Reconsidering Strict Scrutiny of Affirmative Action

Brent E. Simmons
Thomas M. Cooley Law School

Follow this and additional works at: https://repository.law.umich.edu/mjrl

Part of the Fourteenth Amendment Commons, Jurisprudence Commons, Law and Race Commons, and the Supreme Court of the United States Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjrl/vol2/iss1/2

This Article is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of Race and Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
RECONSIDERING STRICT SCRUTINY
OF AFFIRMATIVE ACTION

Brent E. Simmons*

In this Article, the author critiques the Supreme Court’s recent rulings applying strict scrutiny as the proper standard of review for race-conscious affirmative action programs. He contends that the Court’s “new and untested colorblind jurisprudence” is obstructing the national consensus supporting affirmative action measures to eliminate systemic discrimination against minorities and women. To support his critique, the author first argues that the Supreme Court has taken onto itself ultimate responsibility and accountability for the success or failure of ending systemic discrimination, a social policy objective that is more properly the subject for legislative or executive resolution. Second, the author points out how this new “colorblind” jurisprudence deviates from prior, established equal protection doctrine grounded in the remedial objectives of the Fourteenth Amendment and Footnote 4 of United States v. Carolene Products Co. Finally, the author examines the practical effects of strict scrutiny under the Supreme Court’s new colorblind jurisprudence. Specifically, he criticizes the Supreme Court’s and lower courts’ inconsistent application of strict scrutiny, and points out the disruptive effect this has on otherwise legitimate government efforts to end systemic discrimination, that would probably survive judicial scrutiny under a more balanced test.

INTRODUCTION ........................................................................................................52

I. STRICT SCRUTINY OF AFFIRMATIVE ACTION: HAS THE SUPREME COURT OVERSTEPPED ITS ROLE? .........................................................................................................................63
   A. Affirmative Action Defined ..................................................................................64
   B. The Evolution of Affirmative Action as a Federal Policy .................................65
   C. The Constitutional Bases of Race-Conscious Remedies ..................................70
   D. Strict Scrutiny Frustrates the Remedial Objectives of the Fourteenth Amendment ....................................................................................................................73
   E. The Court’s Adoption of Strict Scrutiny and Its Presumption of Race-Neutral Equality ..................................................................................................................80
   F. Crossing the Constitutional Divide ......................................................................82

II. STRICT SCRUTINY OF AFFIRMATIVE ACTION: IS IT RATIONAL? ........86
   A. How Strict Is Strict? ............................................................................................86
   B. Strict Scrutiny of Legislative Factfinding ..........................................................91

INTRODUCTION

Constitutional history is repeating itself. One hundred years after adoption of its now discredited "separate but equal" doctrine in Plessy v. Ferguson, the U.S. Supreme Court is once again directing the future course of race relations in the country. Just as it did more than a century ago in overseeing the demise of Reconstruction, the Supreme Court is obstructing yet another national consensus.

1. 163 U.S. 537 (1896). In Plessy, the Supreme Court held that state laws requiring "separate but equal" public accommodations for Blacks and Whites did not violate the equal protection guarantee of the Fourteenth Amendment. As Justice Harlan accurately predicted in dissent, "[T]he judgment this day rendered will, in time, prove to be as pernicious as the decision made by this tribunal in the Dred Scott Case." Id. at 559.

2. See DAVID JUNG ET AL., AFFIRMATIVE ACTION AND THE COURTS (California Research Bureau & Public Law Research Inst., Hastings College of Law, Report No. CRB-LIS-96-001, Feb. 1996) <http://www.uchastings.edu/plri/fall95/aadoc.html> ("For some time, affirmative action has been debated in the political arena. Recent United States Supreme Court decisions, however, have prompted some commentators to suggest that the future of affirmative action will be determined by the courts, not the legislatures. That future, according to one view, is bleak." (citing Action: Don't Forget the Courts, WALL ST. J., Aug. 2, 1995, at A11)); see also Kenneth Jost, After Adarand, A.B.A. J., Sept. 1995, at 70, 70 ("[T]he Supreme Court...[has] made it clear that the future of affirmative action is more likely to be decided in the courts instead of in the political arena.").

3. While controversial, opinion polls indicate that affirmative action generally has enjoyed a solid core of bipartisan and popular support. See, e.g., Kenneth Jost, Rethinking Affirmative Action, 5 CQ RESEARCHER 369, 372, 374 (1995) (referring to a March 1995 poll taken by the L.A. Times). Most Americans appear to support moderate forms of affirmative action—up to and including the use of goals and timetables—but object to quotas. Id. at 374.

California Governor Pete Wilson attempted to make affirmative action a defining issue early in the 1996 presidential campaign. See Karen Brandon, Affirmative Action Smoldering in '96: Efforts to Repeal Race- and Sex-Based Hiring Practices Remain a Volatile Political Issue, ORLANDO SENTINEL, Jan. 21, 1996, at G1. Campaigning legislators also moved affirmative action to the forefront of their agendas in Congress, as well as in California and in other states. See id. In the final weeks before the November 1996 elections, however, the political campaign to end affirmative action was largely abandoned. As one observer noted:

A year ago, the debate over affirmative action was turning bitter as Republicans in Congress and state legislatures across the country attacked the issue, which seemed certain to become a decisive question in the 1996 presidential election...
supporting affirmative measures to eliminate systemic discrimination from American society. By narrow majorities, the Court has meticulously laid the groundwork for a new and untested colorblind jurisprudence, with the ultimate aim of invalidating government use of race-conscious affirmative action as an instrument of public policy in dismantling entrenched patterns of systemic discrimination against minorities and women. As explained by the Clinton Administration:

But heading into the final eight weeks of the presidential campaign—and against all expectation—the affirmative action issue has virtually fallen from view.

GOP leaders in Congress have abandoned [the Dole-Canady] bill that would have rolled back most federal affirmative action programs. Outside of California, . . . virtually every state legislative proposal launched in the past year to eliminate or sharply curtail affirmative action has been unsuccessful.

Michael A. Fletcher, Losing Its Preference: Affirmative Action Fades as Issue, WASH. POST, Sept. 18, 1996, at A12. Mr. Fletcher also noted that affirmative action continues to enjoy a “surprising amount of popular support” and that “some of the nation’s most prominent moderate Republicans have spoken out against efforts to eliminate it.” Id.


[the comfortable metaphor of colorblindness] stands for an austere proposition: that American government is, or ought to be, denied the power to distinguish between its citizens on the basis of race. A blanket prohibition of racial classifications is impossible to locate in a literal reading of the constitutional text, and it has never been acknowledged by the Supreme Court as a requirement of the “equal protection of the laws” guaranteed by the Fourteenth Amendment. Yet the color-blind idea persists nevertheless, forming a seemingly indispensable theme in the constitutional law of race.


5. The problem of systemic discrimination was first recognized by then-Vice President Richard Nixon and the President’s Committee on Government Contracts. See PRESIDENT’S COMM. ON GOV’T CONTRACTS, PATTERNS FOR PROGRESS: FINAL REPORT TO PRESIDENT EISENHOWER (1960). As summarized by one scholar, the report found that “the indifference of employers to establishing a positive policy of non-discrimination hinders qualified applicants and employees from being hired and promoted on the basis of equality.” Carl E. Brody, Jr., A Historical Review of Affirmative Action and the Interpretation of Its Legislative Intent by the Supreme Court, 29 AKRON L. REV. 291, 301-02 (1996).

[Furthermore, the Report demonstrated that even if overt discrimination did not exist, a covert, societal type of discrimination flourished. This covert type of discrimination had no malicious intent, but the effect still denied employment opportunities to African-Americans. Covert discrimination operates to
The primary justification for the use of race- and gender-conscious measures is to eradicate discrimination, root and branch. Affirmative action, therefore, is used first and foremost to remedy specific past and current discrimination or the lingering effects of past discrimination. Affirmative action is also used to prevent future discrimination or exclusion from occurring. It does so by ensuring that organizations and decisionmakers end and avoid hiring or other practices that effectively erect barriers.

But a constitutional requirement of "colorblindness" would bar all uses of racial classifications by state and local government, including the use of race-conscious programs to end systemic discrimination.

perpetuate the status quo, and to retain discriminatory policies and practices. The problem is that [a] comfort level was achieved during a period when African-Americans and other minorities were not welcomed, thereby excluding them from becoming part of the accepted norm. Therefore, in the employment context, African-Americans were, and still are, excluded because society wants to retain the comfort level, which manifests itself in what Vice President Nixon referred to as "indifference." Though this is not overt discrimination, the effect is equally invidious.


7. Cf. Louisiana Associated Gen. Contractors, Inc. v. State, 669 So. 2d 1185 (La. 1996) (construing the state equal protection clause under LA. CONST. art. 1, § 3, which states: "No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations."). The Louisiana Supreme Court held that the clause affords "greater protection than its federal counterpart"—to White males in this instance. Thus, "when a law discriminates against a person by classifying him or her on the basis of race, it shall be repudiated completely, regardless of the justification behind the racial discrimination." Id. at 1198 (emphasis added). Though racial classifications might be upheld under Fourteenth Amendment strict scrutiny, the court said, "[T]here is no scrutiny under Art. I, § 3" of the state constitution because racial classifications are absolutely prohibited. Id.

The Louisiana Supreme Court went on to reject arguments that: 1) the State has "a constitutional duty under the Fourteenth Amendment to engage in race-preference programs to cure the effects of past discrimination," and 2) adoption of race-conscious programs is often a requirement for receipt of federal funds. See id. at 1199-1200. The court said that while the Fourteenth Amendment authorizes voluntary affirmative action by the State, it imposes no duty to adopt such programs. See id. at 1199. Furthermore, the State is constitutionally bound to reject federal funds
Such a requirement, however, is supported neither by the original intent of the framers nor by the history of the Equal Protection Clause. It would also represent a radical departure from fifty-eight years of modern equal protection jurisprudence.

The Supreme Court began the process of reformulating equal protection doctrine with its adoption of "strict scrutiny" in City of Richmond v. J.A. Croson Co. There, for the first time, a majority of the Court held that government use of voluntarily adopted race-conscious remedies is presumptively invalid under the Equal Protection Clause of the Fourteenth Amendment, and that such programs must be subjected to the same exacting scrutiny previously reserved for invidious forms of racial discrimination. However, the need to strictly scrutinize race-conscious remedial programs was neither self-evident nor compelled by the Court's prior decisions. 8 For more than a decade after its 1978 decision in Regents of the University of California v. Bakke 9 the Court had been sharply divided over the constitutional standard of review to be applied in affirmative action cases. 10 It was not until the 1989 decision in Croson 11 that a politically conservative, yet judicially "activist" majority 12 adopted

conditioned on the use of racial classifications. See id. at 1200. The court's ruling raises a number of interesting federal constitutional issues which, unfortunately, lie beyond the scope of the present Article.


9. The lower courts are still divided over whether strict scrutiny applies to gender-based affirmative action. Compare Brunet v. City of Columbus, 1 F.3d 390 (6th Cir. 1993) (applying strict scrutiny to gender-based affirmative action), with Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991) (rejecting strict scrutiny and applying intermediate scrutiny to gender-based affirmative action). In United States v. Virginia, 116 S. Ct. 2264 (1996), the Supreme Court has reaffirmed the use of intermediate or "skeptical scrutiny" for gender classifications in a non-affirmative-action context.


13. Robert Glennon lays out well the distinction between political conservatism and judicial conservatism:

[T]o understand the character of the Rehnquist Court, it is important to distinguish between political conservatism and judicial conservatism. . . .

Judicial restraint keynotes conservative judicialism. . . . Deference to the other branches of government is a hallmark of judicial conservatism. . . .

. . . [With the Rehnquist Court] we have the specter of politically conservative results and liberal judicial methods combined in an unusual fashion. The character of the Rehnquist Court is not simply that case results serve ideologically conservative ends. The methods used are frequently those of judicial liberals.
the standard of strict scrutiny for state and local government use of race-conscious affirmative action. At the time, *Croson* sparked intense debate over its constitutional significance and long-term impact. It is now clear that *Croson* was indeed a significant decision and a crucial first step by the Court in effecting a fundamental change in equal protection jurisprudence. As the U.S. Department of Justice noted recently:

In the immediate aftermath of [the *Croson* decision], state and local governments scaled back or eliminated altogether affirmative action programs that had been adopted precisely to overcome discriminatory barriers to minority opportunity and to correct for chronic underutilization of minority firms. As a result of this retreat from affirmative action, minority participation in state and local procurement plummeted quickly.

