simply an exercise of the congressional spending power in a way that is designed to encourage behavior of which Congress approves.

It is clear that Congress may use the spending power selectively to encourage or discourage private conduct of which it approves or disapproves. It is also now clear that such selective spending does not violate the Constitution even when it burdens an individual constitutional right. The abortion funding cases illustrate the scope of this congressional power. In *Harris v. McRae* and *Maher v. Roe*, the Supreme Court held that Congress could use its Medicaid program to fund childbirth without funding abortions, and that such selective funding did not violate either the substantive due process right to abortion or the equal protection prohibition on discrimination against fundamental rights.

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399. See SPANN, supra note, 5 at 120, 123 (discussing individual versus group nature of discrimination and affirmative action).
400. See id. at 119-49 and commentators cited therein (discussing affirmative action).
401. See *Adarand*, 115 S. Ct. at 2102-04 (describing bonus program); id. at 2118 (remanding for strict scrutiny).
402. See id. at 2111 (emphasizing the individual nature of the equal protection right).
403. The Constitution grants Congress the power to spend for the general welfare. See U.S. Const. art. I, § 8, cl. 1.
404. See United States v. Butler, 297 U.S. 1, 65-66 (1936) (Congress has power to spend for purposes that it deems to advance general welfare).
407. See *Harris*, 448 U.S. at 312-18 (holding that congressional restriction on the use of federal Medicaid funds for most abortions does not violate Due Process Clause); id. at 321-23; *Maher*, 432 U.S. at 469-77 (holding that state restrictions on the use of Medicaid funds for most abortions does not discriminate against the fundamental right to an abortion).
Why, then, is the congressional decision to encourage the hiring of minority subcontractors in *Adarand* not deemed an equally valid exercise of the congressional spending power? It imposes no more of a burden on white contractors seeking subcontracts than the abortion funding restrictions imposed on women wishing to exercise their constitutional right to abortion. If anything, the *Adarand* bonus is less offensive than the abortion restrictions. The abortion funding cases involved two constitutional rights: the due process right to abortion and the equal protection right not to be discriminated against for exercising a fundamental right. *Adarand*, however, involved only one constitutional right: the right not to be discriminated against on the basis of race. In *Adarand* there was no constitutional right to a construction contract that was analogous to the right to abortion in the abortion funding cases. The Supreme Court’s failure to mention—let alone distinguish—its abortion funding cases in its affirmative action decisions, despite their different resolutions of similar constitutional issues, undermines the coherence of whatever principle the Supreme Court believes that it is applying in the affirmative action cases.

A similar incoherence emerges when *Adarand* is compared to *Miller*, the voter apportionment case that the Court decided a few weeks after *Adarand*.408 In *Miller*, the Court held that when race is the predominant factor in drawing voting district lines, the voting districts are constitutionally suspect and subject to strict equal protection scrutiny.409 When race is not the predominant factor but is simply one of several factors taken into account in drawing district lines, a voter apportionment scheme is not a racial classification that triggers strict scrutiny.410 If the *Miller* reasoning is applied to the *Adarand* statutory scheme, an intractable problem emerges.

The presumption of minority social and economic disadvantage contained in the Small Business and Surface Transportation Acts, was the source of the constitutional problem that triggered strict scrutiny in *Adarand*.411 If Congress were to amend those statutes so that, in addition to the presumption of minority disadvantage, the statute also contained presumptions of disadvantage extending to women, individ-

408. *See supra* text accompanying notes 298-99 (discussing the *Miller* decision).
410. *See id.* at 2488 (holding that where race does not dominate traditional districting principles, district lines are not considered gerrymandered, and strict scrutiny does not apply).
uals with physical impairments, veterans, and individuals with non-traditional sexual preferences, the Supreme Court's precedents seem to preclude the possibility of any ruling on the constitutionality of the amended statute. If *Miller* controls, the amended statute would appear to be constitutional, because race would not "predominate" in the congressional presumption of social and economic disadvantage but would simply be one of five factors that Congress considered. *Miller* would seem to compel the conclusion that the presumption, considered as an aggregation of component presumptions, was not a racial preference. Accordingly, strict scrutiny would not apply. But that cannot possibly be the correct result. It would permit racial discrimination to sneak by uncorrected simply because of its association with other classifications that do not trigger strict scrutiny. Yet, the conclusion that the amended presumption would be unconstitutional is equally problematic.

