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# Affirmative Action on Trial The Retraction of Affirmative Action and the Case for Its Retention

CARL L. LIVINGSTON, JR.\*

[R]acial classifications . . . must serve a *compelling* governmental interest, and must be narrowly tailored. . . . [I]t is especially important that the reasons . . . be *clearly identified and unquestionably legitimate*. . . . [R]equiring strict scrutiny . . . will consistently give racial classifications that kind of *detailed examination*, both as to ends and as to means.

Justice Sandra Day O'Connor<sup>1</sup>

In my view, government can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction.

Justice Antonin Scalia<sup>2</sup>

Both the national and state governments are seriously threatening or actively working to limit affirmative action.<sup>3</sup> Additionally, the Supreme Court has heightened its scrutiny of congressionally-mandated, affirmative action programs by applying the same tough stan-

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1. *Adarand Contr., Inc. v. Pena*, 115 S. Ct. 2097, 2117 (1995) (emphasis added).

2. *Id.* at 2118 (Scalia, J., concurring); see also *id.* at 2119 (Thomas, J., concurring in part) ("In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice." (footnote omitted)).

3. See President's Remarks on Affirmative Action, 31 WEEKLY COMP. PRES. DOC. 1245, 1265 (July 19, 1995) (stating that executive department will mend, but not end affirmative action); Hearing on Federal Affirmative Action Programs and Policies, 60 Fed. Reg. 53, 335 (1995) ("The hearing is to collect information . . . related to Federal affirmative action programs and policies . . ."); see also Jonathan Tilove, *Are White Men Victims?*, ATLANTA J. & CONST., May 28, 1995, at B2 (list of fifteen states considering the limitation or repeal of affirmative action).

dard imposed upon state and local governments. In *Adarand Constructors, Inc. v. Peña*, the Court held that strict scrutiny applied to all "race-based" affirmative action measures.<sup>4</sup> The Court's holding requires that affirmative action programs be based on "identified and unquestionably legitimate" findings of past discrimination as to each group, in order for the affirmative action plan to pass constitutional muster.<sup>5</sup>

Increasingly, the findings required by the Court grow closer to the kind of evidence necessary for a full-fledged discrimination case. Simultaneously, a growing minority on the Court are advocating for the complete end to affirmative action.<sup>6</sup> Hence, affirmative action is on trial in alternate ways: (1) the Court now requires detailed proof of discrimination to justify affirmative action; and (2) some members of the Court wish to end affirmative action altogether.

This article discusses how efforts to promote affirmative action have declined and what steps should be taken to reverse this trend. Part I surveys the rise of affirmative action, chronicles the fall of race-conscious remedies, and analyzes the opinions of Justices who advocate the end of affirmative action. Part II suggests effective responses to attacks on affirmative action, including: first, the presentation of affirmative action exclusively as a compensatory justice remedy; second, reliance on the Marshall-Schnapper interpretation of the Fourteenth Amendment; third, the defining of the scope and terms of affirmative action; fourth, the documentation of convincing evidence of governmental disparate treatment; and, finally, the encouragement of at least one law school to establish a department as a center from which this work may be coordinated nationally.

## I. THE RETRACTION OF AFFIRMATIVE ACTION

### A. The Birth of Affirmative Action

"In order to get beyond racism, we must first take account of race."

Justice Harry Blackmun<sup>7</sup>

Without the guidance of legislation, affirmative action emerged in a piecemeal fashion, initiated by the dual action of an executive order

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4. *Adarand*, 115 S. Ct. at 2100.

5. *Id.* at 2117 (quoting *Fullilove v. Klutznick*, 488 U.S. 448, 533-35, 537 (1980)).

6. See *infra* at Part I.C.

7. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., dissenting).

and court-ordered busing.<sup>8</sup> In 1965, President Lyndon B. Johnson signed Executive Order 11,246, which provided for the elimination of discrimination in government contracting and enhanced opportunities for racial minorities.<sup>9</sup> The Executive Order provided, in pertinent part, “[t]he contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin.”<sup>10</sup> The enforcement of this order in the subsequent administration led to minority set-asides in federal contracting, and later to enhanced hiring of minorities and women generally in the federal government.<sup>11</sup> The order also encouraged the use of race-conscious remedies nationwide.

The first real federal affirmative action program, since the Reconstruction, was the Warren Court’s busing remedies.<sup>12</sup> The Supreme Court established strong precedent for race-based remedial measures through its busing decisions. One of the premier cases in this regard was *Green v. New Kent County School Board*.<sup>13</sup> Virginia’s rural New Kent County maintained two schools in its district: one combined elementary and high school for whites and another combined school for blacks.<sup>14</sup> The New Kent County system remained substantially unchanged despite the Supreme Court’s decision in *Brown v. Board of*

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8. See generally James E. Jones, Jr., *The Origins of Affirmative Action*, 21 U.C. DAVIS J.J. 383 (1988) (describing the evolution of race-conscious remedies from the Freedmen legislation of the Reconstruction era to the reverse discrimination decisions of the 1990s).

9. Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), reprinted in 42 U.S.C. § 2000e (1965).

10. *Id.*

11. See Weldon J. Rougeau, *Enforcing a Clear National Mandate*, 7 J. INTERGROUP REL. 4 (1979) (director of the Office of Federal Contract Compliance Programs during the Carter Administration) (explaining that this Executive Order was estimated to some 300,000 contractors employing approximately 41 million employees).

12. Cf. JAMES W. DAVIDSON ET AL., NATION OF NATIONS 616-20 (1994). On January 15, 1865, General Sherman issued Special Order No. 15, which authorized African Americans to receive 40-acre plots of deserted land in Georgia and South Carolina. *Id.* at 618. President Johnson overturned this order. *Id.* Representative Thaddeus Stevens proposed a similar bill, which distributed 394 million acres of the chief rebels’ property to African Americans in 40-acre lots. *Id.* The bill never passed. *Id.*; see also Ann F. Ginger, *A Personal Analysis: Who Needs Affirmative Action*, 14 HARV. C.R.-C.L. L. REV. 265, 269 (1979) (one of the first affirmative action efforts was the training of housewives for World War II); JOHN H. FRANKLIN, FROM SLAVERY TO FREEDOM 578-79 (3d ed. 1969) (In order to forestall an NAACP-led, African-American civil rights march on Washington D.C. in 1941, President Roosevelt issued Executive Order 8802 outlawing discrimination “in defense industries or Government . . . [a]nd . . . provid[ing] for the full and equitable participation of all workers in defense industries, without discrimination . . .”).

13. *Green v. New Kent County School Bd.*, 391 U.S. 430 (1968).

14. *Id.* at 432.

*Education*,<sup>15</sup> which invalidated the Virginia statutes that created the segregated system thirteen years earlier.<sup>16</sup> When invalidating New Kent County's school system as violative of *Brown*, the Court stated:

School boards . . . then operating state-compelled dual systems were nevertheless clearly charged with the *affirmative duty* to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.

Moreover, whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed.<sup>17</sup>

The Court further held that:

The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a "white" school and a "Negro" school, but just schools.<sup>18</sup>

The *Green* Court imposed upon school districts, which were engaged in *de jure* discrimination at the time of *Brown*, an affirmative duty to eliminate the effects of racial segregation.<sup>19</sup> After *Green*, the Court continued to consider race when fashioning remedies for *de jure* discrimination. In *Regents of the University of California v. Bakke*,<sup>20</sup> Justice Blackmun noted:

I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, *we must first take account of race*. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot — we dare not — let the Equal Protection Clause perpetuate racial supremacy.<sup>21</sup>

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15. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

16. *Green*, 391 U.S. at 432-33. Five months after this suit was brought in 1965, the school board adopted a "freedom-of-choice" plan. *Id.* at 437. The "freedom-of-choice" plan permitted all, but first and eighth grade pupils, to choose between the two schools in New Kent County. *Id.* at 433-34.

17. *Id.* at 437-39 (citations omitted) (emphasis added).

18. *Id.* at 442 (footnote omitted).

19. *Id.* at 442 n.6 ("[T]he elimination of the dual school system and the establishment of a 'unitary, non-racial system' could be readily achieved . . . by assigning students living in the eastern half of the county to the New Kent School and those living in the western half of the county to the Watkins School." (quoting *Bowman v. County School Bd.*, 382 F.2d 326, 332 (4th Cir. 1967))).

20. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

21. *Id.* at 407 (Blackmun, J., dissenting) (emphasis added).

Emboldened by the Court's willingness to consider race, a number of schools and other private entities established their own race-conscious, remedial programming.<sup>22</sup>

In addition to its willingness to consider race, the Supreme Court further acknowledged that racial balancing may be helpful when fashioning remedies to past discrimination. The Court stated, "the Constitution does not compel any particular degree of racial balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful starting points in shaping a remedy."<sup>23</sup> In essence, the Court permitted school boards to consider race for remedial purposes in admissions and, later, in awarding scholarships.

Following the Supreme Court's use of race in its busing decisions, the next major expansion of affirmative action was the executive branch's preferences in employment and contract set-asides in the Nixon administration.<sup>24</sup> Goals and timetables were established in these measures.<sup>25</sup>

By the mid-seventies, numerous schools, private employers, associations, and state and local governments instituted voluntary remedial programs. Exigencies encouraged companies across the country to implement such programming — whether for altruistic or materialistic reasons. The Ford and Carter administrations extended these efforts by such measures as set-aside programs in radio and television licensing.<sup>26</sup>

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22. *E.g.*, *Swann v. Charlotte-Mecklenburg Bd. Educ.*, 402 U.S. 1, 6 (1971) (defining school board's affirmative duty to "eliminate dual [race based] systems") *McDaniel v. Barresi*, 402 U.S. 39 (1971) (reviewing Clarke County's voluntary race-based school desegregation plan). In *Swann* and *McDaniel*, the Court approved student assignments based upon race in an effort to comply. See *Swann*, 402 U.S. at 16; *McDaniel*, 402 U.S. at 41.

23. *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 46 (1971).

24. The Labor Department implemented the Revised Philadelphia Plan — first in Pennsylvania and then nationwide under the inspiration of assistant secretary Arthur Fletcher. The Plan, which provided the underpinnings for affirmative action in government contracting and subsequently, commerce standards for affirmative action programs, required contractors to set goals and timetables for compliance. See Earl M. Leiken, *Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan*, 56 CORNELL L. REV. 84 (1970); Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723 (1972); Jones, *supra* note 8, at 383. The Labor Department's next move was to extend goals and timetables to non-construction contractors. See Exec. Order No. 4, 41 C.F.R. §§ 60-62 (1971); *Legal Aid Soc'y v. Brennan*, 608 F.2d 1319 (9th Cir. 1979); Jones, *supra* note 8, at 383.

25. See U.S. COMMISSION ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 166-72 (1970); Jones, *supra* note 8, at 400-01.

26. See, *e.g.*, *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 556-57 (1990) (upheld the FCC's minority set-aside program), *overruled by Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2113 (1995).

Throughout the 1970s and well into the 1980s, the Court could not agree upon a standard of review for affirmative-action under the Equal Protection Clause.<sup>27</sup> The Court was unanimous in the opinion that the rational basis test<sup>28</sup> should not apply,<sup>29</sup> and divided as to whether strict or intermediate scrutiny should.<sup>30</sup> In *Bakke*, Justice Powell believed that affirmative action demanded the Court's strictest scrutiny, a review which is usually 'fatal in fact.'<sup>31</sup>

By 1978 affirmative action had reached its zenith.<sup>32</sup> Although it had come of age, affirmative action nevertheless had developed in a

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Opponents attacked affirmative action as imposing "quotas" from its inception. Albert Shanker, president of both the American Federation of Teachers and the United Federation of Teachers in New York City, is a longtime enemy of affirmative action. See Jones, *supra* note 8, at 383-84 n.4. Mr. Shanker has frequently attacked affirmative action through his weekly column appearing in the *New York Times*. *Id.* As early as 1972, Mr. Shanker wrote critical articles, such as *A Quarrel with Quotas* (July 11, 1972), *The Quota Principle: Dangerous Arithmetic* (Dec. 9, 1973), and *The Quota Mentality v. the 14th Amendment* (Oct. 20, 1974). *Id.* The American Jewish Committee, which publishes *Commentary*, also sustained a continual assault on affirmative action. *Id.* The AFL-CIO is also an opponent of affirmative action. The Union has issued "a multitude of resolutions and statements denouncing 'quotas' and 'reverse discrimination' . . . ." *Id.* For an explanation as to why certain Jewish groups oppose affirmative action, see Herman Schwartz, *Affirmative Action, in MINORITY REPORT: WHAT HAS HAPPENED TO BLACKS, HISPANICS, AMERICAN INDIANS, AND OTHER MINORITIES IN THE EIGHTIES?* 58, 69 (Leslie W. Dunbar ed., 1984). The attack on affirmative action and "preferential treatment" is merely an example of history repeating itself. See *The Civil Rights Cases*, 109 U.S. 3, 25 (1886) (referring to the newly freed slave as the "special favorite of the laws"); 5 MESSAGES AND PAPERS OF THE PRESIDENTS 3610-11 (1914) ("[T]he distinction of race and color is by the bill made to operate in favor of the colored and against the white race.").

27. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 301 (1986) (Marshall, J., dissenting) ("Agreement upon a means for applying the Equal Protection Clause to an affirmative-action program has eluded this Court every time the issue has come before us.").

28. The Court first adopted rational basis review in the Commerce Clause case, *McCulloch v. Maryland*, 16 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.").

29. See *Wygant*, 476 U.S. at 301 (Marshall, J., dissenting) ("[W]e eschewed the least rigorous, 'rational basis' standard of review, recognizing that any racial classification is subject to misuse.").

30. See *id.* ("[B]ecause no fundamental right was involved and because whites have none of the immutable characteristics of a suspect class, the so-called 'strict scrutiny' applied to cases involving either fundamental rights or suspect classifications was not applicable." (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978) (opinion of Justices Brennan, White, Marshall and Blackmun))).

31. Justice Powell's opinion, in which Justice White joined, argued that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Bakke*, 438 U.S. at 291; see also *Wygant*, 476 U.S. at 302 (Marshall, J., dissenting) ("The only other Justice to reach the constitutional issue in *Bakke* suggested that, remedial purpose or no, any racial distinctions 'call for the most exacting judicial examination.'" (citation omitted))).