While the concern has been that "[a]n increasingly conservative Court is likely to limit affirmative action to progressively narrower

---


Under a "strict constructionist interpretation [of] the legislative intent of [the Fourteenth Amendment and] civil rights laws, the Supreme Court should affirm the underlying rationale for affirmative action programs and return to a more lenient level of scrutiny when analyzing these programs." Brody, *supra* note 5, at 292-93 (citation omitted).

14. Voluntary affirmative action by private employers is subject to somewhat less rigorous standards under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e (1994). In general, a private employer must demonstrate: 1) a manifest imbalance in traditionally segregated job categories; 2) that the affirmative action plan will not unnecessarily trammel the rights of non-targeted groups, nor benefit unqualified individuals; and 3) that the plan is temporary, flexible, and is not designed simply to maintain a racially balanced workforce. *See generally* 29 C.F.R. pt. 1608 (1995) (laying out the EEOC's guidelines on affirmative action).


16. For example, one scholar remarked, "[A]lthough it is certainly too early to assess the full impact of *Croson*, the clear change in direction signaled by the holding in *Croson* seems likely to strike a major blow against long-standing, concerted efforts to narrow the economic gap between black and white entrepreneurs." Rosenfeld, *supra* note 12, at 1731 (emphasis added).

circumstances, and perhaps, to prohibit it entirely, the application of strict scrutiny by lower court judges has been the principal driving force toward a per se ban on race-conscious affirmative action. Under the guise of strictly scrutinizing affirmative action programs, lower court judges are declaring with increasing frequency that only race-neutral means may be employed in remedying systemic discrimination.

Another key premise of the Court’s new colorblind jurisprudence is that the Equal Protection Clause protects individuals, rather than groups. As a consequence, an individual White male may successfully challenge a race- or gender-based affirmative action program in employment, even though White males as a group may be overrepresented in the workforce as a result of the very historic and systemic discrimination that the affirmative action program is

19. For example, in Hopwood v. Texas, 78 F.3d 932 (5th Cir.), rehe’g en banc denied, 84 F.3d 720 (5th Cir.), cert. denied, 116 S. Ct. 2580 (1996), the Fifth Circuit declared that any consideration of race in university admissions was per se invalid. The court said that the government’s use of race “undercuts the ultimate goal of the Fourteenth Amendment: the end of racially-motivated state action.” 78 F.3d at 947-48. In Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994), cert. denied, 115 S. Ct. 2001 (1995), the Fourth Circuit reaffirmed an earlier declaration “that race is an impermissible arbiter of human fortunes.” 38 F.3d at 152.

[J]It is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today’s judgment ignores the fact that for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins.

438 U.S. 265, 400 (1978) (Marshall, J., dissenting). It has also been noted that:

[D]iscrimination is not, contrary to the premise of the nondiscrimination principle, against individuals. It is discrimination against a people. And the remedy, therefore, has to correct and cure and compensate for the discrimination against the people and not just the discrimination against the identifiable persons. .

. . .

. . . [T]he policy of limiting remedies to individually identified victims of racial discrimination is neither compelled nor justified by constitutional considerations. The equal protection clause is not primarily concerned with the protection of individuals against invidious discrimination. On the contrary, it cannot sensibly be interpreted in any other way than . . . in terms of its protection of groups, and of individuals only by reason of their membership in groups.

intended to correct. Moreover, individual White male plaintiffs can challenge affirmative action programs without demonstrating actual personal injury. It is enough to assert that race- or gender-based affirmative action by the government "discriminates" against them on the basis of their group status, even though they are not divested of any existing rights.

To contend, however, that strict scrutiny of affirmative action is required simply because race is involved only begs the question. Prior to Croson, it was by no means self-evident that stringent judicial scrutiny was warranted, or even appropriate, in reviewing the remedial use of racial and gender classifications in government-sponsored programs. Indeed, it was not until the mid-1960s that the Court first "espoused the notion that racial classifications were presumptively unconstitutional." Throughout the entire contentious

21. See, e.g., Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993) ("To establish standing . . . a party challenging a set-aside program . . . need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.").

22. Some observers contend that the Supreme Court's preoccupation with the rights of White males is premised on the notion of "White entitlement"—i.e., the view that the Equal Protection Clause elevates the "established expectations" of White males over group-based remedies aimed at eliminating discrimination in the status quo. See Lia A. Fazzone, Raise High the Roof Beam: Adarand Constructors, Inc. v. Pena and the New Level of Scrutiny for Federal Affirmative Action, 73 DENV. U. L. REV. 599, 601 n.19 (1996). As Anthony Lewis recently noted: "Black Americans may be excused if they see a certain hypocrisy in the sudden zeal for equal protection on behalf of whites." Anthony Lewis, Abroad at Home; Down the River, N.Y. TIMES, July 5, 1996, at A23.

23. Klarman, supra note 13, at 220. Klarman argues that up until the mid-1960s, the Supreme Court never held that government use of racial classifications were subject to strict scrutiny because they were presumptively invalid. See id. at 214, 220. Klarman maintains, instead, that only racial classifications affecting fundamental rights received heightened scrutiny. See id. at 235-39. All other racial classifications were deemed presumptively valid, as long as they were not irrational or arbitrary. As Klarman notes, "the dominant intention of the Fourteenth Amendment's drafters . . . had been to protect blacks in the exercise of certain fundamental rights, rather than to proscribe all racial classifications." Id. at 220. Indeed, that interpretation of the Fourteenth Amendment was supported by the dominant nineteenth-century view that it did not prohibit racial segregation in the schools or other public accommodations, nor did it invalidate laws against interracial marriages. While such laws employed racial classifications, the rights affected were not viewed as fundamental. Klarman goes on to argue that neither Brown v. Board of Education, 347 U.S. 483 (1954), nor the Court's earlier decisions in the Japanese curfew and internment cases—Hirabayashi v. United States, 320 U.S. 81 (1943), and Korematsu v. United States, 323 U.S. 214 (1944)—were premised on the rule that racial classifications were presumptively invalid. See Klarman, supra note 13, at 232, 246-47. In each instance, Klarman explains, the level of scrutiny turned on the importance of the right involved. On the other hand, he contends that "the full Court first stated a presumptive rule against racial classifications in Mcloughlin v. Florida, 379 U.S. 184 (1964), where it struck down on equal protection grounds a state law criminalizing cohabitation by unmarried interracial couples." Klarman, supra note 13, at 255.
history of the Equal Protection Clause, the Supreme Court has vacil-
lated on both the extent to which state government may use racial
and gender classifications and the corresponding level of judicial
scrutiny to be applied. 24

In the closing decades of the nineteenth century, the Equal Pro-
tection Clause "was virtually strangled in infancy by post-Civil War
judicial reactionism." 25 The Supreme Court refused to invoke the
Fourteenth Amendment as a constitutional shield against the politi-
cal compromising of minority rights. 26 In the final decade of the
twentieth century, the Supreme Court is once again commanding a
retreat from the full promise of the Fourteenth Amendment. Much
like the sentiments expressed by Justice Bradley in 1883, the Court
today seems to have concluded that minorities and women must
cease "to be the special favorite[s] of the law," having now attained
the rank of "mere citizen." 27 With its adoption of strict scrutiny, the
Court has all but declared government-sponsored, race-conscious
affirmative action to be per se invalid. 28 Yet, the Court continues to
acknowledge that the playing field is not level, that "[t]he unhappy

24. Compare Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding "separate but
equal" under rational review), and Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872)
(upholding a state's refusal to admit women to the practice of law under rational
review), with City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (applying
strict scrutiny to racial classifications), and United States v. Virginia, 116 S. Ct. 2264

Joseph Tussman & Jacob tenBroek, The Equal Protection of the Laws, 37 CAL. L. REV.
341, 381 (1949)).

26. Robert Cover has written that:

The Slaughter-House Cases, to prevent the fourteenth amendment from being a
comprehensive source of rights against the state, made use of the common
knowledge that the [Civil War] Amendments were designed to ameliorate the
condition of Blacks.

This view of constitutional law and history did perceive Negroes as a
special object of protection . . . [and] might have proven the starting point for
articulating a special judicial role in protecting minorities, or at least in pro-
tecting the most important minority in American experience. But an
observation about the purpose of a constitutional text is not . . . a theory about
the role of the judiciary. . . . [T]he massive retreat from protecting Black rights
between the 1870's and the 1920's—a retreat led by the Court in many in-
stances—eliminated any chance of inferring such a role from practice. . . .
[T]he explicit articulation of a special judicial role with respect to minorities
and their rights awaited the constitutional reconstruction of 1937-38.

Robert M. Cover, The Origins of Judicial Activism in the Protection of Minorities, 91 YALE
144, 152 n.4 (1938)).


28. See discussion infra Part II.A.
persistence of both the practice and the lingering effects of racial discrimination . . . is an unfortunate reality."\(^\text{29}\)

One hundred years after \textit{Plessy v. Ferguson},\(^\text{30}\) an activist Court is again second-guessing and voiding legislatively approved policies to end pervasive and systemic discrimination against minorities and women.\(^\text{31}\) Clearly, "[s]trict scrutiny is inappropriately applied to benign racial classifications intended to remedy our nation's deplorable history of racial discrimination."\(^\text{32}\) Its application "under the pretext of advancing a color-blind Constitution" perpetuates a "grave injustice."\(^\text{33}\) Strict scrutiny of affirmative action disrupts public policies both to end systemic discrimination and to generally improve race relations within the context of equal opportunity.

"The alternative to affirmative action is not a utopia of meritocracy blind to race and gender, but a continuation of the old regime

\textbf{30.} 163 U.S. 537 (1896).
\textbf{31.} Justice Marshall, in his dissent in \textit{Regents of the University of California v. Bakke}, wrote:

I fear that we have come full circle. After the Civil War our Government started several "affirmative action" programs. This Court in the \textit{Civil Rights Cases} and \textit{Plessy v. Ferguson} destroyed the movement toward complete equality. For almost a century no action was taken, and this nonaction was with the tacit approval of the courts. Then we had \textit{Brown v. Board of Education} and the \textit{Civil Rights Acts of Congress}, followed by numerous affirmative action programs. \textit{Now}, we have this Court again stepping in, this time to stop affirmative action programs of the type used by the University of California.

\textbf{32.} Aiken v. City of Memphis, 37 F.3d 1155, 1169 (6th Cir. 1994) (Jones, J., dissenting). Judge Jones went on to state:

The Fourteenth Amendment was never intended to impose an absolute standard of color blindness upon our law to the extent that such a standard becomes a bar to the achievement of the purposes of the amendment . . .

\ldots

\ldots Review of these plans under a strict scrutiny standard routinely results in the invalidation of plans which are designed to achieve the vital goal ofremediating our nation's history of discrimination. Such an application is clearly antithetical to the Fourteenth Amendment. In fact, applying strict scrutiny to the benign use of race-conscious affirmative action, which seeks to alter employment patterns shaped by past racial discrimination, comes perilously close to nullifying the amendment as it pertains to persons of color.

\textit{Id.} at 1172-73; see also Brody, \textit{supra} note 5, at 325 ("The application of strict scrutiny to a program under review is, of course, nearly fatal in fact, and does not serve the intent of the framers of the Fourteenth Amendment. Indeed, by applying strict scrutiny, the Court prevents the Equal Protection Clause from achieving its intended purpose.").

\textbf{33.} Aiken, 37 F.3d at 1172 (Jones, J., dissenting).
of societal preferences. Study after study confirms that systemic discrimination on the basis of race and gender remains a problem in many areas of society. Following a detailed survey of congressional findings, state and local disparity studies, and a variety of economic reports on discrimination, the Justice Department has concluded


35. For example, the bipartisan Glass Ceiling Commission made the following findings on the "glass ceiling" phenomenon:

The term "glass ceiling" first entered America's public conversation . . . when The Wall Street Journal's "Corporate Woman" column identified a puzzling new phenomenon. There seemed to be an invisible—but impenetrable—barrier . . . preventing [women] from reaching the highest levels of the business world regardless of their accomplishments and merits. . . . The metaphor was quickly extended . . . to obstacles hindering the advancement of minority men, as well as women.

. . .

The Glass Ceiling Act was enacted . . . as Title II of the Civil Rights Act of 1991. It established the bipartisan [21-member] Glass Ceiling Commission, with the Secretary of Labor as its chair. . . .