It is possible to view the hypothetical amended presumption as a series of five independent presumptions rather than as a single set of presumptions that must be analyzed in the aggregate. So viewed, it is then possible to isolate the racial presumption for strict scrutiny without strictly scrutinizing the four other presumptions, because only the racial presumption involves a suspect classification that triggers strict scrutiny. This saves *Adarand* from the neutralizing effects of *Miller*, but it does so at the cost of implicating the Supreme Court in yet another act of racial discrimination. If the Supreme Court were to isolate the presumption benefiting racial minorities from the four other presumptions included in the amended statutes, the Supreme Court would be imposing on that presumption the special burdens of strict scrutiny that it did not impose on the four presumptions that benefited whites. When legislatures have imposed special burdens on programs that benefit racial minorities without imposing those same burdens on programs that benefit whites, the Supreme Court has invalidated those special burdens as unconstitutionally discriminatory under the Equal Protection Clause. Accordingly, if the Supreme Court were

412. In this regard, note that under the facts of the actual *Adarand* case, the Small Business Act extends the presumption of disadvantaged status to groups, other than racial minorities, who are designated from time to time by the Small Business Administration. See id. at 2103. In addition, the Surface Transportation Act extends the presumption of disadvantaged status to women. See id. at 2103; supra note 241. Note also that *Miller* seems to let race "sneak by uncorrected" simply because of its association with other districting principles that do not trigger strict scrutiny. Accordingly, either *Adarand* or *Miller* must be wrong; they cannot peacefully co-exist.

similarly to single out the presumption that benefited racial minorities for strict scrutiny, it would be guilty of the very same equal protection violation that it invalidates when committed by legislatures. Again, because there is no doctrinally acceptable way to reconcile Adarand and Miller, it is difficult to have confidence in the Supreme Court's resolution of either case.

A third incoherence in the Supreme Court's approach to affirmative action can be uncovered by comparing Adarand to Rosenberger v. Rector and Visitors of the University of Virginia, which was also decided a few weeks after Adarand. In Rosenberger, a religiously oriented student organization sought funding for a campus publication from a student activity fund available for general student activities, but the University denied the requested funding. The Supreme Court held—once again, with the same five-to-four majority that decided Adarand—that the University was required to fund the student publication because a denial of funding would constitute viewpoint discrimination that violated the First Amendment rights of the students. The Court also held that the University's student activity fund was sufficiently neutral that funding by the University would not violate the Establishment Clause of the First Amendment by supporting religion.

Rosenberger and Adarand involved the same basic constitutional problem, but the two cases arrived at contradictory results. Both cases concerned the government's obligation to remain neutral in the operation of a funding program that the government had adopted in order to advance constitutionally permissible goals. In Rosenberger, the government adopted a program to fund publications run by students, and in Adarand the government adopted a program to fund busing as a remedy for local de facto school segregation, where the normal legislative process was adequate to authorize all other local legislative actions; Hunter v. Erickson, 393 U.S. 385 (1969) (invalidating city charter provision requiring a voter referendum to authorize fair housing ordinances, where the normal legislative process was adequate to authorize all other types of ordinances). But cf. Crawford v. Board of Educ., 458 U.S. 527 (1982) (companion case to Seattle Sch. Dist. No. 1, upholding state constitutional amendment that prohibited busing as remedy for de facto school segregation, where busing remained available to remedy other pertinent legal violations). To the extent that one views Crawford as indistinguishable from Seattle School Dist. No. 1 and Hunter v. Erickson, the principle underlying the Supreme Court's decisions in Adarand and Miller appears to be even less coherent.