32. This is not to say the Court did not recognize further gains after 1978. In cases, as recent as *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) and *United States v. Fordice*, 505 U.S. 717 (1992), the Court further supported, if not expanded, affirmative action in certain areas.

piecemeal fashion as a body of law.<sup>33</sup> Lacking the scope and definition of comprehensive legislation, affirmative action was, and remains, the construct of executive action, legislative add-ons, and a host of cases reconciling intentions, good or bad, with constitutional law.<sup>34</sup>

A metaphor for the amalgamated and arbitrary nature of affirmative action is the label itself. "Affirmative action" is not officially or clearly defined in law.<sup>35</sup> It is neither a term of art nor of choice, but rather mere happenstance.<sup>36</sup> In actuality, the term shields the reason for which the programming was instituted, given that the reason mainly involved compensation for mistreatment.<sup>37</sup>

Because of the lack of congressional guidance, the perceived scope of affirmative action was broader than it actually was. In a

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33. *E.g.*, Jones, *supra* note 8, at 383 ("The modern debate over affirmative action has occupied us for almost twenty years without resolution or clarification of the underlying issues that divide us." (footnote omitted)).

34. *See id.* at 393-99.

35. *E.g.*, *Adarand*, 115 S. Ct. at 2108 (defining affirmative action as "race-based governmental action designed to benefit . . . groups," which have suffered discrimination in our society); *see also id.* at 2134 (Souter, J., dissenting) ("remedial racial preference"); *cf. id.* at 2119 (Thomas, J., concurring) (criticizing affirmative action as "government-sponsored racial discrimination based on benign prejudice"); *see also* U.S. COMMISSION ON CIVIL RIGHTS, *AFFIRMATIVE ACTION IN THE 1980'S: DISMANTLING THE PROCESS OF DISCRIMINATION* 70 (Clearinghouse Publishers 1981):

Affirmative action is a contemporary term that encompasses any measure . . . that permits the consideration of race, national origin, sex, or disability, along with other 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 occurrence of discrimination in the future.

Professor Kennedy defines affirmative action as "policies that provide preferences based explicitly on membership in a designated group." Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1327 n.1 (1986); *cf. Ginger, supra* note 12, at 268 (defining affirmative action by example); James E. Jones, Jr., *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 IOWA L. REV. 901, 903 (1985) (defining affirmative action as "public or private actions or programs which provide or seek to provide opportunities or other benefits to persons on the basis of, among other things, their membership in a specified group or groups"); Myrl L. Duncan, *The Future of Affirmative Action: A Jurisprudential/Legal Critique*, 17 HARV. C.R.-C.L. L. REV. 503, 503 (1982) ("a public or private program designed to equalize hiring and admission opportunities for historically disadvantaged groups by taking into consideration those very characteristics which have been used to deny them equal treatment").

36. The term "affirmative action" ostensibly was first used by President John F. Kennedy. Jones, *supra* note 8, at 395-96. President Johnson subsequently referred to "affirmative action" in Executive Order 11,246. *See supra* Part I.C. *But see* Kennedy, *supra* note 35, at 1327 n.1 ("At the level of semantics, 'affirmative action' avoids the problem of preference that is inescapable if one uses the term 'preferential treatment.'").

37. Duncan, *supra* note 35, at 533 ("Reparations are owed to minorities to compensate not only for lack of job opportunities but also for the stamp of inferiority . . ."). A term containing words such as "compensation," "reparations," or even "remedial" would have been much more instructive.



sense, its smoke billowed high, but its fire burned low, in a way reminiscent of Reconstruction Era policies.

Nonetheless, affirmative action regulations and programming had burgeoned by 1978. Employment and promotion preferences, licensing and contracting opportunities, scholarship and enrollment programming were enforced by goals and timetables, numeric and percentage set asides, and minority and disadvantaged class programming in pockets throughout the United States. Notwithstanding its hodgepodge construction, a structure this extensive could not be dismantled in a day.<sup>38</sup>

## B. The Retraction

"A lack of opportunities for black entrepreneurs . . . cannot justify a rigid racial quota."

Justice Sandra Day O'Connor<sup>39</sup>

In a line of Supreme Court decisions beginning with *Bakke*, the Court has chipped away at the enforcement of affirmative action measures.<sup>40</sup> In fact, some justices advocate zealously for the immediate end of the Affirmative Action era. In *Bakke*, the medical school of the University of California at Davis had instituted an affirmative action program which reserved a specific number of seats, under a two track plan, for certain racial minorities.<sup>41</sup> Allan Bakke, a white male,

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38. The fact that approximately twenty-nine states and the District of Columbia have some form of affirmative action requirements proves it is alive in the nineties. For a survey of state affirmative action plans, see Fair Employment Practices Manual, 8A Lab. Rel. Rep. ¶ 453 (1997).

39. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989).

40. *Defunis v. Odegaard*, 416 U.S. 312 (1974) (per curiam), was a dry run for *Bakke*, the case which changed the terrain of race-conscious programming. *Defunis* revealed that the reactionary, remedy-limiting power which broke the waterline in *Bakke* was forceful and rising. In *Defunis*, the University of Washington Law School adopted a plan identifying and giving extra consideration to racial minorities. *Id.* at 320 (Douglas, J., dissenting). After Marco Defunis, Jr., was denied admission to the law school, he sued the University alleging that the preferential program violated the Equal Protection Clause. *Id.* at 314. Defunis applied unsuccessfully in 1971. *Id.* The trial judge ordered the University to admit Defunis pending adjudication of the case. *Id.* at 314. By the time the case reached the United States Supreme Court, Defunis was ready to complete his final semester of law school. Thus, the Court held that the case was moot. *Id.* at 319-20.

41. The absence of minorities at the University of California's medical school served as the program's justification. When the school opened in 1968, it had no African-American students nor any affirmative action plan. Over the next two years, the faculty devised a two-track plan to promote minority matriculation. By Allan Bakke's second year of application, 16 of 100 seats were placed under a separate committee for the "economically and/or educationally disadvantaged," and minority applicants, including: Blacks, Chicanos, Asians, and American Indians. *Bakke*, 438 U.S. at 274.

unsuccessfully applied to the medical school in both 1973 and 1974.<sup>42</sup> After being denied admission each time, Bakke sued the university on the basis of reverse discrimination. The trial court refused to order Bakke's admission, however, on the grounds that he failed to prove he would have been admitted but for the preferential program.<sup>43</sup>

Although a majority of the justices agreed that the university's program must be struck down, the majority could not agree on the reason why. Justice Powell wrote the lead opinion in which the Court invalidated the university's two-track enrollment system as unconstitutional. Justice Powell explained the limits of affirmative action:

In [*Brown* and its progeny], the States were required by court order to redress the wrongs worked by specific instances of racial discrimination. That goal was far more focused than the remedying of the effects of "societal discrimination," an amorphous concept of injury that may be ageless in its reach into the past.

We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.<sup>44</sup>

Justice Powell added, if governmental findings of past discrimination in a jurisdiction exist, then affirmative action may be constitutional.<sup>45</sup> Justice Powell agreed with Justices Brennan, White, Marshall, and Blackmun that race may be taken into account as a factor in an admissions program.<sup>46</sup>

Three Justices agreed with Justice Stevens' argument that the Court should have avoided the constitutional issue since the university failed to show its program complied with Title VI of the Civil Rights

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42. Bakke received high composite scores both years, but was rejected. The trial court held that the special program violated the U.S. Constitution, the state constitution, and Title VI. *Bakke*, 438 U.S. at 279.

43. *Bakke*, 438 U.S. at 270 (The trial court refused to order Bakke's admission because "he had not carried his burden of proving that he would have been admitted but for the constitutional and statutory violation."). The California Supreme Court partially overruled the trial court and argued that Bakke had been discriminated against because of his race. The University appealed. *Id.* at 270-71.

44. *Id.* at 307 (citations omitted) (alteration by author).

45. See *id.* at 308 n.44 (*Griggs* and Title VII support the proposition that findings of identified discrimination must precede the fashioning of remedial measures embodying racial classifications.).

46. *Id.* at 316. Prescriptively, Justice Powell praised the Harvard Plan, which considered race merely as a favorable factor for admission, as a constitutional option in lieu of the two-track, set-aside approach. The Harvard Plan prevented a student from being excluded "from all consideration for that seat simply because he was not the right color or had the wrong surname." *Id.* at 317.

Act of 1964.<sup>47</sup> Justice Stevens argued that the admissions program was violative of Title VI,<sup>48</sup> and characterized the school's program as "quotas."<sup>49</sup>

Justice Marshall wrote a necessary and poignant restatement of the history on race relations, prior discriminatory Supreme Court judgments, and the pro-affirmative action history of the Fourteenth Amendment.<sup>50</sup> He explained:

While I applaud the judgment of the Court that a university may consider race in its admissions process, 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.<sup>51</sup>

Justice Marshall did not directly address the question of color blindness in his historical analysis. Instead, he proffered the argument with which many knowledgeable of America's history of discrimination agree: "I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible."<sup>52</sup>

Justice Blackmun argued that racial preferences should not be distinguished from any other preferences used by educational institu-

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47. *Id.* at 408-09 (Stevens, J., concurring in judgment). Chief Justice Burger, Justice Stewart, and Justice Rehnquist joined Justice Stevens' opinion.

48. *Id.* at 418 (Stevens, J., concurring in judgment) ("[T]he meaning of the Title VI ban on exclusion is crystal clear: Race cannot be the basis of excluding anyone from participation in a federally funded program." (alteration by author)).

49. *Id.* at 415 (Stevens, J., concurring in judgment).

50. *Id.* at 387-402 (Marshall, J., concurring in part, dissenting in part). Justice Marshall further argued, "There is thus ample support for the conclusion that a university can employ race-conscious measures to remedy past societal discrimination, without the need for a finding that those benefitted were actually victims of that discrimination." *Id.* at 400.

51. *Id.* at 400 (Marshall, J., concurring in part, dissenting in part).

52. *Id.* at 402 (Marshall, J., concurring in part, dissenting in part). Martin Luther King, Jr., also warned of the dangers of forgetting history:

Many of the ugly pages of American history have been obscured and forgotten. A society is always eager to cover misdeeds with a cloak of forgetfulness, but no society can fully repress an ugly past when the ravages persist into the present. America owes a debt of justice which it has only begun to pay. If it loses the will to finish or slackens in its determination, history will recall its crimes and the country that would be great will lack the most indispensable element of greatness—justice.

MARTIN LUTHER KING, JR., *WHERE DO WE GO FROM HERE? CHAOS OR COMMUNITY* 109 (Harpers Row Publishers 1967); see also Remarks of the President at Howard University (June 4, 1965), reprinted in LEE RAINWATER & WILLIAM L. YANCEY, *THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY* 126 (1967) ("It is the devastating heritage of long years of slavery; and a century of oppression, hatred, and injustice. . . . Much of the Negro community is buried under a blanket of history and circumstance. It is not a lasting solution to lift just one corner of that blanket. We must stand on all sides and we must raise the entire cover if we are to liberate our fellow citizens . . .").

tions to admit students. To demonstrate that institutions have given, and continue to give, non-racial preferences, Justice Blackmun stated,

It is somewhat ironic to have us so deeply disturbed over a program where race is an element of consciousness, and yet to be aware of the fact, as we are, that institutions of higher learning, albeit more on the undergraduate than the graduate level, have given conceded preferences up to a point to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful.<sup>53</sup>

In the big picture, the effects of *Bakke* extended far beyond its holding. The *Bakke* decision was the Supreme Court's first successful attack on affirmative action. The decision mystified proponents and electrified opponents. It created a high barrier beyond which affirmative action could not go, revealed cracks in its aggregate structure, and weakened the foundation upon which it stood. Justice Marshall recognized as much in his dissent:

It has been said that this case involves only the individual, Bakke, and this University. I doubt, however, that there is a computer capable of determining the number of persons and institutions that may be affected by the decision in this case. For example, we are told by the Attorney General of the United States that at least 27 federal agencies have adopted regulations requiring recipients of federal funds to take "affirmative action to overcome the effects of conditions which resulted in limiting participation . . . by persons of a particular race, color, or national origin." I cannot even guess the number of state and local governments that have set up affirmative action programs, which may be affected by today's decision.<sup>54</sup>

In the aftermath of *Bakke*, private parties slowed their pursuit of goals and timetables; justice departments did not encourage private parties as strongly to adopt affirmative action measures. The defensive, blitzing use of the terms "quotas" and "reverse discrimination" became more credible and effective.<sup>55</sup>

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53. *Bakke*, 438 U.S. at 404 (Blackmun, J., dissenting in part).

54. *Id.* at 402 (citation omitted) (Marshall, J., dissenting in part) (emphasis in original).

55. *E.g.*, Jones, *supra* note 8, at 387; see also Hill, *Race, Affirmative Action, and the Constitution*, reprinted in ANDREWS, VOICES OF DIVERSITY: PERSPECTIVES ON AMERICAN POLITICAL IDEALS AND INSTITUTIONS 227 (1995) ("The effort to eliminate the present effects of past discrimination, to correct the wrongs of many generations was barely underway when it came under powerful attack. . . . And once again, the defenders of the racial *status quo* have succeeded in confusing the remedy with the original evil. The term 'reverse discrimination,' for example, has become another code word for resisting the elimination of prevailing patterns of discrimination.").

Following *Bakke*, the Court continued its attack on affirmative action by limiting the scope of its use, heightening the standard of review, and imposing an increasing burden of production. The Court further limited the use of affirmative action measures by ruling past societal discrimination as an insufficient justification under Title VII. In *Firefighters Local Union No. 1784 v. Stotts*,<sup>56</sup> the Court stated "that section 706 of Title VII restricted the remedial authority of the Court to actual victims of discrimination."<sup>57</sup> The Court's holding was consistent with the Justice Department's position in the case - namely, that affirmative action should be limited to granting remedies to identified victims of discrimination.<sup>58</sup>

The Court constricted affirmative action further by adding language to its 'identifiable discrimination' requirement, from which a finding is made, and upon which remedial programming must be based. In *Wygant v. Jackson Board of Education*,<sup>59</sup> the Jackson, Mississippi Board of Education and teachers union inserted in their collective bargaining agreement a provision intended to preserve the affirmative action gains made in the event of lay off.<sup>60</sup> The agreement provided that in the event of lay off, those with the most seniority would be retained, except that the percentage of minority teachers retained after the lay off could not be less than before the lay off.<sup>61</sup> The union and two minority teachers, who were laid off in breach of the collective bargaining agreement, alleged the lay off provision violated the Equal Protection clause and Title VII of the Civil Rights Act.<sup>62</sup> The Court held that the lay off provision was unconstitutional.<sup>63</sup> The Court reasoned that a public employer must have "convincing evidence" of prior discrimination in its employment practices—beyond mere societal discrimination—before it embarks on an affirmative action program.<sup>64</sup> The Court held that "the trial Court must make a factual determination that the employer had a

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56. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984).