The factfinding report that the Commission is now releasing confirms the enduring aptness of the "glass ceiling" metaphor. At the highest levels of business, there is indeed a barrier only rarely penetrated by women or persons of color. Consider: 97% of the senior managers of Fortune 1000 industrial and Fortune 500 companies are white; 95 to 97% are male. . . .

The research also indicates that where there are women and minorities in high places, their compensation is lower. For example, African American men with professional degrees earn 79% of the amount earned by white males who hold the same degrees and are in the same job categories. One study found that, more than a decade after they had graduated from the Stanford University Business School, men were eight times more likely to be CEO's than women.

Nor does the evidence indicate that the glass ceiling is a temporary phenomenon. . . . [R]elatively few women and minorities [are] in the positions most likely to lead to the top[, and instead are occupying] . . . staff positions, such as human resources, or research, or administration, rather than line positions, such as marketing, or sales, or production. . . .

In short, the factfinding report tells us that the world at the top of the corporate hierarchy does not yet look anything like America. Two-thirds of our population, and 57 percent of the working population, is female, or minorities, or both. . . .

Glass Ceiling Report, supra note 5 (message from Secretary of Labor and Glass Ceiling Commission chairperson Robert B. Reich); see also JARED BERNSTEIN, ECONOMIC POLICY INST., WHERE'S THE PAYOFF? THE GAP BETWEEN BLACK ACADEMIC PROGRESS AND ECONOMIC GAINS (1995) (finding that the wage gap between Black males and White males actually increased with more education).
that "in the absence of affirmative remedial efforts, federal contracting would unquestionably reflect the continuing impact of discrimination that has persisted over an extended period."

Race and gender discrimination spans the socioeconomic spectrum. In fact, the effects of discrimination may be more pronounced at the top of the economic ladder, where the power, prestige, and monetary stakes are at their greatest. Though often related, discrimination and socioeconomic disadvantage present distinct problems that require distinct solutions. Limiting affirmative action to "social and economic disadvantage," as some have proposed, would not effectively address the "glass ceiling" phenomenon. While minorities and women in corporate management suffer no economic disadvantage, too often they are still the victims of race and gender discrimination.

As the U.S. Civil Rights Commission explains:

When [discriminatory] processes are at work, anti-discrimination remedies that insist on "color blindness" or "gender neutrality" are insufficient. Such efforts may control certain prejudiced conduct, but measures that take no conscious account of race, sex, or national origin often prove ineffective against processes that transform "neutrality" into discrimination. In such circumstances, the only effective remedy is affirmative action, which responds to discrimination as a self-sustaining process and dismantles it.


37. Id. at 26,042.

38. This phenomenon is confirmed by the Glass Ceiling and Bernstein Reports. Glass Ceiling Report, supra note 5; BERNSTEIN, supra note 35.


40. For a discussion of this terminology, see supra note 35 (quoting the Glass Ceiling Report).

41. U.S. COMM’N ON CIVIL RIGHTS, AFFIRMATIVE ACTION IN THE 1980s: DISMANTLING THE PROCESS OF DISCRIMINATION 2 (Clearinghouse Publication No. 70, 1981). Moreover, the Department of Justice has observed that:

Congress also has attempted to redress the problems facing minority businesses through race-neutral assistance to all small businesses. Congress has determined, however, that those remedies, by themselves, are "ineffectual in eradicating the effects of past discrimination," and that race-conscious measures are a necessary supplement to race-neutral ones.

Under the artificial constraints of strict scrutiny, however, the courts are free to veto the government’s choice of more effective, race-conscious means. The Supreme Court’s unfortunate and ill-conceived adoption of strict scrutiny as the constitutional standard for reviewing race-conscious affirmative action should be reconsidered for several reasons.

First, comprehensive remedies for historic and systemic discrimination against minorities and women are proper subjects for legislative and executive—rather than judicial—resolution. In strictly reviewing policy determinations by the politically accountable branches of government, the courts have exceeded their proper constitutional role. The Supreme Court’s rejection of “societal discrimination” as a basis for remedial action by government simply underscores the inappropriateness of applying strict scrutiny—within the context of individual “reverse discrimination” claims—to broadly based social policies.

Second, even assuming certain constitutional limits on the use of race-conscious affirmative action, the use of strict scrutiny to create a “colorblind jurisprudence” displaces more than half a century of settled equal protection doctrine.

Third, the inconsistent application of strict scrutiny by state and federal courts has undermined legitimate efforts to dismantle systemic discrimination in public employment, contracting, and higher education.

I. STRICT SCRUTINY OF AFFIRMATIVE ACTION: HAS THE SUPREME COURT OVERSTEPPED ITS ROLE?

Generally, state and federal agencies have adopted affirmative action programs in response to perceived discrimination. There is, however, widespread misunderstanding about the use of affirmative action as government policy—what it is, how it operates, whom it benefits, and whether it is necessary, given laws prohibiting virtually all forms of discrimination. The U.S. Commission on Civil
Michigan Journal of Race & Law

Rights has issued several statements explaining the concept of affirmative action.\textsuperscript{45}

\textbf{A. Affirmative Action Defined}

In \textit{Affirmative Action in the 1980s: Dismantling the Process of Discrimination},\textsuperscript{46} the United States Commission on Civil Rights stated:

Affirmative action has no meaning outside the context of discrimination, the problem it was created to remedy.

All too often, discussions of affirmative action first divorce this remedy from the historic and continuing problem of discrimination against minorities and women. Such discussions then debate the merits of particular measures that take race, sex, and national origin into account—such as goals and quotas—without any agreement upon or consistent reference to the discriminatory conditions that can make such remedies necessary. This statement . . . continually ties the remedy of affirmative action to the problem of discrimination with a "problem-remedy" approach. Without agreement about the forms and scope of race, sex, and national origin discrimination, agreement about appropriate remedies is difficult, if not impossible. Our starting point, therefore, is not affirmative action, but race, sex and national origin discrimination.

As the title of this statement suggests, the Commission views discrimination against minorities and women as processes that will continue unless systematically dismantled.\textsuperscript{47}

Furthermore, as explained by the Commission's Office of General Counsel:

Affirmative action is a contemporary term that encompasses any measure, beyond simple termination of a discriminatory practice, that permits the consideration of race, national origin, sex, or disability, along with other


\textsuperscript{46} U.S. COMM’N ON CIVIL RIGHTS, \textit{supra} note 41.

\textsuperscript{47} \textit{Id.} at 1-2.
criteria, and which is adopted to provide opportunities to a
class of qualified individuals who have either historically
or actually been denied those opportunities and/or to
prevent the recurrence of discrimination in the future.\(^48\)

Thus, affirmative action is used primarily—though not exclu-
sively—as a remedy for identified discrimination.\(^49\) Additionally, it
addresses systemic, as opposed to individual instances of, discrimi-
nation. The objective is twofold: first, eliminating the effect of prior
discrimination, usually reflected in the underutilization of minorities
and/or women; and second, preventing future discrimination
by identifying and eliminating exclusionary practices or processes, such
as the use of “old boy networks” or stereotypical assumptions about
the abilities of qualified minorities and women.

B. The Evolution of Affirmative Action as a Federal Policy

The use of affirmative action by the federal government
evolved over a period of three decades. First, it was necessary to
pressure the government into simply declaring a policy of
“nondiscrimination” in government-related industries, and by gov-
ernment contractors. Capitulating to a threatened March on
Washington by A. Phillip Randolph and 100,000 African American
men,\(^50\) President Roosevelt issued Executive Order 8802 on June 25,
1941.\(^51\) The Order prohibited employment discrimination by the fed-
eral government, defense related industries, and federal
contractors.\(^52\) The policy was to be reviewed by a five-member Fair
Employment Practices Committee (FEPC).\(^53\) However, many ques-
tioned the legitimacy of the FEPC’s authority, and it was

\(^{48}\) Briefing Paper, supra note 45, at E-2.

\(^{49}\) The Supreme Court has also upheld the nonremedial use of affirmative action
in certain contexts, such as the promotion of a compelling interest in diversity. See, e.g., United States v. Paradise, 480 U.S. 149 (1987) (noting that the diversity of a pol-
lice force contributes to effective law enforcement); Regents of Univ. of Cal. v. Bakke,
438 U.S. 265 (1978) (finding that universities have protected First Amendment inter-
est in diversified student body for educational purposes). But see Hopwood v. Texas,
78 F.3d 932 (5th Cir.), reh’g en banc denied, 84 F.3d 720 (5th Cir.), cert. denied, 116 S. Ct.
2580 (1996), (rejecting Justice Powell’s recognition in Bakke of a “compelling interest”
in educational diversity that would permit consideration of race as “a factor” in uni-
versity admissions).

\(^{50}\) See, e.g., MICHAEL I. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN
EMPLOYMENT 9(1966).


\(^{52}\) See 3 C.F.R. 957.

\(^{53}\) See 3 C.F.R. 957.
strenuously opposed by Southern Democrats in Congress.\textsuperscript{54} It also lacked adequate staffing, funding, and enforcement powers.\textsuperscript{55} As a result, the federal ban against employment discrimination in the defense industry and by federal contractors was never effectively enforced during the 1940s and 1950s.\textsuperscript{56}

Recognizing that it was not enough to simply prohibit discrimination in employment, President Kennedy issued Executive Order 10,925 on March 6, 1961, directing federal contractors to "\textit{take affirmative action} to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."\textsuperscript{57} The President's Committee on Equal Employment Opportunity was established to investigate and resolve complaints.\textsuperscript{58} Again, however, the new Committee lacked adequate enforcement power. Moreover, the Order failed to specify the kind of "affirmative action" federal contractors were expected to take to ensure compliance. Nor were there any reporting or monitoring procedures to measure compliance.

Congress finally became involved with passage of Title VII of the 1964 Civil Rights Act,\textsuperscript{59} outlawing employment discrimination on the basis of race, color, religion, sex, or national origin. The Act also created the Equal Employment Opportunity Commission, with full enforcement powers. To secure passage of Title VII, however, sponsors of the legislation had to make it clear that the law did not require "quotas." Thus, § 703(j) was added:

\begin{quote}
Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin . . . in the available work force.\textsuperscript{60}
\end{quote}

\footnotesize{54. See HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972, at 11-12 (1990); SOVERN, supra note 50, at 12.}

\footnotesize{55. See GRAHAM, supra note 54, at 10-11; SOVERN, supra note 50, at 11-13.}

\footnotesize{56. For an excellent history of the FEPC and the subsequent development of effective administrative enforcement of equal employment opportunity, see GRAHAM, supra note 54; SOVERN, supra note 50.}

\footnotesize{57. Exec. Order No. 10,925, 3 C.F.R. 448, 450 (1959-1963).}

\footnotesize{58. See 3 C.F.R. at 451-52.}

\footnotesize{59. 42 U.S.C. § 2000e (1994).}

\footnotesize{60. 42 U.S.C. § 2000e-2(j) (emphasis added). Senator Hubert H. Humphrey gave the following explanation for the inclusion of § 703(j):}
The authors of the California Civil Rights Initiative—Proposition 209—cite § 703(j) as the source of the Proposition's ban on “preferential treatment” in public employment, contracting, and higher education. They contend that § 703(j)'s ban on preferential treatment includes voluntary affirmative action. However, that interpretation of § 703(j) was flatly rejected by the U.S. Supreme Court in United Steelworkers v. Weber.

In Weber, the Court observed that while § 703(j) does not require affirmative action, neither does it prohibit “voluntary, private, race-conscious affirmative action efforts to abolish traditional patterns of racial segregation and hierarchy.” Moreover, the Court continued,

[Subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly.

110 CONG. REC. 12,723 (1964).


Neither the State nor any of its political subdivisions or agents shall use race, sex, color, ethnicity, or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group in the operation of the State's system of public employment, public education, or public contracting.


62. The Initiative was first drafted by anthropology professor Glynn Custred of California State University, and former philosophy professor Tom Wood, who is now executive director of the California Association of Scholars. See Jost, supra note 3, at 386. They say the Initiative will eliminate “affirmative discrimination” and will restore Title VII’s original ban on “preferential treatment.” See id.


64. Id. at 204-06 (comparing § 703(j) with respondents’ § 703(a), (d) claims). In Weber, the United Steelworkers and Kaiser Aluminum & Chemical Corporation entered into a collective bargaining agreement, under which 50% of in-plant craft-training programs would be reserved for Black employees, so as to eliminate racial imbalance in Kaiser’s historically segregated, virtually all-White craftwork forces.
Congress intended Title VII to operate "as a spur or catalyst to cause employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." Furthermore, the Court has recognized that "Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII" in both private and public employment.