415. See id. at 2510, 2513-16 (stating the facts of case).
416. See id. at 2523-24 (refusal to fund violates First Amendment).
417. See id. at 2523 (honoring First Amendment obligation does not violate the Establishment Clause).
construction companies run by disadvantaged contractors. Both cases also involved the funding of a minority group. In *Rosenberger*, the minority group was the group of students who sought to publish religious views rather than the non-religious views published by the majority of students. In *Adarand*, the minority group was the group of contractors who sought funding under a racial presumption of disadvantaged status rather than under the non-racial presumptions of disadvantaged status that were available to the white majority.\(^\text{418}\)

In *Rosenberger*, the Supreme Court held that the government's obligation to remain neutral *required* it to fund the minority publication, because a failure to do so would constitute viewpoint discrimination prohibited by the First Amendment. In *Adarand*, the Court held that the government's obligation to remain neutral *prohibited* it from funding the minority contractors because such funding would constitute racial discrimination prohibited by the equal protection principle. The two cases reached results that were diametrically opposed to each other concerning the way in which a government must act in order to satisfy its constitutional obligation to remain neutral. The only doctrinal difference that existed between the two cases was that one involved First Amendment viewpoint discrimination, and the other involved equal protection racial discrimination. But that difference seems inconsequential, because both types of discrimination trigger the very same strict constitutional scrutiny.

The reason that *Rosenberger* and *Adarand* can both follow logically acceptable lines of analysis and yet arrive at contrary conclusions is that the concept of discrimination—like the concept of equality itself—does not have any content until it is linked to a normative judgment about what sorts of conduct are desirable and undesirable.\(^\text{419}\) Forming the linkage is a highly indeterminate act, turning on deeply contestable, normative preferences. Therefore, if the Supreme Court has different normative feelings about government conduct in two different cases, the Court can manipulate the same non-discrimination rule to accommodate those different normative feelings. Indeed, the Court *must* do so, because the non-discrimination rule has no content until the Court links it to a normative value.

\(^{418}\) Remember, the *Adarand* presumption also applied to women and other non-racial groups that the Small Business Administration could select from time to time. See *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2103 (1995).

\(^{419}\) Cf. Peter Westen, *The Empty Idea of Equality*, 95 Harv. L. Rev. 537 (1982) (stating that the idea of equality is meaningless without the infusion of a normative standard against which equality can be determined).
Accordingly, if the government eliminates religious publications or minority contractors from a funding program, it is discriminating against the groups that it has chosen to eliminate. If, however, the government adds religious publications or minority contractors to a funding program, it is discriminating in favor of the groups that it has chosen to add. Characterization of a governmental action as discriminatory or non-discriminatory, therefore, turns once again on the baseline that is selected as the starting point for analysis. No baseline can be “natural” or “correct,” because the operative baseline is a function of how the problem is perceived. Accordingly, if one views *Adarand* as involving a new program created to give a government subsidy to minority contractors, the program looks like a program that discriminates in favor of racial minorities and against whites. But if one moves the baseline back in time to the point at which the government created its range of subsidy programs for white defense contractors, oil companies, tobacco growers and the like, but failed to include a similar subsidy for minority construction contractors, then the *Adarand* program looks like affirmative action that compensates for past discrimination. The non-discrimination doctrine will not have any content until the Supreme Court makes this baseline determination, and the baseline determination cannot be made until the Court makes a normative judgment.

It follows that when the Supreme Court expands judicial power, as it did in *Adarand* by replacing fatal strict scrutiny with potentially non-fatal strict scrutiny, the Court also expands the need for the normative judicial judgments necessary to give content to the legal doctrines that the Court applies. Because these judgments are ultimately normative rather than doctrinal in nature, an expansion of judicial power also constitutes an expansion of the degree to which the normative preferences of the representative branches are supplanted by the normative preferences of Court.

420. This is the same phenomenon that made it possible to show that *Adarand* conflicted with *Miller* and the abortion funding cases. See supra text accompanying notes 408-10 (discussing conflict between *Adarand* and *Miller*); supra text accompanying notes 404-07 (discussing conflict between *Adarand* and abortion funding cases). The baselines for analysis were simply shifted in order to expose latent conflicts that are not apparent when different baselines are selected. Moreover, it is this same latent baseline ambiguity that made it impossible to draw an objective distinction between the concepts of affirmative action and discrimination. See supra text accompanying note 349 (noting the lack of objective distinction between affirmative action and discrimination).
Cases like *Adarand* constitute direct substitutions of Supreme Court normative preferences for the normative preferences of the representative branches. Such cases make it apparent that the locus of power in the formulation of race-relations policy has shifted from the political branches to the Court. As *Adarand* attests, the political branches can now formulate race-relations policy only in the manner that the Supreme Court deems appropriate. Such a shift in power might make sense if the Court were applying doctrinal principles that had to be insulated from political infection. But, as has been shown, the non-discrimination principle that the Court purports to apply when it invalidates affirmative action programs does not have principled content requiring insulation from political influence. Rather, the non-discrimination principle must derive its meaning from the political preferences to which it is linked. This suggests that the shift in race-relations policymaking power from the representative branches to the Court is undemocratic, and that the Court's invalidation of affirmative action plans adopted by the representative branches of government is illegitimate. Justice Ginsburg was certainly correct in her *Adarand* dissent when she argued that the affirmative action debate was best left to the political branches for resolution. The affirmative action debate is a debate in which the Supreme Court simply has no legitimate role to play.