57. Jones, *supra* note 8, at 411 (citing *Stotts*, 467 U.S. at 578-82).

58. *Id.*

59. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

60. *Id.* at 270-71.

61. *Id.*

62. *Id.* at 271.

63. *Id.* at 267 (In the five to four decision, the Court ruled the lay-off provision was unjustified.).

64. *Id.* (Powell, J., plurality) (emphasis added).

strong basis in evidence for its conclusion that remedial action was necessary.”<sup>65</sup>

Not only did the Court require identifiable evidence of past discrimination, the Court also began to scrutinize affirmative action measures more closely. The *Bakke* Court agreed that the use of racial quotas was impermissible, but the Justices could not agree upon the standard of review that should be used. As early as 1978, Justice Powell advocated in favor of applying strict scrutiny to affirmative action cases.<sup>66</sup> Against Justice Powell’s view, a plurality of the remaining justices favored a lenient test.<sup>67</sup>

In *Fullilove v. Klutznick*,<sup>68</sup> the Court held that if Congress has expressly mandated a race-conscious program, a court must give “appropriate deference to the Congress” when assessing the program’s constitutionality.<sup>69</sup> The Court determined Federal Communications Commission (FCC) minority preferences are subject to “administrative scrutiny to identify and eliminate from participation” those applicants who are not “bona fide.”<sup>70</sup> The Court found that the congressionally-mandated, race-conscious program was constitutional so long as it does not impose *undue* burdens on nonminorities.<sup>71</sup>

Two decisions have significantly impacted how the Court reviews race-conscious remedies for past discrimination: *Richmond v. J.A. Croson Co.*<sup>72</sup> and *Adarand Constructors, Inc. v. Peña*.<sup>73</sup> In *Croson*, the Court held that Richmond, Virginia’s 1983 ordinance, requiring thirty percent of the city’s construction contracts be awarded to minority business enterprises, violated the Equal Protection Clause.<sup>74</sup>

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65. *Id.* (Powell, J., plurality). Justice Marshall, with whom Justices Brennan and Blackmun joined in dissent, stated “[b]ecause I believe that a public employer, with the full agreement of its employees, should be permitted to preserve the benefits of a legitimate and constitutional affirmative-action hiring plan even while reducing its work force, I dissent.” *Id.* at 296 (Marshall, J.). Hence, the dissent noted the result was against the agreement of most of the parties and, again, was not constitutionally necessary. *Id.* (Marshall, J.)

66. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (Powell, J., plurality).

67. See *supra* notes 30-32 and accompanying text.

68. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

69. *Id.* at 472.

70. *Id.* at 487-88.

71. *Id.* at 484. Chief Justice Burger noted that “[i]t is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms.” *Id.* The Chief Justice reasoned that “[t]he actual ‘burden’ shouldered by nonminority firms is relatively light in this connection when we consider the scope of the public works program as compared with overall construction contracting opportunities.” *Id.* (footnote omitted).

72. *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

73. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995).

74. *Croson*, 488 U.S. at 511.

Although Richmond's population is fifty percent African American, between 1978 and 1983 less than one percent of the city's prime construction contracts had been awarded to minority businesses.<sup>75</sup>

The Court scrutinized the city's program on two fronts. First, the city failed to show identifiable construction industry discrimination against all the nonminorities who benefitted from the set-aside.<sup>76</sup> Second, the size of the thirty percent set-aside, notwithstanding the foregoing, was not narrowly tailored to remedy the effects of any prior alleged discrimination.<sup>77</sup> Justice O'Connor<sup>78</sup> led the Court's walk farther down the path of affirmative action retrenchment:

While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a *lack of opportunities* for black entrepreneurs, this observation, standing alone, *cannot justify a rigid racial quota* in the awarding of public contracts in Richmond, Virginia. Like the claim that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.<sup>79</sup>

Justices Marshall, Brennan, and Blackmun dissented. Writing for the dissent, Justice Marshall stated:

I find deep irony in second-guessing Richmond's judgment on this point. As much as any municipality in the United States, Richmond knows what racial discrimination is; a century of decisions by this and other federal courts has richly documented the city's disgraceful history of public and private racial discrimination.<sup>80</sup>

Justice Marshall explained that the repercussions of the majority's holding were extensive. "The majority's unnecessary pronounce-

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75. *Id.* at 479-80.

76. The actual classifications in the opinion are Blacks, Spanish-speaking persons, Orientals, Indians, Eskimos, or Aleuts. *Id.* at 478.

77. *Id.* at 486.

78. Schwartz, *supra* note 26, at 63-64:

Perhaps the most prominent recent example of affirmative action is President Reagan's selection of Sandra Day O'Connor for the Supreme Court. Obviously she was on a "separate list," because on any unitary list this obscure lower-court state judge, with no federal experience and no national reputation, would have never come to mind as a plausible choice for the highest court. (Incidentally, despite Ms. Decter's, Mr. Reynolds's, and Ms. Chavez's concern about the loss of "self-regard" suffered by beneficiaries of such preferences, "spiritually speaking" Justice O'Connor seems to be bearing her loss and spiritual pain quite easily.) And, like so many other beneficiaries of affirmative action given an opportunity that would be otherwise unavailable, she may perform well.

79. *Croson*, 488 U.S. at 499 (emphasis added).

80. *Id.* at 529 (Marshall, J., dissenting).

ments will inevitably discourage or prevent governmental entities, particularly States and localities, from acting to rectify the scourge of past discrimination.”<sup>81</sup> After specifying the difficulties the decision would pose for governmental entities working to correct the effects of past discrimination, Justice Marshall queried whether the majority felt the battle against discrimination had ended:

[A] majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice. I, however, do not believe this Nation is anywhere close to eradicating racial discrimination or its vestiges. In constitutionalizing its wishful thinking, the majority today does a grave disservice not only to those victims of past and present racial discrimination in this Nation whom government has sought to assist, but also to this Court’s long tradition of approaching issues of race with the utmost sensitivity.<sup>82</sup>

Justices Brennan and Blackmun called Justice Marshall’s opinion “perceptive and incisive.”<sup>83</sup> Justice Blackmun’s remarks, in follow-up to Justice Marshall’s, are equally incisive:

I never thought that I would live to see the day when the city of Richmond, Virginia, the cradle of the Old Confederacy, sought on its own, within a narrow confine, to lessen the stark impact of persistent discrimination. But Richmond, to its great credit, acted. Yet this Court, the supposed bastion of equality, strikes down Richmond’s efforts as though discrimination had never existed or was not demonstrated in this particular litigation.<sup>84</sup>

*Croson* confined affirmative action law in another way. It abandoned the intermediate scrutiny test and imposed, instead, strict scrutiny on all but congressionally-mandated programming.<sup>85</sup> This was a marked change and meant the Court would no longer clearly distinguish between its approach for handling racist programming and affirmative action.

As Justice O’Connor recognized, this “standards” business is important: “A lower standard signals that the Government may resort to racial distinctions more readily.”<sup>86</sup> Reassuringly, the Court, in

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81. *Id.*

82. *Id.* at 552-53 (Marshall, J., dissenting).

83. *Id.* at 561 (Blackmun, J., dissenting).

84. *Id.*

85. *See id.* at 493-94.

86. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 610 (1990) (O’Connor, J., dissenting), *overruled by Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995).



*Metro Broadcasting*, maintained that strict scrutiny would not apply to congressionally-mandated affirmative action.<sup>87</sup> However, this assurance was short-lived.

*Adarand Constructors, Inc. v. Pena*,<sup>88</sup> the other monumental affirmative action decision, extended strict scrutiny review even to congressionally-mandated, race-based remedies. Given the dissenting opinions in *Metro Broadcasting* and the Court's subsequent swing towards a conservative majority, the result was unfortunately foreseeable.<sup>89</sup>

In *Adarand*, Adarand Constructors challenged the rejection of its subcontract bid in favor of a disadvantaged business enterprise (DBE) that submitted a higher bid.<sup>90</sup> The prime contractor rejected Adarand's bid in order to take advantage of a financial incentive offered by the federal government. The government agreed to award the prime contractor an additional \$10,000 for exceeding the specified DBE set-aside goals. The additional award was more than the prime contractor would have received if it accepted Adarand's bid.<sup>91</sup> The Small Business Act authorized the goal-incentive program.<sup>92</sup> Under this Act, the Department of Transportation passed a regulation establishing goals which present the "maximum practicable opportunity" for "socially and economically disadvantaged" small business concerns.<sup>93</sup>

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87. *Id.* at 596-97 ("[W]e similarly find that a congressionally-mandated, benign, race-conscious program that is substantially related to the achievement of an important governmental interest is consistent with equal protection principles so long as it does not impose undue burdens on nonminorities."); see also *Croson*, 488 U.S. at 490 (recognizing Congress's authority to identify the effects of societal discrimination). The *Croson* majority argued that states' race-conscious programming should be subject to strict scrutiny because states, unlike Congress, do not have "a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." *Id.* at 490.

88. *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995).

89. In *Metro Broadcasting*, the Court held that intermediate scrutiny applied to affirmative action. *Metro Broadcasting*, 497 U.S. at 564-65. However, four justices dissented from the majority opinion, urging instead that the Court apply strict scrutiny to all race-based decisions - whether remedial or not. *Id.* at 602 (O'Connor, J., dissenting). Justices Brennan, Blackmun, and Marshall, three of the five-justice majority, are no longer on the Court. With new personnel, the *Adarand* Court did what the *Metro Broadcasting* dissenters could only threaten to do. See generally *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995).

90. *Adarand*, 115 S. Ct. at 2102.

91. *Id.* at 2103-04 (The Subcontracting Compensation Clause of the contract read in pertinent part, "[m]onetary compensation is offered for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals.").

92. Small Business Act, 15 U.S.C. § 644(g) (1994).

93. *Adarand*, 115 S. Ct. at 2102-04 (quoting Small Business Act § 8(d)(1), 15 U.S.C. § 637(d)(1) (1994)).

The Supreme Court, in a five to four decision, overruled *Metro Broadcasting*, wherein the Court had held that affirmative action programs instituted by Congress were subjected to a more lenient scrutiny.<sup>94</sup> Writing for the majority, Justice O'Connor concluded, "[w]e think that requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications that kind of detailed examination both as to ends and as to means."<sup>95</sup>

The Court remanded the case to the lower court to determine if the Small Business Act's affirmative action program passes strict scrutiny review. The Court specified that the lower court must determine whether Congress "clearly identified" the reasons for the classifications and whether they are unquestionably legitimate.<sup>96</sup>

Justice Stevens criticized the Court's unnecessary overruling of such a recent opinion. "Instead of deciding this case in accordance with controlling precedent, the Court today delivers a disconcerting lecture about the evils of governmental racial classifications."<sup>97</sup> Justices Breyer, Ginsberg, and Souter dissented for similar reasons. Justice Ginsberg's dissent was the most historic and poignant:

The divisions in this difficult case should not obscure the Court's recognition of the persistence of racial inequality and a majority's acknowledgment of Congress' authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects. Those effects, reflective of a system of racial caste only recently ended, are evident in our workplaces, markets, and neighborhoods. Job applicants with identical resumes, qualifications, and interview styles still experience different receptions, depending on their race. White and African-American consumers still encounter different deals. People of color looking for housing still face discriminatory treatment by landlords, real estate agents, and mortgage lenders. Minority entrepreneurs sometimes fail to gain contracts though they are the low bidders, and they are sometimes refused work even after winning contracts. Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice.

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94. *Id.* at 2113.

95. *Id.* at 2117.

96. *Id.* at 2118.

97. *Id.* at 2120 (Stevens, J., dissenting).

Given this history and its practical consequences, Congress surely can conclude that a carefully designed affirmative action program may help to realize, finally, the "equal protection of the laws" the Fourteenth Amendment has promised since 1868.<sup>98</sup>

From *Bakke* to *Adarand*, it has become clear the Court is constraining and tightening what may pass as permissible affirmative action programming. Like many in the civil rights community, Justice Marshall foresaw that the Court's efforts constituted a premature "retreat":

The majority today sounds a full-scale retreat from the Court's long-standing solicitude to race-conscious remedial efforts "directed toward deliverance of the century-old promise of equality of economic opportunity." . . . The battle against pernicious racial discrimination or its effects is nowhere near won. I must dissent.<sup>99</sup>

### C. Likely Future Retraction

"[T]his preference . . . exhumes *Plessy's* deferential approach to racial classifications."

Justice Anthony M. Kennedy<sup>100</sup>

The Court's affirmative action jurisprudence has shifted dramatically to the conservative right since 1978. Led first by Justice Rehnquist and now by Justice Scalia, the direction of this move is towards the dismantling of affirmative action. Statements by some justices underscore this fact.

In *Northeastern Florida Chapter of Associated General Contractors v. Jacksonville*,<sup>101</sup> the Court held that a contractor association's challenge to an ordinance according preferential treatment to minority-owned businesses in awarding city contracts was not moot by rea-

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98. *Id.* at 2135-36 (Ginsberg, J., dissenting) (citations and footnotes omitted).

99. *Croson*, 488 U.S. at 561 (Marshall, J., dissenting) (quotation omitted).

100. *Metro Broadcasting*, 497 U.S. at 632 (Kennedy, J., dissenting).