Following enactment of Title VII in 1964, President Johnson took affirmative action one step further by issuing Executive Order 11,246 in 1965. Not only did Executive Order 11,246 prohibit employment discrimination and require government contractors to take affirmative steps to hire minorities (and later, women), it also imposed requirements: first, to determine if minorities and women are being underutilized; second, if so, actually to develop and implement written affirmative action plans; and third, to submit periodic "compliance" reports. Where qualified minorities and women are underrepresented, a federal contractor's affirmative action plan must include "goals and timetables" for achieving a representative workforce.

See id. at 197-98. Several White employees challenged the voluntary agreement as a violation of § 703. See id. at 199-200.

65. 443 U.S. at 204 (quoting Albemarle Paper Co. v. Moody, 442 U.S. 405, 418 (1975)).


67. As the EEOC's policy statement on affirmative action sets forth:

There is ample evidence in all sectors of our society that such equal access frequently has been denied to members of certain groups because of their sex, racial, or ethnic characteristics. . . .

. . . . Vigorous enforcement of the laws against discrimination is essential. But equally, and perhaps even more important are affirmative, voluntary efforts on the part of public employers to assure that positions in the public service are genuinely and equally accessible to qualified persons, without regard to their sex, racial, or ethnic characteristics. . . .

As with most management objectives, a systematic plan based on sound organizational analysis and problem identification is crucial to the accomplishment of affirmative action objectives. For this reason, the [Equal Employment Opportunity Coordinating] Council urges all State and local governments to develop and implement results oriented affirmative action plans which deal with the problems so identified.


70. 3 C.F.R. at 340-41.
Going even further, President Nixon issued Executive Order 11,478 in 1969 requiring federal agencies to establish affirmative action programs for civilian employees. That same year, the Department of Labor set specific numeric targets or “quotas” for federally funded construction projects under the “Philadelphia Plan.”

In the wake of Adarand, the Clinton Administration has reaffirmed the executive branch’s commitment to continued enforcement of federal affirmative action programs. Following a five-month study, the Administration concluded that federal affirmative action programs and requirements had been effective in remediing systemic discrimination and in creating equal opportunity for minorities and women. A Presidential Memorandum for Heads of Executive Departments and Agencies, dated July 19, 1995, declares in part:

This Administration will continue to support affirmative measures that promote opportunities in employment, education, and government contracting for Americans subject to discrimination or its continuing effects. . . . [T]he Federal Government will continue to support lawful consideration of race, ethnicity, and gender under programs that are flexible, realistic, subject to reevaluation, and fair.

The Memorandum goes on to state that specific programs must be eliminated or reformed if they create quotas, preferences for unqualified individuals, or reverse discrimination. In addition, programs must be eliminated if their equal opportunity purposes have been achieved. Federal agencies are directed to evaluate their affirmative action programs to ensure compliance with Adarand, and

72. See Jones, supra note 5, at 399-402.
73. In an address to the nation on July 19, 1995, President Clinton cited historically bipartisan support for affirmative action, noting that affirmative action has not been the cause of middle-class economic woes. See Remarks at the National Archives and Records Administration, 31 WEEKLY COMP. PRES. DOC. 1255, 1256, 1261 (July 19, 1995). He stated that while some programs were in need of reform, the basic approach to affirmative action should be to “[m]end it, don’t end it.” Id. at 1263. He also declared that “affirmative action has been good for America,” id. at 1263, and that “[i]t is simply wrong to play politics with the issue of affirmative action and divide our country,” id. at 1261. This sentiment seems particularly appropriate at a time when we need to unite the country to prepare every American for global competition.
74. Id. at 1264.
75. See id. at 1265.
76. See id.
to reform or eliminate any program that does not meet the constitutional standard. 77

Thus, both the effectiveness and the continuing need for affirmative action to eliminate systemic discrimination against minorities and women have been established. But while the Supreme Court has upheld the constitutionality of race- and gender-based affirmative action in theory, strict scrutiny has given the courts the power to veto implementation of legitimate affirmative action programs.

C. The Constitutional Bases of Race-Conscious Remedies

A number of commentators have pointed out that the Court's "race-neutral" or "colorblind" view of the Equal Protection Clause is plainly inconsistent with the Fourteenth Amendment's original remedial objectives. 78 Just five years after ratification of the Fourteenth Amendment—with the legislative history still fresh in its mind—the Supreme Court observed that the "one pervading purpose" of the Civil War Amendments was "the freedom of the slave race, . . . and [the] firm establishment of that freedom." 79 The Court went on to explain:

We do not say that no one else but the negro can share in this protection. . . . But what we do say . . . is, that in any fair and just construction of . . . these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it. 80

Providing even greater insight into the specific remedial purpose of the Equal Protection Clause, the Court also said, "We doubt very much whether any action of a State not directed by way of

77. See id.
80. Id. at 72 (emphasis added).
discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.”

The Reconstruction-Era Court in the Slaughter-House Cases clearly contemplated “group-based” remedies under the Equal Protection Clause for the specific benefit of African Americans “as a class.” Also anticipating “reverse discrimination” claims by White males, the Court indicated that such claims would not fall within the “purview” of the Amendment’s remedial protections—that is, reverse discrimination did not specifically involve “discrimination against the negroes as a class, or on account of their race.” Clearly, the Court’s interpretation of the Equal Protection Clause in the Slaughter-House Cases was anything but “race-neutral” or “colorblind.”

By contrast, the present Court has a very different view of the equal protection guarantee:

[T]he Fifth and Fourteenth Amendments to the Constitution protect persons, not groups. It follows from that principle that all governmental action based on race—a group classification long recognized as “in most circumstances irrelevant and therefore prohibited”—should be subjected to detailed judicial inquiry. . . . These ideas have long been central to this Court’s understanding of equal protection, and holding “benign” state and federal racial classifications to different standards does not square with them.

But consider the classic and perhaps most familiar example of race-conscious, group-based affirmative action under the Fourteenth Amendment: the desegregation of public schools by the judicial branch itself. School desegregation is quintessentially a systemic, race-conscious, and group-based process—a process that continues forty-two years after Brown v. Board of Education.

While the courts have played a crucial part in the dismantling of systemic discrimination, it is also clear that litigation is an expensive and time-consuming method of achieving social change. Yet, strict scrutiny of legislatively adopted or approved affirmative action means more litigation as the only sure method of establishing a constitutionally viable affirmative action program.
desegregation is not individualized relief, limited to a few specific victims of de jure school segregation. Rather, the constitutional command of *Brown* was to dismantle the entire system of racially segregated public education, district by district.

To that end, the Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education*\(^{85}\) authorized a variety of race-conscious, affirmative measures to achieve school desegregation—including the busing of students by race—in order to attain a "racial balance" of students throughout the school district, in accordance with a court-specified numeric ratio. The historic and ongoing process of school desegregation is plainly inconsistent with assertions by members of the present Court that the Fourteenth Amendment is "colorblind" and forbids the use of race-conscious, group-based affirmative action to remedy systemic discrimination,\(^{86}\) propositions which the Court expressly rejected as recently as its 1980 decision in *Fullilove v. Klutznick*:\(^{87}\)

As a threshold matter, we reject the contention that in the remedial context the Congress must act in a wholly "color-blind" fashion. In *Swann v. Charlotte-Mecklenburg Board of Education*, we rejected this argument in considering a court-formulated school desegregation remedy. . . . In *McDaniel v. Barresi*, citing *Swann*, we observed: "In this remedial process, steps will almost invariably require that students be assigned 'differently because of their race.' Any other approach would freeze the status quo that is the very target of all desegregation processes." And in *North Carolina Board of Education v. Swann*, we invalidated a state law that absolutely forbade assignment of any student on account of race because it foreclosed implementation of desegregation plans that were designed to remedy constitutional violations. We held that "[j]ust as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."\(^{88}\)

Nothing under the Fourteenth Amendment restricts the use of race-conscious remedies to the judicial branch or requires *judicial* findings of constitutional violations as a predicate for government's voluntary use of race-conscious remedies.\(^{89}\) As the Court noted in

---

86. See Rosenfeld, *supra* note 12, at 1755-56.
87. 448 U.S. 448 (1980).
88. Id. at 482 (citations omitted).
Reconsidering Strict Scrutiny

Fullilove, the remedial legislative powers of Congress are much broader than those of the Court. Both the legislative and executive branches of government may undertake voluntary affirmative action, though strict scrutiny requires a "strong basis" in evidence for believing that discrimination has occurred and that remedial action is necessary.

D. Strict Scrutiny Frustrates the Remedial Objectives of the Fourteenth Amendment

Prior to 1938, the Supreme Court subjected all legislation to a single standard of traditional, or rational basis, review. Traditional review applied also to racial classifications under the Equal Protection Clause. However, in footnote 4 of his opinion for the Court in United States v. Carolene Products Co., Justice Stone advanced the idea of "more searching judicial inquiry" for certain kinds of legislation.

90. [T]he power of the federal courts to restructure the operation of local and state governmental entities is not plenary. . . . [A] federal court is required to tailor the scope of the remedy to fit the nature and extent of the . . . violation. . . .

Here we deal . . . not with the limited remedial powers of a federal court, . . . but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress.


92. For example, the Court in Plessy v. Ferguson held:

[E]very exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class. . . .

So far, then, as a conflict with the 14th Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable.


93. 304 U.S. 144, 152-53 n.4 (1938). In analyzing Footnote 4, one commentator has observed that:

Justice Stone . . . found normative justification for judicial review in the failure of legislative process. The normal presumption of constitutionality to which legislation was entitled possibly was inappropriate, Justice Stone
A presumption of constitutionality, he wrote, should no longer extend to laws falling "within a specific prohibition of the Constitution," or where "prejudice against discrete and insular minorities" tended "to curtail the operation of those political processes ordinarily . . . relied upon to protect minorities."\(^9\)

Footnote 4 was the genesis of the Court's modern three-tiered approach to equal protection analysis,\(^6\) an approach that uses rational, intermediate, or strict scrutiny in reviewing government action or legislation, depending on the classifications used or the nature of the individual rights affected. When racial classifications are viewed as "suspect," the highest level of scrutiny would normally apply.

But did Footnote 4 contemplate a "more searching judicial inquiry" for all uses of racial classifications or for only those that disadvantaged "discrete and insular minorities"? Given the premise upon which Footnote 4 is based—the abuse of the political process to the disadvantage of minorities—would the same level of scrutiny apply to special programs adopted by the majority for the specific benefit of disadvantaged racial and ethnic minorities?\(^6\)

Klarman, supra note 13, at 219. Under this view, strict scrutiny applies only where the political process violates fundamental rights, or the rights and interests of "discrete and insular minorities." In other words, strict scrutiny is not triggered merely by the use of a racial classification. Nor should it be. With the eventual demise of "separate but equal," government discrimination on the basis of race became irrational per se—i.e., invidious discrimination by law fails even rational basis review. On the other hand, the use of race- or gender-conscious remedies to end systemic discrimination against minorities and women is rational as well as necessary. See supra note 41 and accompanying text.

94. Carolene Products, 304 U.S. at 152-53 n.4. In denying the presumption of validity to laws disadvantaging discrete and insular minorities, the Court was not applying a presumption of invalidity. The point was that the law would not receive the usual deference, and would be more closely scrutinized in balancing the competing interests of discrete and insular minorities and the government. As discussed below, strict scrutiny's "presumption of invalidity" interjects an unnecessary and artificial evidentiary requirement in analyzing race-conscious affirmative action.

95. See Lewis F. Powell, Jr., Carolene Products Revisited, 82 COLUM. L. REV. 1087, 1087-89 (1982) ("Carolene Products retains its fascination solely because of Footnote 4—the most celebrated footnote in constitutional law. . . . This footnote now is recognized as a primary source of 'strict scrutiny' judicial review. Indeed, many scholars think it actually commenced a new era in constitutional law.").