CONCLUSION

The practical implications of the Supreme Court's decision in *Adarand* may well be unremarkable. Even under a strong reading of the case, in which strict scrutiny remains fatal scrutiny, the decision may come to mean little more than that government entities wishing to adopt affirmative action programs will have to restructure their programs to create preferences for individuals who suffer social or economic disadvantage, without making explicit reference to race as a proxy for such disadvantage. Restructured programs will still be able to provide primary assistance to racial minorities, because racial minorities are overrepresented among the ranks of the disadvantaged, and the Supreme Court has stressed that a mere racially disparate impact will not suffice to establish an equal protection violation. As a practical matter, therefore, *Adarand* may mean only that government entities will be forced to incur the additional administrative expenses

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421. See *Adarand*, 115 S. Ct. at 2134 (Ginsburg, J., dissenting).
entailed in seeking to identify disadvantaged individuals without using race as a proxy.\textsuperscript{422}

The aspect of \textit{Adarand} that is most noteworthy is not its practical consequence but its rhetorical content. The Supreme Court’s holding that a congressional presumption of minority disadvantage is constitutionally suspect constitutes a proclamation by the Supreme Court that systemic racial discrimination no longer exists in the United States. There is a palpable divergence between the doctrinal world from which the Court issued its \textit{Adarand} proclamation and the world of ordinary experience, in which racial minorities remain conspicuously underrepresented in the allocation of societal resources. In fact, the divergence is so palpable that one cannot help but wonder what could have motivated the Court to insist on such an artificial depiction of contemporary culture.

It is logically possible for the Court to have concluded that the discriminatory forces historically at play in American culture have now ceased to exist and that over time discrepancies in the allocation of resources will disappear so long as the culture remains committed to the principle of prospective race neutrality. It is difficult, however, to imagine that anyone sincerely believes such an argument. It is the same argument that opponents of racial equality made in opposition to remedial Reconstruction legislation, in support of separate-but-equal facilities under \textit{Plessy}, and in support of de facto segregated schools in the wake of \textit{Brown}. And the argument seems no more plausible today than it did when the Supreme Court accepted it in those three prior contexts. The contention that racial minorities will, in a race-neutral environment, eventually be able to overcome the historic head start that the white majority has been given in the competition for societal resources requires one to believe that racial minorities are \textit{better} qualified than members of the white majority to compete for societal resources. It is unlikely, however, that the Supreme Court embraces this view. As a result, the suggestion that racial neutrality will someday produce racial equality seems more like

\textsuperscript{422} In addition to the administrative costs of restructuring affirmative action programs to be disadvantage-based programs, \textit{Adarand} may result in a reallocation of affirmative action resources among racial minorities. Wealthy minority individuals and firms may no longer be eligible for preferential treatment under disadvantage-based affirmative action programs. This outcome may be normatively acceptable, although it seems important to remember that successful minority firms can still be the victims of racial discrimination despite the fact that they might not qualify for preferential treatment under subsistence income redistribution programs.
a rationalization than a genuine account of Supreme Court motivation.

It is also possible that the Supreme Court believes that the benefits of prospective neutrality to the society as a whole outweigh the costs of such neutrality to racial minorities. Although this belief may be sincere, it is hardly comforting. It reflects a potential discounting of minority interests that representation-reinforcement judicial review requires the Court itself to guard against when such discounting is engaged in by the representative branches of government. In the affirmative action context, however, the Supreme Court has now discounted minority interests more than the representative branches that the Court is supposed to oversee. Moreover, the institutional history of the Supreme Court in the context of race relations makes it unrealistic to suppose that the Court can be counted on to strike a better cost-benefit balance than the representative branches have struck between the competing interests that are implicated in the affirmative action debate.