101. *Northeastern Fla. Chapter of Associated Gen. Contractors v. Jacksonville*, 113 S. Ct. 2297 (1993).

son of the ordinance's repeal.<sup>102</sup> The Court also held the lower court's dismissal of the challenge for want of standing was inappropriate.<sup>103</sup>

Justice Thomas,<sup>104</sup> writing for a seven-person majority, outlined the present direction of the Court:

The gravamen of petitioner's complaint is that its members are disadvantaged in their efforts to obtain city contracts. The new ordinance may disadvantage them to a lesser degree than the old one, but insofar as it accords preferential treatment to black- and female-owned contractors—and, in particular, insofar as its "Sheltered Market Plan" is a "set aside" by another name—it disadvantages them in the same fundamental way.<sup>105</sup>

Thus, the majority suggested the flat ten percent set-aside program for a number of groups was just as unconstitutional as was the five to sixteen percent goal program only for women and African Americans, because it would still impact white contractors.<sup>106</sup> Moreover, because

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102. *Id.* at 2301. In 1984, Jacksonville enacted a 10% set aside for business enterprises of at least 51% minority ownership. *Id.* at 2299. That region's Associated General Contractors chapter sued claiming the ordinance violated 42 U.S.C. § 1983 and the Equal Protection Clause. *Id.* On January 23, 1989, the Supreme Court decided *Croson*. On April 6, 1989, the District Court temporarily restrained Jacksonville from ordinance implementation but the Court of Appeals reversed. *Id.* Shortly thereafter, a Select Committee of the Jacksonville City Council conducted numerous public hearings on past discrimination in the city. Jacksonville later commissioned an independent study. The findings of the hearings and the study confirmed a long pattern of past discrimination in Jacksonville, Florida. Nonetheless, on May 31, 1990, the District Court entered summary judgment for the AGC chapter and again the Court of Appeals reversed. *Id.* at 2300. Twenty-two days after certiorari was granted, the city repealed its MBE ordinance in lieu of a new ordinance exclusively for African Americans and women. *Id.* This new ordinance provided for a 5 to 16% participation goal range instead of a flat 10% set aside. *Id.* It also listed a set aside — called the "Sheltered Market Plan" in the ordinance — as but one of five means of participation compliance. *Id.* The Supreme Court denied General Contractors's motion to dismiss based on its repeal of the challenged ordinance. *Id.* at 2300-01.

103. *Id.* at 2304-05.

104. Chief Judge A. Leon Higginbotham, Jr., United States Court of Appeals for the Third Circuit, wrote an insightful letter to Justice Clarence Thomas. Judge A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas From a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1992). While chiding Justice Thomas for his criticism of Justice Marshall's comments on the Bicentennial, Judge Higginbotham made reference to the following statements of John Hope Franklin:

There [John Hope Franklin] quite properly observed that, by adopting a philosophy of alleged self-help without seeking to assure equal opportunities to all persons, you "placed [yourself] in the unseemly position of denying to others *the very opportunities and the kind of assistance* from public and private quarters *that have placed [you] where you are today.*"

*Id.* at 1012 n.26 (citations omitted) (alterations in original) (emphasis added); see also Schwartz, *supra* note 26, at 63 ("For example, does anyone believe that blacks like Civil Rights Commission Chairman Clarence Pendleton or Equal Employment Opportunities Commission Chairman Clarence Thomas were picked because of the color of their eyes?").

105. *General Contractors*, 113 S. Ct. at 2301.

106. See *id.* at 2303 ("When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of

the Court desired so strongly to rule in this case, it broadened its standing jurisprudence in order to reach it. In her dissent, in which Justice Blackmun joined, Justice O'Connor acknowledged the overreaching of the court.<sup>107</sup>

In *Croson*, Justices Scalia and Kennedy expressed serious misgivings with race-conscious remedies. Justice Scalia argued that "[t]he benign purpose of *compensating for social disadvantages*, whether they have been acquired by reason of prior discrimination or otherwise, *can no more be pursued* by the illegitimate means of racial discrimination than can other assertedly benign purposes we have repeatedly rejected."<sup>108</sup> Justice Kennedy agreed with this opinion.<sup>109</sup> At the time of the *Croson* decision, Justice Thomas was not on the Court, but he would likely agree that state and local affirmative action is unconstitutional.<sup>110</sup> Hence, probably three votes exist against set asides specifically and very likely against affirmative action generally.

The pre-*Adarand* opinions of Justices Scalia, Kennedy, and Thomas indicate that affirmative action, particularly at the state and local levels, may meet an expeditious end under the guise that it is as discriminatory as slavery.<sup>111</sup> In *Adarand*, Justices Scalia and Thomas argued that affirmative action should be completely abandoned. First, Justice Scalia offered these insightful, anti-affirmative action sentiments:

In my view, government can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction. Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. . . . To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of

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the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.")

107. *Id.* at 2309 ("By treating the exceptional case as announcing a general rule favoring the exercise of jurisdiction, moreover, today's decision casts doubt on our other statutory-change cases and injects new uncertainty into our mootness jurisprudence." (O'Connor, J., dissenting)).

108. *Croson*, 488 U.S. at 520 (citation omitted) (emphasis added).

109. *Id.* at 518 (Kennedy, J., concurring) ("Justice Scalia's opinion underscores that proposition, quite properly in my view. The rule suggested in his opinion, which would strike down all preferences which are not necessary remedies to victims of unlawful discrimination, would serve important structural goals, as it would eliminate the necessity for courts to pass upon each racial preference that is enacted.")

110. See *infra* notes 113-14 and accompanying text.

111. *Croson* and *General Contractors* both concerned municipal affirmative action plans.

thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.<sup>112</sup>

Justice Thomas sided with Justice Scalia in equally bold language as he equated affirmative action to Jim Crow apartheid in the United States:

I believe that 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.

. . . .

That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged.<sup>113</sup>

In *Adarand*, Justice Kennedy joined the concurring opinions of Justices Scalia and Thomas without issuing a separate opinion of his own.<sup>114</sup> Lest someone be confused as to whether Justice Kennedy truly opposes affirmative action, Justice Kennedy has left a clear indication. Referencing two of the most racist and insensitive historical and legal acts, Justice Kennedy analogized affirmative action to Jim Crow laws and South African apartheid in *Metro Broadcasting*:

In upholding this preference, *the majority exhumes Plessy's deferential approach to racial classifications*. The Court abandons even the broad societal remedial justification for racial preferences once advocated by Justice Marshall, and now will allow the use of racial classifications by Congress untied to any goal of addressing the effects of past race discrimination.<sup>115</sup>

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112. *Adarand*, 115 S. Ct. at 2118-19 (Scalia, J., concurring in part).

113. *Id.* at 2119 (citation omitted) (Thomas, J., concurring in part).

114. *Id.* at 2101.

115. *Metro Broadcasting*, 497 U.S. at 632 (Kennedy, J., dissenting) (citation omitted) (emphasis added). *But see* Schwartz, *supra* note 26, at 67:

No one can honestly equate a remedial preference for a disadvantaged (and qualified) minority member with the brutality inflicted on blacks and other minorities by Jim Crow laws and practices. The preference may take away some benefits from some white men, but none of them is being beaten, lynched, denied the right to use a bathroom, a place to sleep or eat, being forced to take the dirtiest jobs or denied any work at all, forced to attend dilapidated and mind-killing schools, subjected to brutally unequal justice, or stigmatized as an inferior being. Setting aside, after proof of discrimination, a few places a year for qualified minorities out of hundreds and perhaps thousands of employees, as in the Kaiser plant in the *Weber* case, or 16 medical school places out

As with other areas concerning issues of federalism, the Court has generally accorded Congress more authority to remedy affirmative action than it does to the states. Chief Justice Burger stated “when a program employing a benign racial classification is adopted . . . at the explicit direction of Congress, we are ‘bound to approach our task with appropriate deference to the Congress, a co-equal branch . . . .’”<sup>116</sup> Even in *Adarand*, the Court recognized and struggled with the enhanced power Congress has to act in this area. However, the Court summarily concluded, “[w]e need not, and do not, address these differences today.”<sup>117</sup>

For this reason, the Court—as it is currently constituted—is likely first to end state and local affirmative action programs. But just as Congress’ greater power did not shield it from the uniform application of strict scrutiny, so too it will not exempt it from a ruling that affirmative action is unconstitutional.

In *United States v. Fordice*,<sup>118</sup> the Supreme Court ruled that Mississippi’s efforts to correct past discrimination in its universities did not satisfy the Equal Protection Clause.<sup>119</sup> What was significant in *Fordice* was not the eight to zero holding, but the concurring opinion of Justice Scalia. Justice Scalia disagreed with the portion of the majority opinion requiring the Court to look beyond race-neutral policies to ensure the state has actually abandoned and dismantled a prior

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of 100 as in *Bakke*, or 10 percent of federal public work contracts as in *Fullilove*, or even 50 percent of new hires for a few years as in some employment cases—this has nothing in common with the racism that was inflicted on helpless minorities, and it is a shameful insult to the memory of the tragic victims to identify the two.

116. *Metro Broadcasting*, 497 U.S. at 563 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980)).

117. *Adarand*, 115 S. Ct. at 2114.

118. *United States v. Fordice*, 505 U.S. 717 (1992).

119. Mississippi’s dual public university system had been composed of five well funded historically white institutions and three historically African-American institutions. *Id.* at 721-22. In 1963—after *Brown* but before its actual judicial enforcement in *Green*—Mississippi’s three “flagship” historically white universities enacted a policy requiring all entrants to achieve a minimum score of fifteen on the standardized college admission test at a time when the average score for whites was eighteen and for African Americans, seven. *Id.* at 734. In 1975, private plaintiffs sued and subsequently the United States intervened as a plaintiff claiming the state had failed its duty under Title VI and the Equal Protection Clause. *Id.* at 723. Under the consensual resolution in 1981, Mississippi adopted race-neutral admissions policies and assigned its universities to either of three missions: (1) three of the historically white universities were labeled “comprehensive” because they possessed the greatest resources and program offerings; (2) one of the historically black institutions was categorized as the sole “urban” institution; (3) and two each of the remaining historically white and black institutions were termed “regional” with primarily an undergraduate role. *Id.* at 724.

dual university system.<sup>120</sup> The Court impliedly supported the continuation of affirmative action until the state met its “affirmative duty” to rid its schools of the vestiges of prior discrimination. Justice Scalia was convinced that “the standard for dismantling a dual system ought to control here: discontinuation of discriminatory practices and adoption of a neutral admissions policy.”<sup>121</sup> Even upon proof of prior discriminatory practices, Justice Scalia prefers race-neutral admissions policies as a remedy. The remaining justices, including Justice Thomas, evinced a willingness to continue busing.<sup>122</sup> However, the Court imposed limitations on the use of busing as a remedy for the present effects of past discrimination.

In *Missouri v. Jenkins*,<sup>123</sup> the Court ruled that proof of illegal segregation within a school district does not authorize a district court to impose a remedy involving other school districts.<sup>124</sup> The Court held that an interdistrict remedy was unavailable even if it was necessary to attract whites, who had migrated in significant numbers immediately after the original desegregation orders became effective.<sup>125</sup>

However, the five-justice majority reasoned that the failure to prove discriminatory “white flight,” the costly efforts to comply with earlier desegregation orders, and the need to return control over to the non-judicial authorities forced its ruling.<sup>126</sup> The majority—which

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120. The majority in *Fordice* argued that “even after a State dismantles its segregative admissions policy, there may still be state action that is traceable to the state’s prior *de jure* segregation and that continues to foster segregation. . . . If policies traceable to the *de jure* system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational practices.” *Fordice*, 505 U.S. at 729 (citations omitted).

121. *Id.* at 757. Justice Marshall criticized Justice Scalia’s position: “Justice Scalia’s artful distinction allows him to avoid having to repudiate ‘our school desegregation cases,’ but, like the arbitrary limitation on race-conscious relief adopted by the majority, his approach ‘would freeze the status quo that is the very target’ of the remedial actions of States and localities.” *Croson*, 488 U.S. at 559 (Marshall, J., dissenting) (citation omitted).

122. Justice Thomas agreed with the *Fordice* majority that the proper standard to apply “in the higher education context” is “[i]f policies traceable to the *de jure* system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational practices.” *Fordice*, 505 U.S. at 745. Justice Thomas further noted that “because it does not compel the elimination of all observed racial imbalance, it portends neither the destruction of historically black colleges nor the severing of those institutions from their distinctive histories and traditions.” *Id.* at 745.

123. *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995). This is the third time this case had been before the United States Supreme Court. See *Missouri v. Jenkins*, 491 U.S. 274 (1989); *Missouri v. Jenkins*, 495 U.S. 33 (1990). To avoid confusion, *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995) hereinafter is referred to as *Jenkins III*.

124. *Jenkins III*, 115 S. Ct. at 2051-52.

125. *Id.* at 2050.

126. *Id.* at 2052-56. The district court based its interdistrict order for capital improvements, magnet schooling, and pay raises in the Kansas City, Missouri School District (KCMSD) on the



consisted of Justices Rehnquist, O'Connor, Scalia, Kennedy, and Thomas—ruled that because Missouri had acted “in good faith,” it mattered not that serious *de facto* segregation remained.<sup>127</sup> The majority directed the district court “to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution” after governments have “remed[ie]d the violation’ to the extent practicable.”<sup>128</sup> This decision is a marked departure from the Court’s earlier role as enforcer of desegregation. The Court’s analysis raises the possibility that the Court’s days of enforcing desegregation orders may be over. Most, if not all, local authorities may be able to show that their attempts constitute “good faith” and that further compliance would be “impracti[cal].”<sup>129</sup>

Justice Souter argued in dissent that the majority violated the normal review process.<sup>130</sup> He criticized the majority for ruling on issues “that we did not accept for review . . . we need not reach . . . and that we specifically refused to consider . . .”<sup>131</sup> Thus, as with *General Contractors*, the Court was so eager to set conservative affirmative action precedent that it upset its own procedural rules.

Justice Ginsberg’s dissenting opinion praised Justice Souter’s opinion as “illuminating” and noted the sordid history of *de jure* discrimination in Missouri’s educational system.<sup>132</sup> She concluded, “[g]iven the deep, inglorious history of segregation in Missouri, to curtail desegregation at this time and in this manner is an action at once too swift and too soon.”<sup>133</sup>

Nonetheless, because of the symbolism of *Brown* and the importance of education to judicial notions of equal opportunity, the Court may extend its special regard and greater tolerance for race-conscious

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need to make the district “desegregative[ly] attractive[.]” *Id.* at 2045. To comply with the various court orders beginning in 1985, the State paid over \$540 million in capital improvements and at least \$400 million for the operation of magnet schools. *Id.* at 2044.

127. *See id.* at 2042, 2056 (“The District Court also should consider that many goals of its quality education plan already have been attained: the KCMUSD now is equipped with ‘facilities and opportunities not available anywhere else in the country.’ KCMUSD schools received an AAA rating eight years ago, and the present remedial programs have been in place for seven years. It may be that in education, just as it may be in economics, a ‘rising tide lifts all boats,’ but the remedial quality education program should be tailored to remedy the injuries suffered by the victims of prior *de jure* segregation.” (citations omitted)).

128. *Id.* at 2056 (quoting *Freeman v. Pitts*, 503 U.S. 467, 489 (1992)).

129. *Id.* at 2048 (citing *Freeman*, 503 U.S. at 492).

130. *Id.* at 2073 (Souter, J., dissenting).