96. The language of Footnote 4 suggests there would be no need for a "more searching judicial inquiry" if "discrete and insular minorities" suffer no disadvantage from the ordinary operation of the political process. Justice Powell explains:

The footnote . . . is thought to have provided its own theoretical justification. The theory properly extracted from Footnote 4 . . . is roughly as follows: The fundamental character of our government is democratic. Our
The Supreme Court first considered the question in *Regents of the University of California v. Bakke.* In Bakke, the Court struck down a special medical school admissions program that reserved sixteen of one hundred seats for minority applicants only. A key question in the case was the level of judicial scrutiny to apply. Justice Powell, in a lone opinion announcing the judgment of the Court, rejected the University’s argument under *Carolene Products* that White males are not a “discrete and insular minority” requiring extraordinary protection from the majoritarian political process. He responded:

This rationale . . . has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny. Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious. . . . Racial and ethnic classifications . . . are subject to stringent examination without regard to these additional characteristics. . . .

constitution assumes that majorities should rule and that the government should be able to govern. Therefore, for the most part, Congress and the state legislatures should be allowed to do as they choose. But there are certain groups that cannot participate effectively in the political process. And the political process therefore cannot be trusted to protect these groups in the way it protects most of us. Consistent with these premises, the theory continues, the Supreme Court has two special missions in our scheme of government: First, to clear away impediments to participation, and ensure that all groups can engage equally in the political process; and [s]econd, to review with heightened scrutiny legislation inimical to discrete and insular minorities who are unable to protect themselves in the legislative process.

I do not embrace this theory one hundred percent; nor do I condemn it.

*Id.* at 1088-89 (emphasis added).


The parties . . . disagree as to the level of judicial scrutiny to be applied to the special admissions program. Petitioner [the University] argues that the court below erred in applying strict scrutiny. . . . That level of review, petitioner asserts, should be reserved for classifications that disadvantage “discrete and insular minorities.” Respondent [Bakke], on the other hand, contends that the California [Supreme Court] correctly rejected the notion that the degree of judicial scrutiny accorded a particular racial or ethnic classification hinges on membership in a discrete and insular minority, and duly recognized that the “rights established [by the Fourteenth Amendment] are personal rights.”

*Bakke,* 438 U.S. at 287-88 (Powell, J.) (citation omitted).

Justice Stevens—joined by Chief Justice Burger and Justices Stewart and Rehnquist—concurred in the judgment on statutory grounds, finding that the special admissions programs violated Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, which prohibits discrimination in federally funded programs. See *Bakke,* 438 U.S. at 412-13. Since Justice Stevens did not reach the constitutional question, he expressed no view on the level of judicial scrutiny to be applied. See *id.* at 411-12, 421.
Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.\textsuperscript{100}

However, in referring to "discrete and insular minorities" in \textit{Carolene Products}, Justice Stone quite clearly had racial, ethnic, national, and religious minorities in mind.\textsuperscript{101} One commentator explained:

"Discrete and insular" minorities are not simply losers in the political arena, they are perpetual losers. Indeed, to say they lose in the majoritarian political process is seriously to distort the facts: they are scapegoats in the real political struggles between other groups. Moreover, in their "insularity" such groups may be characteristically helpless, passive victims of the political process. It is, therefore, because of the discreteness and insularity of certain minorities (objects of prejudice) that we cannot trust "the operation of those political processes ordinarily to be relied upon to protect minorities." A more searching judicial scrutiny is thus superimposed upon the structural protections against "factions" relied on by the original Constitution—the diffusion of political power and checks and balances.\textsuperscript{102}

It is not the use of a racial classification itself that triggers strict scrutiny under Footnote 4. Rather, it is the underlying abuse of the political process to the detriment of a discrete and insular minority that triggers heightened review.

As a consequence, Powell’s above-quoted response in \textit{Bakke} was clearly at variance with the underlying premise of Footnote 4—i.e., that unlike non-minorities, "discrete and insular minorities" are at a distinct disadvantage in the political process and, for that very rea-

\begin{itemize}
\item \textsuperscript{100} \textit{Bakke}, 438 U.S. at 290-91.
\item \textsuperscript{101} See Cover, \textit{supra} note 26, at 1298 ("[B]y the 1930’s, ‘minorities’ in the footnote four sense was already an accepted term of art with a recognized technical meaning in international law.").
\item \textsuperscript{102} \textit{Id.} at 1294-97. By contrast, see \textit{Bakke}, 438 U.S. at 357 (Brennan, J., concurring in part, dissenting in part): \[W\]hites as a class [do not] have any of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.
\end{itemize}
son, require special protection from the Court. In other words, minorities and non-minorities are not "similarly situated" in the political process. Therefore, the Equal Protection Clause does not require that they be treated the same when remedying defects in a political process. To reject that distinction, as Justice Powell did, is to reject the very premise upon which Footnote 4 is grounded.

Under Footnote 4, therefore, race- or gender-conscious affirmative action programs receive traditional or less-than-strict review, since they do not violate the fundamental rights of individual White males, or result from a defect in the democratic process

103. In a Columbia Law School address several years later, Justice Powell made the following observations about Footnote 4 and its author:

[In one sense, any group that loses a legislative battle can be regarded as both "discrete" and "insular." But, as the cases cited make clear, these are not the types of groups that Stone had in mind.

... Stone referred to discrete and insular minorities in a sentence, divided by a colon, in which he had referred earlier to racial, ethnic, and religious groups. Examining the textual evidence only, I think it would be a plausible reading that these are the only kinds of groups to which the term "discrete and insular" was intended to refer. In the normal operation of the political process, the term then would suggest that some racial, religious, and ethnic groups are not treated fairly and equally. Courts therefore should apply strict scrutiny to laws "directed at" these disadvantaged groups.

Powell, supra note 95, at 1090-91. Despite its "intuitive appeal," Powell could not accept the underlying premise of Footnote 4 as constitutional doctrine. He maintained that in our heterogeneous democracy, "there inevitably are both winners and losers." Id. at 1091. A former law clerk to Justice Stone refers to Powell's reading of Footnote 4 as "another doubtful interpretation of 'discrete and insular.' " See Louis Lusky, Footnote Redux: A Carolene Products Reminiscence, 82 Colum. L. Rev. 1093, 1105 n.72 (1982).

104. Heightened scrutiny applies only when a racial classification invidiously discriminates against racial minorities. For as Justice Stewart put it:

The Constitution is violated when government, state or federal, invidiously classifies similarly situated people on the basis of the immutable characteristics with which they were born. . . .

... Thus, detrimental racial classifications by government always violate the Constitution, for the simple reason that, so far as the Constitution is concerned, people of different races are always similarly situated.


105. The Supreme Court has held that there is no fundamental right to government employment. See Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976). The Court has not recognized any fundamental right to higher education or in the awarding of government contracts—all subjects of traditional affirmative action programs. Thus, individual White males cannot claim violation of their fundamental rights under most affirmative action programs. Instead, they can only claim that it is the consideration of race itself that presumptively violates the Equal Protection
disadvantaging a discrete and insular minority. Consequently, "heightened" or strict scrutiny is not triggered.

Justice Powell also misapprehended the Court's role in reviewing legislation employing racial classifications, as contemplated by Footnote 4. In his Columbia Law School address, Powell charged:

Footnote 4, as interpreted by many commentators, represented a radical departure of its own. Far from initiating a jurisprudence of judicial deference to political judgments by the legislature, Footnote 4—on this view—undertook to substitute one activist judicial mission for another [i.e., Lochnerism]. . . . Where the Court before had used the substantive due process clause to protect property rights, now it should use the equal protection clause . . . as a sword with which to promote the liberty interests of groups disadvantaged by political decisions.106

But in fact, Footnote 4 calls for less "judicial activism" than the strict scrutiny Powell advocated. Under Footnote 4, heightened review applies only to legislation that is "inimical" to the interests of discrete and insular minorities. All other government uses of racial classifications would receive at most "searching," but less-than-strict review.

Compare, for example, the searching, but less-than-strict review applied by Chief Justice Burger in Fullilove:

A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to "provide for the . . . general Welfare of the United States" and "to enforce, by appropriate legislation," the equal protection guarantees of the Fourteenth Amendment. . . .

. . .

Our analysis proceeds in two steps. At the outset, we must inquire whether the objectives of this legislation are within the power of Congress. If so, we must go on to decide whether the limited use of racial and ethnic criteria . . . is a constitutionally permissible means for achieving the congressional objectives and does not violate the equal

Clause and triggers strict scrutiny—the very propositions that are being questioned in this Article.

106. Powell, supra note 95, at 1089-90 (emphasis added).
Reconsidering Strict Scrutiny

protection component of the Due Process Clause of the Fifth Amendment.\textsuperscript{107}

Finding that Congress had exercised “an amalgam of its specifically delegated powers” in enacting the ten percent minority-owned business set-aside requirement under the 1977 Public Works Employment Act, the Court “reject[ed] the contention that in the remedial context the Congress must act in a wholly ‘color-blind’ fashion.”\textsuperscript{108} Furthermore, Burger explained, “In dealing with this facial challenge to the statute, doubts must be resolved in support of the congressional judgment,”\textsuperscript{109} rather than presuming against that judgment as is now required by \textit{Adarand}. Burger noted that “after due consideration,” Congress “perceived a pressing need to move forward with new approaches in the continuing effort to achieve the goal of equality of economic opportunity. In this effort, Congress has necessary latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives.”\textsuperscript{110}

Chief Justice Burger noted that “when such a program comes under judicial review, courts must be satisfied that the legislative objectives and projected administration give reasonable assurance that the program will function within constitutional limitations.”\textsuperscript{111} Thus, “any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.”\textsuperscript{112} However, Burger also made it clear that “a most searching examination” did not mean strict scrutiny: “This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as \textit{Regents of the University of California v. Bakke}.”\textsuperscript{113}

Finally, under Footnote 4, the Court’s role in “correcting defects of process” is limited to heightened review of legislation resulting from such defects. The fashioning of \textit{structural} remedies to correct “defects of process” is left to the political branches of government—for example, enactment of the 1965 Voting Rights Act\textsuperscript{114} and race-conscious remedies authorized under it.

\textsuperscript{108} \textit{Id.} at 482.
\textsuperscript{109} \textit{Id.} at 489 (emphasis added).
\textsuperscript{110} \textit{Id.} at 490.
\textsuperscript{111} \textit{Id.}
\textsuperscript{112} \textit{Id.} at 491 (emphasis added).
\textsuperscript{113} \textit{Id.} at 492. The “formulas of analysis articulated” would include strict scrutiny (per Justice Powell) and intermediate scrutiny (per Justice Brennan).
In strictly scrutinizing all uses of racial classifications, the Supreme Court has lost sight of the central concern underlying Footnote 4—not the use of racial classifications per se, but the checking of defects in the democratic process that disadvantage discrete and insular minorities.

E. The Court’s Adoption of Strict Scrutiny and Its Presumption of Race-Neutral Equality

Since there was no majority holding, Regents of the University of California v. Bakke left unresolved the issue of whether strict or intermediate scrutiny applied to race-based affirmative action.115 In City of Richmond v. J.A. Croson Co., however, the majority formally severed the link between Footnote 4 and the special protection it afforded “discrete and insular minorities”:

If one aspect of the judiciary’s role under the Equal Protection Clause is to protect “discrete and insular minorities” from majoritarian prejudice or indifference, some maintain that these concerns are not implicated when the “white majority” places burdens upon itself. In this case, blacks constitute approximately 50% of the population of the city of Richmond. Five of the nine seats on the city council are held by blacks. The concern that a political majority will

115. In 1980—two years after Bakke—the Court applied less-than-strict review in upholding the 10% minority-owned business contracting requirement under the federal Public Works Employment Act of 1977. See supra text accompanying notes 107-13 (discussing Fullilove v. Klutznick, 448 U.S. 448 (1980)). Indeed, Justice O’Connor in Croson acknowledged this use of less stringent review:

The principal opinion in Fullilove, written by Chief Justice Burger, did not employ “strict scrutiny” or any other traditional standard of equal protection review. The Chief Justice noted at the outset that although racial classifications call for close examination, the Court was at the same time “bound to approach [its] task with appropriate deference to the Congress.”

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 487 (1989). However, the Croson Court refused to apply that less stringent standard in reviewing state-sponsored affirmative action programs, the majority of which had been adopted in response to Fullilove. See id.

Finally, in deciding that the same standard should apply to federal and state programs, Adarand effectively overruled Fullilove: “Of course it follows that to the extent (if any) that Fullilove held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling.” Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995). Unfortunately, the Court overruled the wrong case. A judicially conservative Court would have overruled Croson, opting instead for Fullilove’s deferential, but “searching,” examination of both state and federal affirmative action. Only a politically conservative and judicially “activist” Court would go the other way. Cf. Glennon, supra note 13 (distinguishing between judicial conservatism and political conservatism).
more easily act to the disadvantage of a [political] minority
. . . would seem to militate for, not against, the application
of heightened judicial scrutiny in this case.\textsuperscript{116}

Here, too, Justice O’Connor departs from the basic premise of Foot-
note 4 by extending the protection of heightened scrutiny to White
males as a political minority.\textsuperscript{117}

In making strict scrutiny applicable to all racial classifications,
regardless of purpose, the \textit{Croson} majority rejected Footnote 4’s fun-
damental premise of historic and actual inequality in the political
process for discrete and insular minorities. Instead, the majority
adopted a legal and philosophical \textit{presumption} of “race-neutral” or
“colorblind” equality.