Benign accounts of the Supreme Court's motivation in adopting its Adarand opposition to affirmative action seem either disingenuous or unrealistic. One is, therefore, prompted to seek alternate accounts of the Supreme Court's actions. Ultimately, I believe that it is most realistic to conclude that the Court has been motivated by a form of racial prejudice that has become too virulent to be mentioned in polite conversation, but which is widespread in the culture nonetheless. I believe that a majority of the justices on the Supreme Court believe that racial minorities are inherently inferior to whites.

Historically, the language of infamous Supreme Court opinions has revealed unmistakable condescension toward racial minorities in the attitudes of the justices who wrote those opinions. Justice Taney in Dred Scott viewed blacks "as beings of an inferior order, and altogether unfit to associate with the white race."423 In Plessy, even the dissenting opinion of Justice Harlan agreed that the white race was "the dominant race in this country,"424 and added, "So, I doubt not, it

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423. Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 407 (1856). The suggestion that Chief Justice Taney was merely describing the views of the Framers, rather than adopting those views as his own, has never rung true. See Stone et al., supra note 31, at 480 (suggesting that it might be unfair to attribute the sentiments expressed in Chief Justice Taney's opinion to Chief Justice Taney himself). Chief Justice Taney repeated those views too often and with too much relish to permit the inference that he did not share those views himself. See Spann, supra note 5, at 96 (arguing that Chief Justice Taney shared views attributed to Framers in Dred Scott).

will continue to be for all time, if it remains true to its great heritage." The Adarand Court dispensed with the inherent-inferiority language used by its predecessor Courts, but its holding remains equally condescending. The racial attitude of the Adarand Court can be uncovered by asking one revealing question. Why was not the presumption of minority disadvantage in Adarand adequately supported by the stark racial disparity that presently exists in the allocation of societal resources—the disparity that the Supreme Court goes to such pains to disregard as the product of non-cognizable, general societal discrimination? After all, if the society has truly arrived at a post-discriminatory stage in its cultural evolution, one would expect societal resources to be distributed among racial groups in a way that corresponds to the representation of those groups in the population at large. By hypothesis, race is irrelevant to the distribution of resources, so a nondiscriminatory distribution should be racially proportional. Why then isn't proportional distribution of societal resources the proper test for distinguishing racial discrimination from racial equality?

The answer that is commonly given to this question is that an insistence on proportional distribution would override considerations of merit; it would force resources to go to those with the appropriate complexion rather than to those with the appropriate abilities. Even a moment's reflection, however, reveals that this cannot be the right answer. If the society were free from racial discrimination, not only societal resources, but merit itself would be distributed proportionally among racial groups. As a result, an allocation of resources based on merit would also be an allocation that was racially proportional. Moreover, a racially disproportionate allocation of societal resources would be evidence that the society was discriminating on the basis of race. That discrimination might occur in the way that the society cultivated merit in its members, or in the way that the society defined the concept of merit. But, one way or the other, racial discrimination would necessarily exist.

This is the line of reasoning that Congress pursued in its adoption of the Adarand presumption, viewing the perpetual disadvantage of racial minorities in the allocation of resources as evidence that discriminatory forces must still be at play in the society. This, however, is

425. *Id.*

426. *See supra* text accompanying notes 143-66 (discussing general societal discrimination).
also the line of reasoning that the Supreme Court read the Constitution to prohibit Congress from adopting, proclaiming that the society was free from the forces of systemic racial discrimination. The Court must, therefore, have found some fault in the seemingly straightforward congressional reasoning that led to the *Adarand* presumption. There seems to be only one assumption in the congressional reasoning that could realistically be objected to as faulty. This is the assumption that merit would be distributed in a racially proportional manner in a non-discriminatory society. It might be that even after having been given equal opportunities, racial minorities would convert those opportunities into less merit than their white counterparts. And although it is possible to conclude, as the Supreme Court appears to have concluded in *Adarand*, that merit is not proportionally distributed in a non-discriminatory society, it is possible to reach this conclusion only if one first believes in the inherent inferiority of racial minorities.