131. *Id.* (Souter, J., dissenting).

132. *Id.* at 2091 (Ginsberg, J., dissenting).

133. *Id.* (Ginsberg, J., dissenting).

measures in primary and secondary education. It was the first to arrive and is likely to be the last to depart.

The Court has moved away from race-conscious affirmative action as a remedy for past discrimination. The rationale proffered for ending affirmative action is illustrative. For example, Justice Thomas expressed concern that affirmative action beneficiaries may experience feelings of inferiority and, alternatively, that whites may feel wronged:

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.<sup>134</sup>

Justice Scalia discussed the effect such race-based remedies will have on nonminorities:

Racial preferences appear to "even the score" (in some small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white. Nothing is worth that embrace.<sup>135</sup>

For some, these arguments are convincing, in fact dispositive; but not so for others. Professor Jones states that "from our nation's inception it has acted in a very color conscious fashion. In most instances that color consciousness was used for malignant purposes. . . . It is only recently that such benign programs have been artfully attacked as 'reverse discrimination' and labeled undesirable, illegal, and unconstitutional."<sup>136</sup> Other scholars have argued that:

The frequently expressed concern about the displacement of white male students by affirmative action programs reveals a fundamental insensitivity to the great need for minority professionals. In a fundamental way, it asks the wrong question and fails to address the deep concerns that affirmative action is required to remedy.<sup>137</sup>

The effect of the Court's attack on affirmative action is evident: Numeric set asides fell in the wake of *Bakke*; timetables and goals are generally unenforced by the federal government in the aftermath of

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134. *Adarand*, 115 S. Ct. at 2119.

135. *Croson*, 488 U.S. at 528 (Scalia, J., concurring).

136. Jones, *supra* note 8, at 387.

137. Ginger, *supra* note 12, at 279.

*Bakke* and *Stott*; the remaining race-based remedies are under the “straight jacket” of strict scrutiny after *Croson* and *Adarand*; and finally, a consensus is forming among the Justices that affirmative action itself is discriminatory. The words of Justice Blackmun, with which Justice Marshall concurred, provide a fitting end to this historical survey on the decline of affirmative action: “Sadly, this comes as no surprise. One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against non-whites—is a problem in our society, or even remembers that it ever was.”<sup>138</sup>

## II. ERECTING A TEMPORARY RETAINING WALL

As *Adarand* demonstrates, only two currently sitting justices<sup>139</sup> believe that any form of race-based affirmative action violates the Constitution. The majority of Justices favor affirmative action where there is “a strong basis in evidence . . . that remedial action [is] necessary . . . [and] the program . . . is narrowly tailored to remedy the effects of prior discrimination.”<sup>140</sup>

Practically-speaking, this situation leaves proponents no other alternative but to research and present a compelling “case” for affirmative action. The Court’s more recent usage of the terms “prima facie case,”<sup>141</sup> “evidence,”<sup>142</sup> and “probative value”<sup>143</sup> signal that, in the future, the required proof in support of an affirmative action program may be tantamount to a ‘preponderance of the evidence.’ Moreover, the evidence must be specific to each jurisdiction in which affirmative

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138. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 662 (Blackmun, J., dissenting).

139. In their opinions in *Adarand*, Justices Scalia and Thomas made it clear that they oppose any race-conscious programs. For a more detailed discussion, see Part I.C. Although Justice Kennedy has expressed an antipathy towards affirmative action, he joined the *Adarand* majority, which permitted the consideration of race if it served a “compelling state interest” and the use of race was “narrowly tailored” to achieve its intended goal.

140. See *Adarand*, 115 S. Ct. at 2110 (citations omitted).

141. *Croson*, 488 U.S. at 500 (“There is nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry.”); see also *id.* at 556 n.12 (Marshall, J., dissenting) (“Although the majority purports to ‘adher[e] to the standard of review employed in *Wygant*, the ‘prima facie case’ standard it adopts marks an implicit rejection of the more generally framed ‘strong basis in evidence’ test endorsed by the *Wygant v. Jackson Bd. of Education* plurality, and the similar ‘firm basis’ test endorsed by Justice O’Connor in her separate concurrence in that case.” (citations omitted) (alteration in original)).

142. *Id.* at 504.

143. *Id.* at 501.

action is offered.<sup>144</sup> Colloquially-speaking, the majority of the Justices is challenging the civil rights community to “put up or shut up.”

Therefore, Part II of this article proposes a roadmap that civil rights activists may follow when defending affirmative action programs. To establish “identifiable evidence,” activists should do the following: first, base all justifications exclusively on compensatory justice theory to forestall arguments of reverse discrimination; second, present favorable Fourteenth Amendment jurisprudence to demonstrate the constitutionality of affirmative action programs; third, quantify disparate treatment to resolve questions of proof; fourth, agree on a defined scope of affirmative action remedies to ensure narrow tailoring; and fifth, marshal this information in a coordinated fashion before every forum where affirmative action is on trial.

### A. Compensatory Justice Theory Exclusively

“[A]ward[ing] reparations for past injury.”<sup>145</sup>

In his recognized article, Professor Nickel explained that affirmative action may be supported by any of three theories: distributive justice, social utility, or compensatory justice.<sup>146</sup> Each theory offers a different rationale, level of proof, and susceptibility to a reverse discrimination challenge.

#### 1. Distributive Justice and Social Utility

An affirmative action program based on the distributive justice theory does not simply repay for past harm; it is also “a means of promoting the redistribution of income and other benefits.”<sup>147</sup> Instead, the program would attempt to ameliorate the present effects of past harm by addressing the unfair distribution of property or rights. This theory would suffice but for the ferocity of the opposition which is now that “benefits and burdens be distributed in accordance with relevant considerations such as the rights, deserts, merits, contribu-

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144. *Id.* at 505 (“Moreover, Justice Marshall’s suggestion that findings of discrimination may be ‘shared’ from jurisdiction to jurisdiction in the same manner as information concerning zoning property values is unprecedented. We have never approved the extrapolation of discrimination in one jurisdiction from the experience of another.” (citations omitted)).

145. Duncan, *supra* note 35, at 510.

146. James W. Nickel, *Preferential Policies in Hiring and Admissions: A Jurisprudential Approach*, 75 COLUM. L. REV. 534, 536 (1975). Not everyone uses the same terms. *E.g.*, Michel Rosenfeld, *Affirmative Action, Justice, and Equalities: A Philosophical and Constitutional Appraisal*, 46 OHIO ST. L.J. 845, 860 (1985) (uses the terms “social utility” with “procedural justice”).

147. Nickel, *supra* note 146, at 539.

tions and needs of the recipients.”<sup>148</sup> When affirmative action proponents utilize statistical racial disparities as justification for preferential treatment *ipso facto*, they implicitly rely on the distributive justice theory.<sup>149</sup> Upon failure to establish a nexus between past and present disparities, such proponents are vulnerable to arguments of reverse discrimination<sup>150</sup> and inciting racial hostility.<sup>151</sup>

The manifold complexities of presenting clear evidence of past discrimination in every jurisdiction of this country makes resort to this theory irresistible, even unavoidable.<sup>152</sup> A functional construct of this theory underlies most arguments for the need for affirmative action.<sup>153</sup> This theory should suffice, but the ferocity of the opposition<sup>154</sup> is now pressing proponents to proffer convincing evidence of past discrimination anywhere such programs would be instituted. We can no longer argue as Justice Marshall did that African Americans experience pervasive discrimination without quantifiable proof:

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148. *Id.*

149. See Duncan, *supra* note 35, at nn.66, 73.

150. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 637 (1989) (Kennedy, J., dissenting) (“But this is not a proposition that the many citizens, who to their knowledge ‘have never discriminated against anyone on the basis of race,’ will find easy to accept.” (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 516 (1989)). *But see* Schwartz, *supra* note 26, at 73 (“After so many years of invidious, cruel color-consciousness, of devastating ‘special treatment,’ and of harmful ‘group thinking,’ one cannot avoid suspicion about the sudden demand for color neutrality just as society begins trying to undo the harm wrought by hostile color-consciousness. Scepticism [sic] seems especially justified when some of those making the demand have in the past always been indifferent to color-hurt minorities and who now oppose the struggle for equal rights in almost every other sphere.”).

151. See Lino A. Graglia, *Title VII of the Civil Rights Act of 1964: From Prohibiting to Requiring Racial Discrimination in Employment*, 14 HARV. J.L. & PUB. POL’Y 68, 75-77 (1991).

152. See John J. Donohue III, *The Impact of Federal Civil Rights Policy on the Economic Status of Blacks*, 14 HARV. J.L. & PUB. POL’Y 41 (1991); *see also* Richard A. Posner, *The Efficiency and Efficacy of Title VII*, 136 U. PA. L. REV. 517 (1987); Jeffrey Robinson, *Addressing the Gap: Some Thoughts on the Government’s Role*, 14 HARV. J.L. & PUB. POL’Y 53 (1991) (offers distributive justice and social utility reasons for why the government should deal with the gap between African Americans and whites).

153. For example, Professor Nickel advances distributive justice and social utility arguments in favor of affirmative action. Nickel, *supra* note 147, at 540-42. *See also* Duncan, *supra* note 35, at 552-53 (“The compensatory justice rationale is unacceptable to the American public because it requires acknowledgment of ongoing discrimination. The social utility rationale, which is fraught with the potential for dispute over what constitutes the ‘greatest good,’ is unworkable in practice. In contrast, distributive justice, rather than being the obnoxious social intruder its opponents believe it to be, is rooted in the fundamental principles of American jurisprudence: liberty, justice, and equality. Belief in the right to equal opportunity, the essence of distributive justice, has occupied a singular position in our national value system and pervaded our law since the founding of the republic.”).

154. Jennifer Roback, *The Separation of Race and State*, 14 HARV. J.L. & PUB. POL’Y 58 (1991). Professor Roback argues that government wealth transfers among ethnic groups motivate people “to invest effort to obtain the transfers.” *Id.* at 58. This phenomenon - characterized as “rent seeking” - makes it “advantageous for people to define themselves more sharply as ethnic groups.” *Id.* at 59.

It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact.<sup>155</sup>

The court gave this argument little weight when Justice Marshall employed it in *Bakke*, and accords it no weight now.

Alternatively, the second theory—social utility—does not primarily consider the recipient's relative present position. The social utility theory provides benefits solely because the result is good for society's general welfare. This theory supports "affirmative action programs on the ground that they are necessary to promote maximum well-being for society as a whole."<sup>156</sup> Under the social utility theory, the provision of remedies has even less to do with past or present discrimination than the distributive justice theory. Arguments in favor of averting future unrest, enhancing diversity, or promoting goodwill are rooted in this theory.<sup>157</sup> Proponents of the social utility theory argue for affirmative action exclusively in terms of the direct benefit it will bring to the majority of society.<sup>158</sup> This argument is simultaneously the easiest to establish and the easiest to rebut.

It is difficult to prove when "social utility"-based programming is beneficial, particularly in the subjective areas of "goodwill" and "diversity." Moreover, as society experiences economic hardship, any economic benefit gained by minorities must surmount increasingly higher thresholds. In a world economic order pressing downward on American working class wages, Americans are likely to be less and less inclined to see affirmative action as cost effective or goodwill promoting.<sup>159</sup> The current foundation for most affirmative action sounds

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155. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 400 (1978) (Marshall, J., dissenting).

156. Duncan, *supra* note 35, at 524.

157. *Cf. Metro Broad.*, 497 U.S. at 637 (Kennedy, J., dissenting) ("Until the Court is candid about the existence of stigma imposed by racial preferences on both affected classes, candid about the 'animosity and discontent' they create, and open about defending a theory that explains why the cost of this stigma is worth bearing and why it can consist with the Constitution, no basis can be shown for today's casual abandonment of strict scrutiny." (citation omitted)).

158. Ginger, *supra* note 12, at 274 ("If minority-group members could make contributions of such magnitude in the difficult roles of criminal defendants and first and fourteenth amendment plaintiffs, it is logical to predict remarkable contributions to society by minority-group members when affirmative action programs permit significant numbers of them to become doctors, lawyers, and engineers, who can serve as leaders in industry and government.").

159. *Adarand Constr., Inc. v. Peña*, 115 S. Ct. 2097, 2119 (1995) (Thomas, J., concurring) ("It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others. As to the races benefitted, the classification could surely be called 'benign.' Accord-

in some combination of the distributive justice and social utility theories. Yet fluctuating economic circumstances force proponents to argue a more burdensome, but impactful, comprehensive case for affirmative action—one which goes to the very heart of the rule of law in this country and to American history.<sup>160</sup>

## 2. Compensatory Justice

Compensatory justice, in the context of affirmative action, is firmly based on evidence of personal and actual discrimination.<sup>161</sup> It “awards reparations for past injury . . . to make whole those who were injured by putting them where they would have been ‘but for’ the injustices suffered.”<sup>162</sup> Affirmative action as a remedy for the present effects of past—or present—discrimination is compensatory in nature rather than distributive.<sup>163</sup>

The compensatory justice theory rests squarely on notions of the rule of law instead of altruism or utility: A person is entitled to compensation for injuries suffered.<sup>164</sup> Remedies are *how* an entitlement is enforced. According to Judge Easterbrook, remedies “track entitlements, to give people their due.”<sup>165</sup> Remedies are fundamental to our legal system.

Under our legal system, remedies are as narrow or as broad as the need may constitutionally justify.<sup>166</sup> Remedial action may man-

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ingly, whether the law is ‘benign’ or ‘malign’ either turns on ‘whose ox is gored’ or on distinctions found only in the eye of the beholder.”).

160. See Nickel, *supra* note 147, at 539 (“Any approach in terms of compensatory justice is likely to be controversial and problematic, but it seems to me that the least problematic approach along these lines is to suggest that the ones who have a right to compensation are those who have personally been injured by discrimination, and who have not yet been able to overcome this injury.”).

161. *Id.* at 537.

162. Duncan, *supra* note 35, at 510.

163. Rosenfeld, *supra* note 147, at 907.

164. Nickel, *supra* note 147, at 538 (discussing and rejecting the compensatory justice theory for groups as a basis for affirmative action).