For all its legal and philosophical assumptions, however, the
\textit{Croson} majority was no closer to knowing the actual facts about ra-
cial discrimination in Richmond’s construction industry than it was
at the time it noted probable jurisdiction in the case. Most of the evi-
dence relied on by the Richmond city council was discounted or
ignored by the Court on questionable grounds and under a retroac-
tive application of strict scrutiny that the Court was then in the
process of adopting. The result was dictated by the Court’s me-
chanical application of strict scrutiny, and not by a considered
weighing of the evidence presented in the record or by appropriate
deferece to the legislative factfinding of the city council.

\textit{Croson} involved far more than the validity of Richmond’s pro-
gram. Ultimately, the case has been about the ability of state and
local governments to formulate effective policies in addressing a
problem that predates the U.S. Constitution, a problem that will not
disappear on the basis of legal or philosophical assumptions. The
lower courts, however, have had to apply \textit{Croson}’s “color-blind

\begin{itemize}
  \item \textsuperscript{116} \textit{Croson}, 488 U.S. at 495-96 (citations omitted). \textit{But see} Klorman, \textit{supra} note 11,
at 314 (“[W]hile whites possibly constituted a slight minority of Richmond’s popula-
tion, they enjoyed a secure majority in the state of Virginia, which could amply
defend their interests by restricting, or even banning, local affirmative action
plans.”). Like Klorman, Michel Rosenfeld also found O’Connor’s opinion in \textit{Croson}
to be problematic:

  \begin{quote}
  Justice O’Connor’s conclusion is erroneous, however, for two principal rea-
sons: first, the analogy she draws is not supported by the facts; and second,
more importantly, even if it were, it would be valid only at a purely abstract
and superficial level.

  . . . [T]here is no justification for simply equating that vote with that of
an overwhelmingly white legislature acting to disadvantage a group of blacks
which is unmistakably in the minority.
  \end{quote}

  Rosenfeld, \textit{supra} note 12, at 1774-75, 1777.

  \textsuperscript{117} Even Justice Powell recognized that Footnote 4’s reference to “discrete and
insular minorities” did not include \textit{political} minorities. \textit{See discussion} \textit{supra} note 103.
\end{itemize}
equal protection jurisprudence” in a wide range of remedial contexts involving employment, higher education, legislative redistricting, and public contracting. The results have been erratic and inconsistent, due in large measure to the Supreme Court’s own ambivalence and incoherence in strictly scrutinizing affirmative action.

Even assuming constitutional limits on the use of race-conscious affirmative action, the Court’s “colorblind” jurisprudence has only served to frustrate the central remedial objectives of the Fourteenth Amendment.

F. Crossing the Constitutional Divide

In *Lochner v. New York*, the Supreme Court invalidated a state statute limiting the number of hours employees could work in bakeries. The Court found the regulation to be a “meddlesome interference[]” with liberty of contract, as guaranteed by the Due Process Clause of the Fourteenth Amendment. In *Liberty of Contract*, Roscoe Pound wrote that in reaching the result in *Lochner*, the Court had ignored the legislative record and had made improper assumptions about “equality of rights” between employers and employees in the marketplace. “Why,” Pound queried, do courts insist on testing social and economic legislation against an “academic theory of equality in the face of practical conditions of inequality”? Legal systems, he continued, go through periods of decay in which “scientific jurisprudence becomes mechanical jurisprudence,” where concepts become “fixed,” where premises are no longer examined and where principles cease to be important. The law, in short, becomes a body of rules under which “social progress [is] barred by barricades of dead precedents.”

Chief Justice Burger echoed those same warnings in *Fullilove*:

---

118. 198 U.S. 45 (1905).
120. See id. at 480.
121. Id. at 454. Pound further observes:

The court is driven to deal with the problem artificially or not at all, unless it is willing to assume that the legislature did its duty and to keep its hands off on that ground. More than anything else, ignorance of the actual situations of fact for which legislation was provided and supposed lack of legal warrant for knowing them, have been responsible for the judicial overthrowing of so much social legislation.

Id.
122. See id., at 462.
123. Id.
Petitioners have mounted a facial challenge to a program developed by the politically responsive branches of Government. . . . [A]s Mr. Justice Jackson admonished in a different context in 1941:

The Supreme Court can maintain itself and succeed in its tasks only if the counsels of self-restraint urged most earnestly by members of the Court itself are humbly and faithfully heeded. After the forces of conservatism and liberalism, of radicalism and reaction, of emotion and of self-interest are all caught up in the legislative process and averaged and come to rest in some compromise measure . . . or some other legislative policy, a decision striking it down closes an area of compromise in which conflicts have actually, if only temporarily, been composed. Each such decision takes away from our democratic federalism another of its defenses against domestic disorder and violence. The vice of judicial supremacy, as exerted for ninety years in the field of policy, has been its progressive closing of the avenues to peaceful and democratic conciliation of our social and economic conflicts.

In a different context to be sure, . . . Mr. Justice Brandeis had this to say:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. 124

In departing from well-settled principles of judicial restraint in matters affecting social and economic policy, the Croson majority made academic and unsupportable assumptions about racial equality, in the face of practical conditions of inequality. Indeed, central to the holding in Croson is its rejection of congressional findings125 and other evidence of discrimination in the construction industry as a

relevant basis for voluntary remedial action by the Richmond city council. Justice O'Connor noted:

While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts. . . . An amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.126

Yet, Justice O'Connor concluded that that "sorry history" of discrimination could be given no evidentiary consideration by Richmond. To the contrary, O'Connor wrote, "[The Richmond set-aside] seems to rest on the unsupported assumption that white contractors simply will not hire minority firms. . . . There is no finding—and we decline to assume—that male caucasian contractors will award contracts only to other male caucasians."127

In other words, Justice O'Connor applied an "academic" assumption of racial equality in the awarding of subcontracts, "in the face of practical conditions of inequality." As the Justice Department has noted: "[T]he discriminatory barriers facing minority-owned businesses are not vague and amorphous manifestations of historical societal discrimination. Rather, they are real and concrete, and reflect ongoing patterns and practices of exclusion, as well as the tangible, lingering effects of prior discriminatory conduct."128 Nevertheless, the courts today are constrained to apply a "mechanical jurisprudence" of strict scrutiny, with the inevitable result that legitimate government policies to dismantle systemic discrimination are routinely struck down.

"Societal discrimination" is, of course, the sum total of local discriminatory practices.129 "The problem in Richmond was . . . both

126. 488 U.S. at 499.
127. Id. at 502.
129. As Justice Marshall observed in his dissent in Croson:

[T]he majority downplays the fact that the city council had before it a rich trove of evidence that discrimination in the Nation's construction industry had seriously impaired the competitive position of businesses owned or controlled by members of minority groups. It is only against this backdrop of documented national discrimination, however, that the local evidence adduced by Richmond can be properly understood. The majority's refusal to recognize that Richmond has proved itself no exception to the dismaying pattern of national exclusion which Congress so painstakingly identified infects its entire analysis of this case.
similar to, and part of, a much broader national problem. Time and again the observation has been made that the elimination of race-conscious affirmative action will lead to “resegregation” of our workplaces, legislative bodies, colleges and universities, and in society generally—a process that will no doubt accelerate in response to Adarand, Shaw II, Bush v. Vera, and lower court

... So long as one views Richmond’s local evidence of discrimination against the backdrop of systematic nationwide racial discrimination in this very industry, this case is readily resolved.

488 U.S. at 530, 535.
130. Rosenfeld, supra note 12, at 1746.
131. See Linda Greenhouse, High Court Voids Race-Based Plans for Redistricting: Questions Remain, N.Y. TIMES, June 14, 1996, at A1. She notes one such observation:

Laughlin McDonald, director of the southern regional office of the American Civil Liberties Union, predicted the result would be the “bleaching of Congress” as well as state and local legislative bodies, as new districts drawn across the South to increase minority representation fall under legal attack.

Id.
132. If admissions committees were mandated to base their decisions solely on grade point averages (GPAs) and standardized test scores, analyses indicate that (with the exception of Asians) the complexion of selective higher education institutions, including medical schools, would return to that of the 1950s (Association of American Medical Colleges, unpublished staff analysis, 1995).

... In our view, those who wish to see our country abandon affirmative action have given insufficient consideration to the severe damage that would occur to our social structure if our slow movement toward racial and ethnic equity were to be reversed.

... [T]he paradigm for affirmative action in both medicine and the corporate world is diversity; the diversity paradigm incorporates justice and equity, but also recognizes that diversity is essential for quality improvement. For medicine, this view acknowledges that eradicating the underrepresentation of minorities among medical students, house staff, faculty, administrators, and researchers is essential if the medical profession is to fulfill its obligations to society; diversity is a necessary condition for medicine to provide culturally sensitive medical education, improve access to quality health care for all Americans, and address important research questions affecting all segments of our society.


133. See Jeffrey Rosen, Affirmative Action: A Solution, NEW REPUBLIC, May 8, 1995, at 20, 20 (“Color-blindness, for all its moral and political appeal, is not really a practical option. When asked point-blank, few conservatives are honestly willing to accept the widespread resegregation that would follow from a rigid ban on racial preferences.”).
decisions such as Hopwood. Clearly, strict scrutiny of affirmative action exceeds the proper role of the courts in our constitutional system.

II. STRICT SCRUTINY OF AFFIRMATIVE ACTION: IS IT RATIONAL?

A. How Strict Is Strict?

In Adarand Constructors, Inc. v. Pena, seven members of the U.S. Supreme Court agreed that race-based affirmative action programs are constitutional, provided they satisfy the test of strict scrutiny. Writing for the Court, Justice O'Connor also declared, "[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" Despite the admonition, however, Adarand has only intensified the debate over what strict scrutiny means and how to apply it. As one observer notes: "[T]he Supreme Court has essentially delegated the difficult responsibility of defining strict scrutiny to a nationwide judiciary. . . . [T]he lower courts are sure to take a variety of approaches in applying strict scrutiny and the differences in these approaches ultimately will have to be resolved.

139. See id. at 2117. Justice O'Connor was joined by Chief Justice Rehnquist and Justice Kennedy in Part III.D of her opinion. In separate concurrences, Justice Scalia opined that government use of race-conscious remedies can never be justified under the Constitution, see id. at 2118, while Justice Thomas expressed the view that "government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice," see id. at 2119.
140. 115 S. Ct. at 2117 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)). But Justice O'Connor may be alone in that view. During oral argument in the North Carolina and Texas congressional redistricting cases, the attorney for the White North Carolina plaintiffs argued that once race was identified as the motivating factor, the district must be struck down under strict scrutiny. The following exchange then took place:

"So you take the position that once strict scrutiny is applied, it's fatal in fact," Justice O'Connor said. . . . Yes, Mr. Everett replied, it was his position that no race-conscious districting could survive the hurdle of strict scrutiny.

Justice O'Connor said, "I had thought we had indicated it is possible to survive strict scrutiny, but you're arguing for something else."

Mr. Everett replied, "I'm descending from the theoretical to the practical."

Linda Greenhouse, Supreme Court Roundup: Court Heats Arguments on Race in Redistricting, N.Y. TIMES, Dec. 6, 1995, at B11. As a practical matter, many judges continue to regard strict scrutiny as strict in theory, fatal in fact—i.e., they apply it as a per se rule of invalidity.
by the Supreme Court. Indeed, the lower courts have taken divergent approaches to strict scrutiny. The Supreme Court has only added to the confusion in its most recent affirmative action decisions in the voting rights context, Shaw v. Hunt and Bush v. Vera. In separate concurring opinions in those two cases, members of the Court invalidated four majority-minority congressional districts in North Carolina and Texas, under different formulations of strict scrutiny.