165. Frank H. Easterbrook, *Civil Rights and Remedies*, 14 HARV. J.L. & PUB. POL’Y 103, 103 (1991).

166. For example, courts have ordered labor unions to issue work permits to minority applicants as a remedy for past discrimination. Jones, *supra* note 8, at 403 n.91 (citing *United States v. Wood, Wire, & Metal Lathers Int’l Union, Local No. 46*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973)). Courts have also ordered employers to begin an affirmative action minority recruitment program. *Id.* (citing *United States v. Sheet Metal Workers Int’l Ass’n, Local No. 36*, 416 F.2d 123 (8th Cir. 1969)). Moreover, courts have ordered employers to “hire minority employees until they constituted up to thirty per cent of the total work force.” *Id.* (citing *Stamps v. Detroit Edison Co.*, 365 F. Supp. 87 (E.D. Mich. 1973)). Courts have ordered unions to hire one minority worker every time two white workers were hired, until 20 minority workers had been hired. *Id.* (citing *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950

date back pay, preferential employment policies or programs,<sup>167</sup> forcing a district to raise taxes in order to protect rights,<sup>168</sup> and ordering municipal council members to vote in favor of constructing public housing in white neighborhoods.<sup>169</sup> A court may order remediation as occurred for the Lakota Nation.<sup>170</sup> Equally, Congress may provide remedial legislation as it did for the interned Japanese Americans.<sup>171</sup>

An affirmative action case based on the compensatory justice theory—brought before legislative bodies and, if necessary, the courts—can be analogized to a standard discrimination case: it involves parties, claims, mastery of relevant history, presentations and burdens of proof, and prayers for relief. Remedies, where there has been proven injury, are as fundamental to the American system of justice as the receipt of damages pursuant to proof of breach of contract.<sup>172</sup> The Court formerly stood by as institutions provided affirmative action remedies, summarily for an undetermined period, for distributive justice or social utility reasons. Now the Court is forcing institutions to limit such remedies until at least a *prima facie* compensatory justice

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(1972)). Courts have also required employers to give priority to black applicants, who failed to measure up to constitutionally-impermissible standards. *Id.* (citing *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972)).

167. The Supreme Court has approved the creation of magnet schools as a desegregation remedy. *Milliken v. Bradley*, 433 U.S. 267 (1977). Moreover, the Court upheld an order requiring the Alabama Department of Public Safety make good faith efforts to promote African Americans to corporal and other upper ranks. *United States v. Paradise*, 480 U.S. 149 (1987).

168. *See Jenkins III*, 115 S. Ct. at 2045.

169. *E.g.*, *Spallone v. United States*, 453 U.S. 265 (1990).

170. "The Claims Commission . . . determined that the Lakota were entitled to a total of \$17.5 million in compensation for the taking" of their land. *WARD CHURCHILL & JIM V. WALL, AGENTS OF REPRESSION* 417 n.73 (1990). The Court of Claims subsequently held that the Lakota Indians were entitled to accrued interest on the \$17.5 million; thus, the total compensation was \$122.5 million. *Id.* Interestingly, the Lakota have refused to accept the award because of their belief that their lands "were not for sale." *Id.*

171. Civil Liberties Act of 1988, 50 U.S.C. § 1989b (1994) (apology and award of \$20,000 per surviving former internee).

172. *See Rosenfeld, supra* note 147, at 863 (analogizing affirmative action to compensation for breach of contract); Martin Luther King, Jr., Remarks at the March on Washington, D.C. (1963), reprinted in *MARTIN LUTHER KING, JR., I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD* 102 (James M. Washington ed., 1992):

So we've come here today to dramatize a shameful condition. In a sense we've come to our nation's capitol to cash a check. When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was the promise that all men, yes, black men as well as white men, would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness.

It is obvious today that America has defaulted on this promissory note in so far as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check; a check which has come back marked "insufficient funds." We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation. And so we've come to cash this check, a check that will give us upon demand the riches of freedom and the security of justice.



case is presented. Remedies where there has been proven injury are as fundamental to the American system of justice as the receipt of damages pursuant to proof of breach of contract.<sup>173</sup>

## B. The Marshall-Schnapper View On The Fourteenth Amendment

“[T]he thirty ninth Congress repeatedly chose to do so.”

Professor Eric Schnapper<sup>174</sup>

Two camps have emerged on the question of the constitutionality of affirmative action under the Equal Protection Clause. The first is the Scalia-Bickel camp, which includes Justice Kennedy and a growing number of other justices.<sup>175</sup> This camp argues that race-based affirmative action most likely contravenes the original understanding of the Fifth and Fourteenth Amendments.<sup>176</sup> The other camp, which includes Justice Marshall and Professor Schnapper, argues the counter position. What appears lost on many is that the Marshall-Schnapper school is so compelling that it holds, demonstrably, the superior position.

### 1. Justice Marshall's Argument that Race-Conscious Remedies Are Within the Scope of the Equal Protection Clause

Justice Marshall was among the first to argue authoritatively that race-conscious remedies were within the intent of the Congress that

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173. *Id.*

174. Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 798 (1985).

175. Justice Scalia argued that, “[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (Scalia, J., concurring in judgment) (quoting ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 133 (1975)). See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990); JOHN H. ELY, *DEMOCRACY AND DISTRUST* (1980).

176. Justice O'Connor wrote the opinion in *Croson* in which Chief Justice Rehnquist and Justices White, Kennedy, and Stevens joined. *Croson*, 488 U.S. at 476. Justice Scalia agreed with the majority that:

The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress under § 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under § 1. We believe that such a result would be contrary to the intentions of the Framers of the Fourteenth Amendment, who desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations.

*Id.* at 490-91, 521 (citations omitted). Since this time, Justice Scalia has most been associated with this argument on the intent of the Fourteenth Amendment.

ratified the Fourteenth Amendment and subsequently enacted race-based civil rights legislation. Justice Marshall noted:

The Congress that passed the Fourteenth Amendment is the same Congress that passed the 1866 Freedmen's Bureau Act, an Act that provided many of its benefits only to Negroes.

....

Since the Congress that considered and rejected the objections to the 1866 Freedmen's Bureau Act concerning special relief to Negroes also proposed the Fourteenth Amendment, it is inconceivable that the Fourteenth Amendment was intended to prohibit, all race-conscious relief measures. . . . Such a result would pervert the intent of the Framers by substituting abstract equality for the genuine equality the Amendment was intended to achieve.<sup>177</sup>

Justice Marshall's allusion to the Freedmen's Bureau Act was apposite because the Act was race-conscious and remedial. Moreover, because the Act was passed contemporaneous with the Fourteenth Amendment, it offers insight on the question of whether the Framers of the Fourteenth Amendment believed race-conscious remedies violated the Amendment. Justice Marshall made similar arguments in *Croson*, when referring to the Framers' intent inherent in the passage of the Civil War Amendments.<sup>178</sup>

Justice Marshall was not alone. Other justices made similar points.<sup>179</sup> More than any other justice, however, Justice Marshall argued earlier and more frequently that affirmative action comports with, and is in no way counter to, the intent of the Equal Protection Clause or any other constitutional provision.

## 2. Schnapper's Scholarship on the Race-Conscious Legislation of the Thirty-Ninth Congress

Perhaps the best scholarly treatment of race-conscious legislation enacted during the thirty-ninth Congress is by Professor Eric Schnap-

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177. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 397, 398 (1978).

178. *Croson*, 488 U.S. at 560. Justice Marshall did not reference the Freedmen's Bureau Act as he did earlier in *Bakke*.

179. *Bakke*, 438 U.S. at 405 (Blackmun, J.) ("This enlargement does not mean for me, however, that the Fourteenth Amendment has broken away from its moorings and its original intended purposes. Those original aims persist. And that, in a distinct sense, is what 'affirmative action,' in the face of proper facts, is all about. If this conflicts with idealistic equality, that tension is original Fourteenth Amendment tension, constitutionally conceived and constitutionally imposed, and it is part of the Amendment's very nature until complete equality is achieved in the area. In this sense, constitutional equal protection is a shield.").

per.<sup>180</sup> He argued, with detailed references, the same point Justice Marshall raised:

From the closing days of the Civil War until the end of civilian Reconstruction some five years later, Congress adopted a series of social welfare programs whose benefits were expressly limited to blacks. These programs were generally open to all blacks, not only to recently freed slaves, and were adopted over repeatedly expressed objections that such racially exclusive measures were unfair to whites. The race-conscious Reconstruction programs were enacted concurrently with the fourteenth amendment and were supported by the same legislators who favored the constitutional guarantee of equal protection. This history strongly suggests that the framers of the amendment could not have intended it generally to prohibit affirmative action for blacks or other disadvantaged groups.<sup>181</sup>

Professor Schnapper charted the 1866 congressional adoption of the Fourteenth Amendment contemporaneously with the passage of legislation like the Freedmen's Bureau Act, which was fully remedial in intent.<sup>182</sup> In fact, Professor Schnapper explained that the Fourteenth Amendment was adopted in part to support the Freedmen's Bureau Act.<sup>183</sup>

Moreover, Professor Schnapper chronicled other race-conscious legislation passed before, during, and after congressional passage of the Fourteenth Amendment. Congress assisted freed slaves at the end of the Civil War by establishing the Bureau of Freedmen's Affairs to supply food, hospitals, land, and education to these newly freed citizens; indubitably, these were race-conscious remedies.<sup>184</sup> Notwithstanding the Amendment's express application to the states, Professor Schnapper argued that Congress considered itself also bound by its strictures.<sup>185</sup> The view that "the Fourteenth [Amendment] was passed to facilitate the passage of Freedmen's Bureau legislation"<sup>186</sup> was so strong, President Johnson stated, in an attempt to block the Amendment, that, "Congress lacked authority to spend funds, at least outside the District of Columbia, to aid any needy class."<sup>187</sup>

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180. Schnapper, *supra* note 174.

181. *Id.* at 754 (footnote omitted).

182. *Id.*

183. *Id.* at 785.

184. *See id.* at 755.

185. *Id.* at 787.

186. *Id.* at 785.

187. *Id.* at 785-86.

The strong nexus between the Fourteenth Amendment and the passage of the Freedmen legislation offers a strong, original intent argument for proponents of affirmative action. For where congressional intent is clear, the Court should be bound to give effect to it:

The historical intent behind the various provisions of the Constitution is often obscure, but where it is clear that intent must be faithfully implemented by the judiciary. . . . The interpretation of the fourteenth amendment's limitations on affirmative action should turn, however, not on whether a majority of the present Supreme Court would have voted for these race-conscious Reconstruction programs, but on the fact that *the thirty-ninth Congress repeatedly chose to do so*.<sup>188</sup>

Because the Equal Protection Clause of the Fifth Amendment is indistinguishable from the Fourteenth Amendment's Equal Protection clause,<sup>189</sup> the Marshall-Schnapper original intent argument applies to any legislation promulgated under either the Fifth or Fourteenth Amendment.

### C. Depth And Breadth

"These difficulties and costs will not disappear behind euphemistic terminology."

Professor Randall Kennedy<sup>190</sup>

In the mid-seventies when the resolve to end apartheid<sup>191</sup> in America was keen and the move to do so was prevailing, society was more tolerant of indefinite affirmative action law. When the subsequent backlash to affirmative action arose, affirmative action begged for purpose, definition, scope, a strong declaration of its remedial basis, and a statement as to when it would timely end.<sup>192</sup> Now, with the Court majority mandating particularized proof and a minority advocating to end affirmative action altogether, the time is past for the civil rights community to successfully advance affirmative action as a remedy without such clarity. In this regard, Professor Kennedy stated,

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188. *Id.* at 798 (emphasis added).

189. *Adarand Constr., Inc. v. Pena*, 115 S. Ct. 2097, 2106-08 (1995) (citing *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964)).

190. Kennedy, *supra* note 35, at 1327 n.1.

191. *Croson*, 488 U.S. at 545 (Marshall, J., dissenting) ("[T]he majority nonetheless agreed with the plaintiffs' assertion that within the City of Richmond there has been state (also federal) action tending to perpetuate apartheid of the races in ghetto patterns throughout the city." (quoting *Bradley v. School Bd. of Richmond*, 462 F.2d 1058, 1065 (4th Cir. 1972))).

192. *Jones*, *supra* note 8, at 387 ("With all due respect to the intellectuals, it is Congress' role to determine the rights, pains, and privileges distributed among us.").

On all too many occasions, however, proponents of affirmative action have hurt their own cause by evading the difficulties posed and costs incurred by the policy they advance. *These difficulties and costs will not disappear* behind euphemistic terminology. To properly convince the public that these costs are worth shouldering, proponents of affirmative action will have to grapple straightforwardly with them — a process which involves, at the least, conceding their existence.<sup>193</sup>

From the initial conception of the term itself<sup>194</sup> to its current programming, affirmative action evolved loosely without a clear consensus, lacking coordinated direction from a unified civil rights community. Concerning this, Professor Jones noted, “so little agreement on its context exists.”<sup>195</sup> Agreement should have been, but must now be, forged on a number of issues.

First, affirmative action should be defined in terms of compensatory justice.<sup>196</sup> Second, the scope of remedial action should be considered on national, regional, and local levels.<sup>197</sup> Because there is both a causal and an unavoidable nexus between an injury and its remedy, consideration of affirmative action’s scope must involve discussion of the identifiable injuries at the various governmental levels.<sup>198</sup>

Third, to whom affirmative action applies must be settled to respond to opponents’ overbreadth challenge.<sup>199</sup> Consideration must be given to exempting recently naturalized citizens, and perhaps those born after some agreed date.<sup>200</sup> Although the Reconstruction-era Congress placed no such restrictions on the receipt of the benefits of

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193. Kennedy, *supra* note 35, at 1327 n.1 (emphasis added).

194. In actuality, the term “affirmative action” as a label for remedial action is itself problematic. “Affirmative action” is a term which does not look over the shoulder: it shields the why for which the programming was instituted. The term “remedial action” signals that a wrong is being righted. This area of the law should have always been referred to as, and only as, remedial action.

195. Jones, *supra* note 8, at 385.

196. See *supra* Part II.A.

197. See *supra* note 145.

198. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989) (Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects).

199. *Id.* at 506 (“The foregoing analysis applies only to the inclusion of blacks within the Richmond set-aside program. There is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry.”); see also *id.* at 508 (“Under Richmond’s scheme, a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination.”).

200. See Rosenfeld, *supra* note 147, at 864-65 (arguing that “[n]ot all Blacks or all women have personally experienced discrimination”).

its race-conscious programs—not even to assure that the ‘Negro’ recipients were actual victims or to measure the degree of past disadvantage—this generation is not so fortunate.<sup>201</sup>

Fourth, affirmative action law needs a satisfaction point, such as a graduation rule or date.<sup>202</sup> Although some may prefer a date, it may be more advisable to agree on some objective criterion. For example, affirmative action should end in industries where affected minorities reach and maintain their proportional percentage for a specified number of years.<sup>203</sup>

Where affirmative action is needed in more highly-skilled, specialized industries, the relevant labor pool for determining the minority percentage goal should be the “minorities qualified to undertake the particular task.”<sup>204</sup> Were such a remedial plan employed, federal and certain state civil service agencies would be at, or near, satisfaction; whereas, areas such as securities and banking would have decades of work still to go.