Building on the Court’s prior decision in Miller v. Johnson, Justice O’Connor explained in Bush v. Vera that strict scrutiny applies where race is a predominant factor in the drawing of congressional districts:

142. See supra note 19 (discussing the Fifth Circuit’s Hopwood decision); see also infra text accompanying notes 150-56 (comparing Aiken v. City of Memphis, 37 F.3d 1155 (6th Cir. 1994) with Middleton v. City of Flint, 92 F.3d 396 (6th Cir. 1996)).
145. In Bush v. Vera, Justice O’Connor assumed Texas had a “compelling interest” under the first prong of strict scrutiny in complying with § 2 of the 1965 Voting Rights Act. However, because the three majority-minority districts were “bizarrely shaped,” “far from compact,” and drawn primarily on the basis of race, she concluded they were not “narrowly tailored” under the second prong of strict scrutiny. See 116 S. Ct. at 1961. Justice O’Connor rejected the State’s argument that bizarreness and noncompactness were irrelevant to narrow tailoring, since they related only to improper motive under the first prong of strict scrutiny. See id. at 1961-62. She also rejected the federal government’s argument that because “bizarreness and noncompactness are necessary to achieve the State’s compelling interest in compliance with § 2, . . . the narrowly tailoring requirement is satisfied.” Id.

According to Justice O’Connor, “Significant deviations from traditional districting principles . . . cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial. . . . [I]t is part of the constitutional problem insofar as it disrupts nonracial bases of political identity and thus intensifies the emphasis on race.” Id. Accordingly, bizarrely shaped, noncompact districts are not sufficiently tailored.

Justice Kennedy, on the other hand, felt constrained to disagree with O’Connor’s formulation of the narrowly tailored prong of strict scrutiny:

In this respect, I disagree with the apparent suggestion in Justice O’Connor’s separate concurrence that a court should conduct a second predominant-factor inquiry in deciding whether a district was narrowly tailored . . . . There is nothing in the plurality opinion or any opinion of the Court to support that proposition. The simple question is whether the race-based districting was reasonably necessary to serve a compelling interest.

Id. at 1972 (Kennedy, J., concurring).
Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. Nor does it apply to all cases of intentional creation of majority-minority districts. . . . For strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were "subordinated" to race. By that, we mean that race must be "the predominant factor motivating the legislature's [redistricting] decision." We thus differ from Justice Thomas, who would apparently hold that it suffices that racial considerations be a motivation for the drawing of a majority-minority district.¹⁴⁷

Does O'Connor mean, then, that the equal consideration of race as one factor among others receives less than strict scrutiny, contrary to Powell's opinion in Bakke? Moreover, how does one determine if race has been the predominant consideration? Justice O'Connor reminds us that "[s]trict scrutiny remains . . . strict."¹⁴⁸ Thus, it seems that only the Court will know for sure how much a consideration of race is too much.¹⁴⁹

The Court's ambivalence about the permissible use of race-conscious remedies has frustrated good-faith efforts by government at all levels to investigate and voluntarily rectify both historic and continuing problems of racial and gender discrimination. Many state and local agencies that want to implement voluntary plans have no clear, definitive guidance from the Court on what is required to satisfy strict scrutiny.

---


¹⁴⁸  Id. at 1961. As one Court observer notes, "Like most contested issues of social policy . . . the future of . . . affirmative action . . . rests on the cryptic impulses of Sandra Day O'Connor. Divining Justice O'Connor's wishes is never easy, least of all for Justice O'Connor herself." Jeffrey Rosen, The Day the Quotas Died, NEW REPUBLIC, Apr. 22, 1996, at 21, 24. "[I]n her tortured opinions in the voting rights cases, O'Connor has said that government can be race-conscious, as long as it's not too obvious about it." Id.

¹⁴⁹  In her plurality opinion in Bush v. Vera, Justice O'Connor acknowledged that "problems have arisen from the uncertainty in the law prior to and during its gradual clarification in Shaw I, Miller, and today's cases." She continued, however:

We are aware of the difficulties faced by the States, and by the district courts, in confronting new constitutional precedents, and we also know that the nature of the expressive harms with which we are dealing, and the complexity of the districting process are such that bright-line rules are not available. But we believe that today's decisions . . . will serve to clarify the States' responsibilities. The States have traditionally guarded their sovereign districting prerogatives jealously, and we are confident that they can fulfill that requirement, leaving the courts to their customary and appropriate backstop role.

The lower courts as well are making the task ever more difficult. Consider, for example, two recent decisions from the U.S. Court of Appeals for the Sixth Circuit. In Aiken v. City of Memphis,\(^{150}\) White police officers and firefighters challenged two affirmative action promotion plans adopted by the city of Memphis, Tennessee. In its opinion, the Sixth Circuit, \textit{en banc}, summarized the prior histories of discrimination in police and fire promotions, supporting its conclusion that "the race-based promotions at issue here were supported by a 'compelling interest.'"\(^{151}\) However, the case was remanded for further proceedings to determine if the plans were narrowly tailored. In explaining the test of strict scrutiny, the \textit{Aiken} court said:

No formal finding of past discrimination by the governmental unit involved is necessary to determine that a compelling interest exists, but there must be "strong" or "convincing" evidence of past discrimination by that governmental unit. . . .

It is settled that "[a]ppropriate statistical evidence setting forth a prima facie case of discrimination is sufficient to provide a strong basis in evidence to support a public employer['s] affirmative action plan." . . . "[A]ppropriate" statistical evidence involves an examination of the racial composition of the qualified labor pool . . . . When a gross disparity exists between the expected percentage of minorities selected and the actual percentage of minorities selected, then prima facie proof exists to demonstrate intentional discrimination in the selection of minorities to those particular positions. Such prima facie proof presents a strong basis in evidence to support a finding of a compelling governmental interest.

. . . [T]he City presented evidence of a wide disparity between the percentage of black patrol officers and the percentage of black sergeants in the Memphis Police Department . . . . Although such a disparity "is not conclusive as to a finding of discrimination," the Aiken plaintiffs have not offered any evidence to rebut the inference of discrimination that arises from these statistics.\(^{152}\)

However, two years later, a three-judge panel of the Sixth Circuit struck down a similar affirmative action plan in \textit{Middleton v. City of

\(^{150}\) 37 F.3d 1155 (6th Cir. 1994).
\(^{151}\) \textit{Id.} at 1158.
\(^{152}\) \textit{Id.} at 1162-63 (citations omitted) (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)).
holding that "a disparity between the percentage of a protected class employed in a particular workforce or occupation and the raw percentage of class members in a regional labor pool, standing alone, cannot be 'a strong basis in evidence' sufficient to justify hiring or promotion quotas." The panel said "it is permissible to remedy discrimination[, but i]t is not permissible to remedy disparity, without more."

In purporting to apply strict scrutiny, the Middleton panel rejected the use of statistically significant disparity studies as a basis for voluntary affirmative action. Yet, in response to Croson, such studies have served as the primary means of validating public-sector affirmative action programs.

---

153. 92 F.3d 396 (6th Cir. 1996). Similar to the facts in Aiken, White police officers in Flint, Michigan, also challenged an affirmative action plan requiring that a percentage (50%) of all promotions to sergeant be filled by minorities. See id. at 397. Largely on the basis of a carefully drawn disparity study and in light of findings by the Flint Human Relations Commission, the federal district court granted summary judgment in favor of the City. See id. at 400-01. The Sixth Circuit reversed, finding that the City had failed to establish discrimination. See id. 406-09, 413.

While the Sixth Circuit panel in Middleton offered some criticisms of the disparity study conducted by the City's expert, its chief objections were to the expert's "conclusory assumptions that have no basis in the law." Id. at 408. For example, the panel noted that the expert "assumes without any substantiation whatsoever that minority men and women as a group are exactly as inclined as are non-minority men and women as a group—neither more so nor less so—to seek employment in the police department, and that they are exactly as qualified under non-discriminatory conditions." Id.

Of course, the panel itself assumes—with no basis in the record—that differences in inclination exist between qualified minorities and non-minorities in seeking employment as police officers. Why should the court's unsupported assumption of facts displace the conclusions of the Flint city council, which were based on an administrative investigation as well as a valid and unrebutted disparity study? The underlying issue was one of fact, not of law (i.e., was it more likely than not that the noted disparity was the product of discrimination)? Under strict scrutiny, however, lower court judges felt free to take certain liberties with the record and substitute their view of the facts for the conclusions of politically accountable agencies.

154. Middleton v. City of Flint, 92 F.3d at 406 (emphasis added).

155. Id.

156. This point is further corroborated by David Jung, Cyrus Wadia, and Murray Haberman:

[When Croson established that strict scrutiny applied, and required states to justify their affirmative action programs with detailed proof of discrimination, a veritable "cottage industry" arose to provide the necessary evidence. "Researchers retained by counties, municipalities and their agencies have produced more than 100 studies detailing statistical disparities between the amount of work awarded to minority businesses and the number of such businesses available to do the work." ]

B. Strict Scrutiny of Legislative Factfinding

In Croson, Justice O’Connor observed that “[t]he factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary.” However, as she said in Adarand, when a legislative body employs a racial classification for remedial purposes, its proffered legal and factual justifications must be strictly scrutinized. But why? In considering legislation for the benefit of discrete and insular minorities, why does political accountability not suffice as an adequate, if not a more effective, check on legislative factfinding?

In cases challenging affirmative action plans aimed at remedying past discrimination, the case generally turns on whether prior discrimination has been established and whether the proposed remedy is sufficiently tailored. If evidence is presented to a trial judge, the court’s findings will be overturned only if clearly erroneous. That deferential standard, however, does not apply to the findings of legislative or administrative bodies under strict scrutiny. If a legislative or administrative body finds prior discrimination, a reviewing court will consider the sufficiency of the evidence as a question of law. In other words, it is not enough that reasonable legislators were persuaded by evidence that there was prior discrimination. The reviewing court wants to know if the evidence would suffice to establish a prima facie case or would otherwise satisfy the government’s burden of production.

The difficulty with strict scrutiny does not lie in requiring government agencies to amass sufficient evidence to support an inference of discrimination. The problem lies in permitting the courts de novo review of the same evidence, under the legal premise that all government uses of racial classifications are suspect and therefore presumptively invalid. Certainly, the Croson Court said that “gross statistical disparities . . . alone . . . may constitute prima facie
decision, . . . [gross statistical] disparities can give rise to an inference of discrimination that can serve as the foundation of race-conscious remedial measures.”).

158. See, e.g., Contractors Ass’n v. City of Phila., 91 F.3d 586, 596 (3d Cir. 1996) (determining whether a strong basis in evidence by reviewing “the district court’s findings of fact for clear error”).
159. See id. The court went on to state:

[U]ltimately, whether a strong basis in evidence of past or present discrimination exists, thereby establishing a compelling state interest . . . to enact a race-conscious ordinance, is a question of law, “subject to plenary review.” The same is true of the issue of whether there is a strong basis in evidence for concluding that the scope of the ordinance is narrowly tailored to remedy the identified past or present discrimination.

Id. (quoting Concrete Works v. City of Denver, 36 F.3d 1513 (10th Cir. 1994), cert. denied, 115 S. Ct. 1315 (1995)).
proof of a pattern or practice of discrimination,"\(^{160}\) and that such disparities can provide a "strong basis in evidence for voluntary affirmative action by the government."\(^{165}\) As a practical matter, however, Croson invites de novo review of legislative or administrative factfinding and judicial speculation as to possible alternative, race-neutral "explanations" for statistical disparities.\(^{162}\) The courts have readily availed themselves of that approach in rejecting the reasonable "inference" of discrimination that a government agency might find in a disparity study.\(^{163}\) For example, in Middleton v. City of Flint, the Sixth Circuit panel noted:

[T]his court should be ever mindful that there could have been and generally were numerous explanations for disparities between the percentage of minority and nonminority police officers on the Saginaw police force, many of them unrelated to discrimination of any kind . . . .

. . . .[Furthermore just as "[t]here is no iron law of human behavior that every racial or ethnic group will perform equally well on nonbiased examinations in all fields of human endeavor," "it is common for different groups to rely on different mobility ladders."\(^{164}\)

All too often, the courts lose sight of what should be the underlying query—i.e., did the government have a *reasonable basis in evidence* for concluding that a race-conscious remedy was necessary to correct prior discrimination; not what the court concludes in reviewing the same evidence, or what it believes may explain a statistical disparity. Croson invites this kind of judicial speculation. As a result, courts are now in a position to second-guess legislative and administrative factfinding and to "explain away" statistical evidence of discrimination, no matter how valid the legislative or administrative study may have been. Despite the technical distinctions between the burden of proof and the burden of production,\(^{165}\) strict scrutiny makes it far too easy for judges to simply substitute their own beliefs and factual conclusions for those of legislative and administrative factfinders.

---

161. Id. at 510.
162. See id. at 503.
163. See, e.g., supra discussion accompanying notes 153-55 (discussing Middleton v. City of Flint).
Reconsidering Strict Scrutiny

Legislative factfinding for purposes of formulating public policy is clearly different from judicial factfinding and its quest for the truth in resolving competing legal claims between parties. Given the differences of purpose, the Court never really explains why a legislative finding of prior systemic discrimination is any more suspect or any less credible than a judicial finding. In Adarand, Justice O'Connor posits that:

Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.166

But where is the breakdown in the democratic process that necessitates this degree of intense judicial scrutiny? Is such scrutiny always justified whenever the legislature uses a racial classification?

The Court has recognized at least two legitimate uses of racial classifications that serve "compelling" government interests: 1) remedying past discrimination and, in certain contexts, 2) improving racial diversity so as to achieve other compelling governmental interests, such as enhancing the quality of higher education or making law enforcement more effective. So if the government claims that it is pursuing one of these objectives, is strict scrutiny still required?

In Croson, the Court said that "the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight."167 Yet, the mere recitation of a legitimate objective appears entirely consistent with the allocation of proof set out in Johnson v. Transportation Agency:

The ultimate burden remains with the [plaintiff] to demonstrate the unconstitutionality of an affirmative-action program. . . . Once a plaintiff establishes a prima facie case that race or sex has been taken into account in the employer's employment decision, the burden shifts to the

---

employer to articulate a nondiscriminatory rationale for its decision.168

Since the mere articulation of a nondiscriminatory rationale—such as the adoption of an affirmative action plan to remedy past discrimination169—satisfies the government's burden of production under Johnson, should it not also suffice to at least dispel the "suspectness" or presumption of invalidity under strict scrutiny?170 Contrary to Johnson, however, many courts impose a heavy evidentiary burden on the government because of strict scrutiny's presumption of invalidity.171

C. Unequal Protection of the Laws

If a state legislature finds that disabled persons, women, and Blacks have been discriminated against in public employment, is the finding of discrimination against Blacks any more "suspect" than the findings of discrimination against women and the disabled? Either the discrimination exists or it does not. Why should the evidentiary standards and degree of judicial scrutiny turn on the race, gender, or physical abilities of the victim? Yet, clearly they do. An affirmative action program for the disabled is more readily upheld under rational review, as compared to similar programs for women under intermediate scrutiny and to those for racial minorities under strict scrutiny.172 Such a result is hardly consistent with the idea that all

168. 480 U.S. at 626 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277-78 (1986)).
169. See id.
170. In discussing the allocation of proof laid down in Wygant, the Court in Johnson noted that the rules were the same for both constitutional challenges under the Fourteenth Amendment and statutory challenges under Title VII. 480 U.S. at 626.
171. See, e.g., Contractors Ass'n v. City of Phila., 91 F.3d 586, 597 (3d Cir. 1996). There, the court held:

[When ... race-based classifications of an affirmative action plan are challenged, the proponents of the plan have the burden of coming forward with evidence providing a firm basis for inferring that the legislatively identified discrimination in fact exists or existed and that the race based classifications are necessary to remedy the effects of the identified discrimination.

Id. This is more than a mere articulation requirement. Indeed, it goes beyond proving a prima facie case based, for example, on "gross statistical disparities," as approved in Croson, 488 U.S. at 501. Under the 1996 Contractors Association decision, the government carries the burden of persuasion.

172. See, e.g., Contractors Ass'n v. City of Phila., 6 F.3d 990 (3d Cir. 1993). In this earlier Contractors Association decision, the district court had invalidated each aspect of the City's "disadvantaged business enterprises" contracting program—covering the disabled, women, and racial minorities—under three different standards of review. See id. at 995. The U.S. Court of Appeals for the Third Circuit affirmed in part,
"persons" should receive the equal protection of the laws, including affirmative relief from systemic discrimination.

As the Court recently observed in Romer v. Evans, "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." Persons who are denied opportunities on the basis of race suffer no less injury than persons denied the same opportunities on the basis of physical or mental disabilities. The use of different judicial standards for reviewing affirmative action programs makes it more difficult for racial or ethnic groups than for other victims of discrimination to seek aid from the government.

The use of different judicial standards in reviewing both legislative findings of discrimination and legislatively approved remedies also violates "equal protection of the laws in the most literal sense." Clearly, as a matter of sound social policy, the legislative and executive branches have equally compelling interests in eradicating systemic discrimination against all groups who have suffered past and continuing discrimination.

D. Equating Benign and Invidious Discrimination

Supporters of affirmative action have long argued that strict scrutiny should not apply to the "benign" or remedial use of racial classifications. Justice Marshall observed in Croson:

Today, for the first time, a majority of this Court has adopted strict scrutiny as the standard of Equal Protection Clause review of race-conscious remedial measures. This is an unwelcome development. A profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism. . . . "Because

vacated in part, reversed in part, and remanded. The appellate court agreed that different standards of review applied to the three categories of disadvantaged businesses. See id. at 999.

In affirming rational basis review for the disabled, the court specifically noted that "application of heightened scrutiny to the preference for handicapped business owners would run counter to the [American with Disabilities Act], which Congress enacted to reduce discrimination against handicapped persons." Id. at 1001. The court did not explain, however, why Title VII of the 1964 Civil Rights Act failed to provide a similar justification for relaxed scrutiny of the gender and racial classifications under the program. The appellate court's only justification for imposing strict scrutiny on the "racial and ethnic preferences" under the program was that Croson required it. See id. at 1001-02.

the consideration of race is relevant to remedying the continuing effects of past discrimination, and because governmental programs employing racial classifications for remedial purposes can be crafted to avoid stigmatization, . . . such programs should not be subjected to conventional ‘strict scrutiny’—scrutiny that is strict in theory, but fatal in fact.”174

In his Adarand dissent, Justice Stevens agreed, arguing that “[t]here is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination.”175

However, Justice Marshall’s successor on the Court, Justice Clarence Thomas, sharply disagreed with Justice Stevens:

I write separately . . . to express my disagreement with the premise underlying Justice Stevens’ and Justice Ginsburg’s dissents: that there is a racial paternalism exception to the principle of equal protection. I believe there is a “moral [and] constitutional equivalence” . . . between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law. . . . [R]acial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called “benign” discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government’s use of race. These programs


The Court[] . . . assumes that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority . . . . Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government’s constitutional obligation to “govern impartially,” . . . should ignore this distinction.

Id.
For Justice Thomas, any remedial use of race-conscious remedies is morally reprehensible and a violation of the colorblind principle that "government may not make distinctions on the basis of race."\textsuperscript{177}

However, different standards of review should apply to "benign" as opposed to "invidious" uses of race not only because the "burdened" and the "benefited" may be treated differently, but more importantly because the underlying judicial inquiries are fundamentally different. If the government first articulates a legitimate compelling interest in race-conscious relief, the affirmative action plan is entitled to a rebuttable presumption of validity. The presumption can be rebutted if the party challenging the plan can prove "pretext" or some other impermissible government purpose—i.e., the Court should impose the same evidentiary burden on opponents of affirmative action that it imposes on all other civil rights plaintiffs who challenge government action.

\textbf{E. Restricting the Government's Choice of Means}

It is somewhat puzzling that the Court is quick to suspect the government's motives when it \textit{openly} employs race-conscious

\begin{flushright}
\textsuperscript{176.} \textit{Id.} at 2119 (Thomas, J., concurring).
\textsuperscript{177.} \textit{Id.} In complete disregard of this nation's history of race relations and of the very circumstances that led to the adoption of the Fourteenth Amendment, Justice Thomas opines:

There can be no doubt that the paternalism that appears to lie at the heart of this [affirmative action] program is at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.")

\textit{Id.} Justice Thomas' concurring opinion is notable because of its rejection of affirmative action as bad social policy. Rarely, however, has the Court invalidated social and economic legislation because it was "paternalistic," or because it "engenders attitudes" of superiority, inferiority or resentment. Indeed, the Court upheld social security legislation in the late 1930s, despite such characterizations:

A system of old age pensions has special dangers of its own . . . . The existence of such a system is a bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose . . . .

Whether wisdom or unwisdom resides in the scheme of benefits . . . [under the Act], it is not for us to say . . . . Our concern here, as often, is with power, not with wisdom.

\end{flushright}
remedies, but is far less inclined to question those motives when "facially neutral" means are used and the government simply articulates a race-neutral basis for discriminatory conduct.\textsuperscript{178} It seems as though the Court is more concerned about the appearance of discrimination, rather than the reality.\textsuperscript{179}

Even if the government establishes its compelling interest in race-conscious affirmative action, its program still may be voided under the narrow tailoring requirement of strict scrutiny. Once again, courts may freely veto the government's choice of means on the theory that racially neutral, less burdensome means could have been used. But assuming a compelling interest in eliminating systemic discrimination, what is the justification for so severely restricting the government's choice of means?

The Supreme Court's requirement of narrow tailoring appears to rest on the colorblind premises that: 1) race is an irrelevant criterion that should rarely be used by government, and 2) the Equal Protection Clause protects individual, rather than group rights.\textsuperscript{180} Given these assumptions, even a compelling government interest in race-conscious, group-based relief is viewed as subordinate to the rights of "innocent" individuals bearing the burden of the remedy.\textsuperscript{181}

But those assumptions betray a myopic view of the rights and the interests involved. Reduced to its essence, the question is whether the "innocent victims" of affirmative action have, in fact, an


\textsuperscript{179.} Cf. Rosen, supra note 148, at 24 ("... O'Connor has said that government can be race-conscious, as long as it's not too obvious about it.").

\textsuperscript{180.} The Fifth and Fourteenth Amendments to the Constitution protect persons, not groups. It follows from that principle that all governmental action based on race—a group classification long recognized as "in most circumstances irrelevant and therefore prohibited"—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed.

\textit{Adarand}, 115 S. Ct. at 2112-13.

\textsuperscript{181.} In \textit{Wygant}, the Court stated:

Article XII [of the contract is] a political compromise that "avoided placing the entire burden of layoffs on either the white teachers as a group or the minority teachers as a group." But the petitioners before us today are not "the white teachers as a group." They are Wendy Wygant and other individuals who claim they were fired from their jobs because of their race. ... The Constitution does not allocate constitutional rights to be distributed like bloc grants within discrete racial groups; and until it does, petitioners' more senior union colleagues cannot vote away petitioners' rights.

\textit{Wygant v. Jackson Bd. of Educ.}, 476 U.S. 267, 281 n.8 (1986) (citation omitted). It appears that Wendy Wygant was as much a victim of her "more senior ... colleagues" as she was of her race.
overriding, *constitutionally* protected right to benefits from a system that discriminates or that perpetuates the effects of discrimination. Strict scrutiny operates on the premise that they do.\textsuperscript{182} Eliminating systemic discrimination, however, *necessarily* means denying "innocent" persons the benefits of discrimination.

At bottom, the Court's only arguable rationale for severely restricting the government's choice of remedial means is its insistence on colorblindness, which—as we have seen—is neither mandated by the intent of the Fourteenth Amendment, nor by the half-century of equal protection jurisprudence that preceded *Croson*. In short, if eliminating systemic discrimination is a compelling government interest, there is no justification for severely narrowing the government's choice of means, beyond the Court's arbitrary adoption of strict scrutiny as the test for race-conscious affirmative action.

**CONCLUSION**

In adopting strict scrutiny as the constitutional standard of review for government-adopted affirmative action, the Supreme Court has taken onto itself ultimate responsibility and accountability for the success or failure of ending systemic discrimination in this country. It is that very kind of public policy control which the Court has studiously avoided throughout most of its history. And yet, an activist majority on the present Court appears determined to oversee race relations in this country with little more than a judicial declaration that government must be "colorblind," even though the rest of the nation is not. Moreover, as I have attempted to demonstrate, the Court's theoretical justifications for requiring strict scrutiny of affirmative action are seriously flawed.

The Supreme Court should begin anew—starting with Chief Justice Burger's predicate in *Fullilove*: "As a threshold matter, we reject the contention that in the remedial context . . . [government] must act in a wholly 'color-blind' fashion."\textsuperscript{183}

\textsuperscript{182} See *supra* note 22.

\textsuperscript{183} Fullilove v. Klutznick, 448 U.S. 448, 482 (1980).