Lastly, affirmative action proponents must show that the race-based remedies, in each jurisdiction in which they are established, are narrowly tailored to achieve the end of remedying the particularized past discrimination.<sup>205</sup> As with the scope of the remedy, this showing required for the length of the remedy directly relates to the nature of the injuries involved, their deliberateness, persistence, and egregiousness.

#### D. Presenting The Compensatory Justice Case

“[E]stablish[ing] a prima facie case of discrimination”<sup>206</sup>

Because the Court mandates prima facie evidence with individualized facts, affirmative action supporters would do well to present a thorough compensatory justice case. The judicial trend over the last decade of mandating an increased quantum of evidence should move proponents to go so far as to prove the present effects of past discrimi-

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201. See Schnapper, *supra* note 174, at 796.

202. *Adarand*, 115 S. Ct. at 2118 (“It also did not address . . . whether the program was appropriately limited such that it ‘will not last longer than the discriminatory effects it is designed to eliminate.’”) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980)).

203. *Croson* and *Adarand* both involved set-asides proportionally related, at least loosely, to the percentage of the participating groups in the population.

204. *Croson*, 488 U.S. at 501-02.

205. See *supra* notes 140-45 and accompanying text.

206. *Croson*, 488 U.S. at 503 (citation omitted).

nation by a preponderance of the evidence.<sup>207</sup> Where possible, proponents should prove present discrimination by a preponderance of the evidence as well. The following discussion suggests how this may be accomplished primarily for African Americans in support of affirmative action, and sets forth a historical framework of documentary proof of discrimination.<sup>208</sup>

### 1. Compensatory Justice Case Elements

The elements for compensatory affirmative action are unestablished. While *Adarand* did clarify the standard of review, it did not set forth the elements which, if met, would survive the Court's new narrowly tailored review. Professor Nickel argued that compensatory affirmative action should be limited to, "the *actual* recipients or the persons that one thinks *ought* to be the recipients."<sup>209</sup> On the other hand, Professor Duncan stated, "[t]he relevant inquires are (1) who has been injured? and (2) how should compensation be determined?"<sup>210</sup> Although neither *prima facie* case is easy to prove, Professor Nickel's suggested *prima facie* case is less demanding than Professor Duncan's. An even heightened standard of proof, one which exceeds even conservative judicial requirements, is found in Title VII case law.

Intentional discrimination or disparate treatment elements, as modified by the Civil Rights Act of 1991,<sup>211</sup> could be utilized to make out compensatory affirmative action. Evidence of intentional discrim-

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207. Currently, this is not what the Court requires, nor should any court do so. See *supra* notes 141-44 and accompanying text.

208. The author understands that women, Native Americans, and Hispanic Americans, *inter alia*, also have particularized facts which can be offered in support of affirmative action to remedy their past discrimination. Moreover, evidence exists to show women may be benefitting more from affirmative action than any other group. See THE WASHINGTON STATE COMMISSION ON AFRICAN AMERICAN AFFAIRS, AFFIRMATIVE ACTION: WHO'S REALLY BENEFITING? (1995) (data provided by the Washington State Department of Personnel). The author alludes generously hereafter to African Americans because he knows their story better. Furthermore, African Americans have led the affirmative action struggle, are most identified with it, and are the group most likely to fight first and hardest to retain it.

209. Nickel, *supra* note 147, at 537. Professor Nickel urges proponents of affirmative action "to avoid reliance on compensatory principles for groups." *Id.* at 538-39. According to Nickel, the compensatory justice approach is "least problematic" when "the ones who have a right to compensation are those who have personally been injured by discrimination, and who have not yet been able to overcome this injury." *Id.* at 539.

210. Duncan, *supra* note 35, at 511 (footnote omitted). Duncan further argues that "because past discrimination was aimed at minorities as groups, and not as individuals, compensatory justice is now due them as groups." *Id.* at 515.

211. Civil Rights Act of 1991, 42 U.S.C. § 1981a (1994).

ination has to be more racist on its face.<sup>212</sup> Because the discrimination is more subtle, disparate treatment requires a showing that a person is a member of a suspect class, was qualified for an opportunity or benefit, but was denied the opportunity or benefit in favor of someone outside of the class.<sup>213</sup>

A disparate impact claim may be available where criteria has systematically excluded members of a protected class from opportunities for which they were qualified.<sup>214</sup> Elements for disparate impact are less burdensome in order to reach the practices which may be neutral in intent, but discriminatory in effect. Generally, the elements are:

1. Membership in a suspect class;
2. Ready, willing, and able or qualified to receive property, a right, or an opportunity;
3. Denied the property, right, or opportunity;
4. The property, right, or opportunity went to someone outside of the class (at which point the burden shifts to, and remains on, the defendant to show it had a legitimate business reason for the disparity);
5. The production of rebuttal evidence indicating the illegitimacy of the defendant's reason and/or that plaintiff's membership in the suspect classification was the reason.<sup>215</sup>

As with disparate treatment, any proffered business reason for the difference in treatment must be rebutted by a preponderance of the evidence.<sup>216</sup> In order to do this, proponents of affirmative action must present testimony, documents, disparity studies,<sup>217</sup> and some

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212. See *infra* Part II.D.4.

213. What is most important concerning the motive here—whether expressed or implied—is the clarity of an aim to unlawfully discriminate. The more obviously discriminatory the proven acts are the less the proof required and the more this type of disparate treatment looks like intentional discrimination. The more subtle the acts the more of a practice or pattern is necessary to properly infer discriminatory intent. See William Cohen, *Proving Discriminatory Intent in Constitutional Law Disparate Impact Cases*, 14 HARV. J.L. & PUB. POL'Y 78 (1991).

214. *Id.*

215. The Civil Rights Act of 1991 articulates the elements of a disparate impact case as follows:

An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration . . . with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

216. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 254-55 (1989).

217. Where the discrimination occurred in a field of specialized knowledge or skill, the disparity study should determine the actual or would-be “qualified” pool of minorities affected. See



kind of expert opinion.<sup>218</sup> In summary, the elements involved in compensatory affirmative action theory post-*Adarand*, rest somewhere between Professor Nickel's suggestion and disparate treatment or impact analyses under Title VII. To pass judicial scrutiny, proponents should definitely be prepared to exceed what Professor Duncan proposes and are advised to establish the elements of modern anti-discrimination law.

## 2. Threshold Issue: Present Injury

Professor Duncan posits that the compensatory justice rationale for affirmative action has a threshold test: whether compensation is owing for injuries inflicted on those "long since dead."<sup>219</sup> Some scholars proffer a strong legal (although not moral) argument that any claims as a result of slavery ended within a generation after those enslaved had deceased. This argument would also apply to claims arising under Jim Crow apartheid in the United States. Advocates of this position advance theories of limitations and laches for, at least, four reasons.

First, an individual is entitled only to compensation for proven injuries. The passage of time makes such proof difficult to produce and unfair to rebut. Second, the government extinguishes otherwise legitimate causes of action against them after the passage of a reasonable period of time in order to provide some repose.<sup>220</sup> Third, any

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City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501-02 (O'Connor, J.) ("But where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." (citation omitted)).

218. Persons with specialized knowledge are needed to clarify and simplify the voluminous details, to explain the often subtle nature of discrimination, to offer an opinion, and, if possible, to present models depicting how the discrimination is injurious. The arguments in *Brown* are rough examples of this. *Brown v. Board of Educ.*, 347 U.S. 483, 494 n.11 (1954) (relying on psychological studies of the effects of segregation on black school children).

219. Duncan, *supra* note 35, at 510.

220. With respect to statute of limitations or laches, such notions require opportunity to have sufficiently presented a claim or some type of waiver. Too little time after slavery passed for African Americans to present their claims during the Reconstruction Era. After this short period, Jim Crow apartheid was imposed on African Americans. The edifice of Jim Crow apartheid was not effectively deconstructed until around 1970. At every critical period, including before and after the end of Jim Crow apartheid, groups like African Americans have been pressing their claims. The claims were never waived by delay and the injuries have been continuing in nature, whether material, physical or psychological. *E.g.*, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 400 (1978) (Marshall, J., dissenting) ("It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact.").

remedy would be imposed on nonminorities who did not, for the most part, cause the discrimination.<sup>221</sup> Fairness to this majority involves limitation of any remedy. Lastly, the sheer scale of slavery and Jim Crow compensation would be impracticable, if not impossible, to remedy.

These concerns are answerable. First, proof of injury is abundant.<sup>222</sup> Court decisions, legislative hearings, and the anecdotal witness testimony provide compelling evidence of slavery and Jim Crow discrimination, identifiable evidence which stood the test of inquiry and cross-examination.<sup>223</sup>

Second, arguments pertaining to repose and laches lie where serious delay is involved and the injuries are not continuing. From the slavery era to Jim Crow apartheid, there was a continuous series of injuries to African Americans group-wide.<sup>224</sup> The claims flowing from these injuries were postponed by further oppression not waived by undo delay.

Moreover, anyone attempting to cut off such claims will have difficulty separating proximate from remote claims legally. The argument for the present effects of injuries resulting from causes as distant as slavery is considerable. Vestiges of the pathological and denigrating impacts of slavery and pre-World War II Jim Crow apartheid most likely survived not just in the institutions, but in the minds of their victims' progeny. With regard to this, Professor Duncan states:

Since the injuries sustained by blacks today cannot be disassociated from the facts of slavery and segregation, it is irrelevant whether a compensatory affirmative action system is viewed as making reparations for prior history, or as compensating for the present injurious effects of that history.<sup>225</sup>

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221. See *Adarand Constr., Inc. v. Pena*, 115 S. Ct. 2097, 2119 (1995) (Thomas, J., concurring) ("It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others. As to the races benefitted, the classification could surely be called 'benign.' Accordingly, whether a law relying on racial taxonomy is 'benign' or 'malign' either turns on 'whose ox is gored' or on distinctions found only in the eye of the beholder." (citations omitted)); see also Nickel, *supra* note 147, at 537 (recognizing that "questions about whether governments, companies, institutions and individuals have obligations to compensate losses they did not cause" are difficult).

222. *Bakke*, 438 U.S. at 400 (Marshall, J.).

223. See generally *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

224. See *Adarand*, 115 S. Ct. at 2117 (O'Connor, J.) ("The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality . . ."); see also Duncan, *supra* note 35, at 511-20.

225. Duncan, *supra* note 35, at 511.

Third, nonminorities must bear some form of reasonable burden, because of the necessity of compensation upon proof of injury under our system of justice. The nature of providing compensation for proven injuries permits no other alternative. Costs inhere in injuries and remedies. The art and science of compensating for proven injuries involves tailoring and limiting the remedy so it is tolerable and fair.<sup>226</sup>

Narrow tailoring speaks to the fourth point as well. Affirmative action proponents concede the impracticability and impossibility of compensating fully for injuries sustained in the Slavery, Jim Crow, and Affirmative Action eras. Affirmative action is but a modest down payment.<sup>227</sup> Nevertheless, even if one were to assume that remote claims were extinguished, post-World War II discrimination in this country inflicted sufficient harm to warrant current affirmative action programming for the foreseeable future.<sup>228</sup>

As this article shifts to suggest the kind of evidence which can be utilized, liberal reference is made to pre-World War II evidence of intentional discrimination and disparate treatment. This evidence supports remote claims for injuries as well as provides an indispensable understanding of present discrimination. Notwithstanding the scale of the evidence, the compensation requested should only and always be affirmative action.

### 3. Evidence of Intentional Discrimination

Intentional discrimination requires considerable proof of willful discrimination, such as conduct that is discriminatory on its face. Facially discriminatory statutes and cases are as equally authoritative on the question of government action as they are dispositive of the question of government liability. Willful and blatant discrimination in the southern slave states from 1650 to 1870 is incontestable.<sup>229</sup> Three points, however, are little appreciated.

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226. See *Adarand*, 115 S. Ct. at 2113 (“[S]uch classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”).

227. See *Bakke*, 438 U.S. at 402 (Marshall, J.).

228. Cf. *Adarand*, 115 S. Ct. at 2135 (Ginsberg, J., dissenting).

229. OFFICE OF POLICY PLANNING AND RESEARCH, U.S. DEP'T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965), reprinted in LEE RAINWATER & WILLIAM L. YANCEY, *THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY* 61 (The M.I.T. Press 1967) [hereinafter *MOYNIHAN REPORT*] (“The most perplexing question about American slavery, which has never been altogether explained, and which indeed most Americans hardly know exists, has been stated by Nathan Glazer as follows: ‘Why was American slavery the most awful

First, because ninety-one percent of all African Americans lived in the South<sup>230</sup> between 1790 to 1910, discriminatory treatment of African-Americans in this region during these years is dispositive of the question of discriminatory treatment nationally.<sup>231</sup> Most of these states enacted and enforced slave or black codes that were discriminatory on their face and in effect; while this was occurring, the United States government either hid its face or played along.<sup>232</sup>

Second, Congress authorized slave codes, which paralleled those of the southern states, for the District of Columbia, which was a slaving center during the colonial period.<sup>233</sup> Moreover, the military was racially segregated. Every war fought during this period was done so with de jure segregated forces.<sup>234</sup>

Finally, most northern states recognized the legality of slavery for some period and engaged in racial discrimination as well.<sup>235</sup>

The first two points prove the existence of intentional discrimination in southern states. To present a prima facie case against northern states, consider the remarks of Justice Taney and President Lincoln. Relevant materials also lie in the congressional hearings surrounding passage of the Civil Rights Act of 1866, 1875, and the Civil War amendments.<sup>236</sup>

Justice Taney's majority opinion in *Dred Scott v. Sandford*,<sup>237</sup> viewed by many as aberrant, should rather be understood as a lucid discussion of intentional discrimination. Speaking on behalf of the

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the world has ever known?" The only thing that can be said with certainty is that this is true: it was." (quoting NATHAN GLAZER, *SLAVERY* ix (1963)).

230. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 1990, at 26 (110th ed. 1990) (documenting the migration pattern of African Americans in Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, District of Columbia, West Virginia, Florida, Kentucky, Tennessee, Alabama, Mississippi, Arkansas, Louisiana, Oklahoma and Texas).

231. *Id.*

232. *E.g., Jenkins III*, 115 S. Ct. at 2091 (Ginsberg, J., dissenting) (discussing Missouri's slave codes). See generally A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR* (1978) (documenting the use of slave codes in colonial America).

233. See *Bakke*, 438 U.S. at 393-94 (Marshall, J.).

234. *Id.*

235. *Id.* at 394 (Marshall, J.); see also NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, U.S. RIOT COMMISSION REPORT: WHAT HAPPENED? WHY DID IT HAPPEN? WHAT CAN BE DONE? 209-10 [hereinafter U.S. RIOT COMMISSION REPORT] ("Most Americans were, in fact, against abolishing slavery. They refused to rent their halls for anti-slavery meetings. They harassed abolitionist leaders who sought to educate white and Negro children together. They attacked those involved in the movement. Mobs sometimes killed abolitionists and destroyed their property.").

236. *Bakke*, 438 U.S. at 391.

237. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

majority on the United States Supreme Court, Justice Taney provided a primer on whether America intended to discriminate on the basis of race:

[African slaves] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the Negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.<sup>238</sup>

Justice Taney further explained that colonial American society erected “a perpetual and impassable barrier”<sup>239</sup> between it and African Americans whom that society ruled “with absolute and despotic power.”<sup>240</sup> Justice Taney argued that African Americans were “so far below [the rest of American society] in the scale of created beings . . . that they had no rights which the white man was bound to respect.”<sup>241</sup> Justice Taney did not distinguish between “the free Negro or mulatto and the slave, [because] this stigma, of the deepest degradation, was fixed upon the whole race.”<sup>242</sup>

Justice Taney and the majority added:

Yet the men who framed this declaration were great men. . . . They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the Negro race, which, by common consent, had been excluded from civilized Governments and the family of nations and doomed to slavery.<sup>243</sup>

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238. *Id.* at 407. President Lincoln reminded Americans, in his speech on the *Dred Scott* decision, (1857), of Mr. Scott’s family: “Dred Scott, his wife and two daughters were all involved in the suit.” Abraham Lincoln, *The Dred Scott Decision and the Declaration of Independence*, reprinted in 8 *THE ANNALS OF AMERICA* 459 (Encyclopedia Britannica, Inc. 1976).

239. *Dred Scott*, 60 U.S. (19 How.) at 409.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

President Lincoln's and the Republican Party's positions on race during the Emancipation era reasonably expressed the racist views of many Americans who would not be as bold as Justice Taney, but who still demanded nationwide segregation.<sup>244</sup> The slave codes, Supreme Court jurisprudence, and anecdotal evidence present a compelling case of intentional discrimination during the Reconstruction era.

For willful discrimination from 1870 to 1970, much authoritative information exists. First, in the south — where most African Americans have always resided save for the last few decades — the states and municipalities instituted Black Codes, which mirrored in almost all respects the Slave Codes which facilitated slavery.<sup>245</sup> Many of these Black Codes were discriminatory on their face; all of them were discriminatory in effect.<sup>246</sup> Second, Congress also passed similar laws for the District of Columbia, including mandating the racial segregation of the United States Capitol building. Justice Marshall described the nature of this discrimination:

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244. Lincoln, *supra* note 238, at 464-65:

But Judge Douglas is especially horrified at the thought of the mixing of blood by the white and black races.

*Agreed for once; a thousand times agreed.*

.....  
It is worthy of note too, that among the free states those which make the colored man the nearest equal to the white have proportionably the fewest mulattoes, the least of amalgamation. In New Hampshire, the state which goes the farthest toward equality between the races, there are just 184 mulattoes, while there are in Virginia—how many do you think? — 79,775, being 23,126 more than in all the free States together.

.....  
*I have said that the separation of the races is the only perfect preventive of amalgamation.* I have no right to say all the members of the Republican party are in favor of this, nor to say that as a party they are in favor of it. There is nothing in their platform directly on the subject. But I can say a very large proportion of its members are for it and that the chief plank in their platform—opposition to the spread of slavery—is most favorable to that separation.

.....  
*How differently the respective courses of the Democratic and Republican parties incidentally bear on the question of forming a will—a public sentiment—for colonization is easy to see. The Republicans inculcate, with whatever of ability they can, that the Negro is a man, that his bondage is cruelly wrong, and that the field of his oppression ought not to be enlarged. The Democrats deny his manhood; deny, or dwarf to insignificance, the wrong of his bondage; so far as possible, crush all sympathy for him, and cultivate and excite hatred and disgust against him; compliment themselves as Union-savers for doing so; and call the indefinite outspreading of his bondage “a sacred right of self-government.”*

245. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 390-91 (1978) (Marshall, J., dissenting); see also JOHN H. FRANKLIN, FROM SLAVERY TO FREEDOM 187-89 (3d ed. 1969); W.E.B. DU BOIS, THE AUTOBIOGRAPHY OF W.E.B. DU BOIS (International Publishers Co., Inc. 9th prtg. 1968); FREDERICK DOUGLASS, LIFE AND TIMES OF FREDERICK DOUGLASS (1962).

246. See *Jenkins III*, 115 S. Ct. at 2091 (Ginsberg, J., dissenting) (discusses Missouri's Black Codes).

Under President Wilson, the Federal Government began to require segregation in Government buildings; desks of Negro employees were curtained off; separate bathrooms, and separate tables in the cafeterias were provided; and even the galleries of the Congress were segregated. When his segregationist policies were attacked, President Wilson responded that segregation was “‘not humiliating but a benefit’” and that he was “‘rendering [the Negroes] more safe in their possession of office and less likely to be discriminated against.’”<sup>247</sup>

In addition, the United States continued the tradition of segregated armed forces until pressed by the civil rights community to integrate, which it did after World War II.<sup>248</sup> Other national government action recognized a past of intentional discrimination.<sup>249</sup>

Third, criminal, repressive violence against African Americans flourished as a direct result of the national abandonment of southern African Americans. The violent acts ranged from assaults with deadly weapons at polling stations and public intimidation by parading hate groups to lynchings that functioned as social gatherings.<sup>250</sup>

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247. *Bakke*, 438 U.S. at 394 (citation omitted); see also U.S. RIOT COMMISSION REPORT, *supra* note 235, at 101 (“In 1913, members of Congress from the South introduced bills to federalize the Southern segregation policy. They wished to ban interracial marriages in the District of Columbia, segregate white and Negro Federal employees and introduce Jim Crow laws in the public carriers of the District. The bills did not pass, but segregation practices were extended in Federal offices, shops, restrooms, and lunchrooms. The Nation’s Capitol became as segregated as any in the former Confederate states.”). Given its sordid history, the continual failure of this country to allow District residents, U.S. Senators and representatives with full voting rights may be considered evidence of present discrimination against them.

248. For executive and legislative department discrimination, see Justice Marshall’s opinion in *Bakke*, 438 U.S. at 393-94. For discrimination on the part of the Supreme Court, see Justice Powell’s concession that the Court strangled the Fourteenth Amendment after the Civil War. *Id.* at 291 (“The Equal Protection Clause, however, was ‘[v]irtually strangled in infancy by post-civil-war judicial reactionism’ It was relegated to decades of relative desuetude while the Due Process Clause of the Fourteenth Amendment, after a short germinal period, flourished as a cornerstone in the Court’s defense of property and liberty of contract.” (alteration in original)).

249. See U.S. RIOT COMMISSION REPORT, *supra* note 235, at 95-112. See generally IDA B. WELLS, A RED RECORD: TABULATED STATISTICS AND ALLEGED CAUSES OF LYNCHING IN THE UNITED STATES (1895); W.E.B. DU BOIS, SOULS OF BLACK FOLKS (1903).

250. *Bakke*, 438 U.S. at 390-94. The National Advisory Commission on Civil Disorder reported:

Negroes who voted or held office were refused jobs or punished by the Ku Klux Klan. One group in Mississippi boasted of having killed 116 Negroes and of having thrown their bodies into the Tallahatchie River. In a single South Carolina county, six men were murdered and more than 300 whipped during the first 6 months of 1870. The Federal Government seemed helpless. Having withdrawn the occupation troops as soon as the Southern states organized governments, the President was reluctant to send them back.

U.S. RIOT COMMISSION REPORT, *supra* note 235, at 99-100. It was not until 1947 that the Federal Government took a determined stand against lynchings:

First, many of the most serious wrongs against individual rights are committed by private persons or by local public officers. In the most flagrant of all such wrongs—lynch-

Fourth, racism was real and entrenched in the north.<sup>251</sup> For instance, northern cities enforced racially-exclusive covenants and restrictions, in such areas as housing, associations, and employment.<sup>252</sup> Many of these provisions were discriminatory on their face. This evidence shatters the misguided notion that significant and sustained discrimination did not occur in the North.<sup>253</sup>

Fifth, the Supreme Court's decisions contributed to intentional discrimination against blacks. During the late slavery era, *Dred Scott* had a sinister impact. At the end of the nineteenth century, *Plessy* legitimized Jim Crow segregation in words which live in infamy:

If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . . If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.<sup>254</sup>

Celebrated as the most color-blind member of the Court in his era, even Justice Harlan proffered a racist position in his lone dissent in *Plessy*.<sup>255</sup>

Too little appreciated are the actual societal impacts of the *Civil Rights Cases*<sup>256</sup> and *Brown*.<sup>257</sup> The *Civil Rights Cases* dealt a fatal blow to Reconstruction; similarly, this decision provided a constitu-

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ings—private individuals, aided upon occasion by state or local officials, are the ones who take the law into their own hands and deprive the victim of his life. The very fact that these outrages continue to occur, coupled with the fact that the states have been unable to eliminate them, points clearly to a strong need for federal safeguards.

REPORT ON THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS (1947). The next time a lynching photo is viewed, notice its public, Roman, festive, rather-well-dressed-up-for setting; and then ask how often such an event needs to happen before a people cower down.

251. *Bakke*, 438 U.S. at 394 (Marshall, J.) ("In many of the Northern States, the Negro was denied the right to vote, prevented from serving on juries, and excluded from theaters, restaurants, hotels and inns."); see also U.S. RIOT COMMISSION REPORT, *supra* note 235, at 101-02; A. LEON HIGGINBOTHAM, IN THE MATTER OF COLOR 11 (1978).

252. See U.S. RIOT COMMISSION REPORT, *supra* note 235, at 101-02.

253. *But see Bakke*, 438 U.S. at 393-94 (Marshall, J., dissenting); *Jenkins III*, 115 S. Ct. at 2091 (Ginsberg, J., dissenting) (surveys Missouri's racist legal history).

254. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

255. *Id.* at 559 ("The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty."). Justice Ginsberg criticized Justice Harlan on this very point. See *Adarand Constr., Inc. v. Pena*, 115 S. Ct. 2097, 2134-35 (1995).

256. *The Civil Rights Cases*, 109 U.S. 3 (1883).

257. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).



tional foundation for the subsequent Jim Crow movement.<sup>258</sup> Thunderstruck, civil rights leaders held an emergency meeting in 1883 to ponder their misfortune.<sup>259</sup> In every major civil rights opinion from the Slavery era until shortly before *Brown*, the United States Supreme Court sided against African Americans.<sup>260</sup> This penchant spanned over sixty years and, judging from the words of Frederick Douglass, may have existed as far back as the nation's inception.<sup>261</sup>

*Brown* has also had a misperceived effect, although in a much more benign way. *Brown* is often touted as the decision that ended segregation, but this is not true.<sup>262</sup> As monumental as the decision was, *Brown* applied only to segregation in public education and was not enforced for approximately ten years.<sup>263</sup> The Court slowly de-constitutionalized segregation in education.<sup>264</sup> However, it was the civil rights movement which dismantled Jim Crow apartheid in the

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258. *Bakke*, 438 U.S. at 391 (Marshall, J.) ("Then in the notorious *Civil Rights Cases*, the Court strangled Congress' efforts to use its power to promote racial equality. . . . The Court ruled that the Negroes who were excluded from public places suffered only an invasion of their social rights at the hands of private individuals, and Congress had no power to remedy that.").

259. FREDERICK DOUGLASS, *THE LIFE AND TIMES OF FREDERICK DOUGLASS* 540 (1962):

[T]he decision in question came to the black man as a painful and bewildering surprise. It was a blow from an unsuspected quarter. The surrender of the national capitol to Jefferson Davis in time of the war could hardly have caused a greater shock. For the moment the colored citizen felt as if the earth was opened beneath him.

He was wounded in the house of his friends. He felt the decision drove him from the doors of the great temple of American justice. The nation that he had served against its enemies had thus turned him over naked to those enemies. His trouble was without any immediate remedy. The decision must stand until the gates of death could prevail against it.

260. *Adarand*, 115 S. Ct. at 2135 (Ginsberg, J., dissenting) ("Not until *Loving v. Virginia*, which held unconstitutional Virginia's ban on inter-racial marriages, could one say with security that the Constitution and this Court would abide no measure designed to maintain White Supremacy.") (citations omitted). With Congress' finding that *Wards Cove Packing Co. v. Atonio* "weakened the scope and effectiveness of Federal civil rights protections," history may record that the Court took the wrong side of the issue again. See *Civil Rights Act of 1991* § 2(2), 42 U.S.C. § 1981 (1994) (citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)).

261. DOUGLASS, *supra* note 259, at 548 ("In the dark days of slavery this court on all occasions gave the greatest importance to intention as a guide to interpretation. The object and intention of the law, it was said, must prevail. Everything in favor of slavery and against the Negro was settled by this object and intention rule.").

262. See *Bakke*, 438 U.S. at 394 (Marshall, J.) ("The *Brown* decision and its progeny "did not automatically end segregation, nor did they move Negroes from a position of legal inferiority to one of equality.").

263. See *Green v. County Sch. Bd.*, 391 U.S. 430, 438 (1968); see also MOYNIHAN REPORT, *supra* note 229, at 45 ("School integration has not occurred in the South, where a decade after *Brown v. Board of Education* only 1 Negro in 9 is attending school with white children.").

264. See THE REPORT OF THE PRESIDENT'S COMMISSION ON NATIONAL GOALS (1960), reprinted in GOALS FOR AMERICANS 3-4 (The American Assembly ed., 1960) (documenting "sharply lower" discrimination in the 1960s, and setting 1970 as a time goal for ending discrimination in higher education).

schools. American apartheid compelled the 1963 March on Washington, at which Dr. Martin Luther King, Jr., bellowed:

But one hundred years [after the Emancipation Proclamation], the Negro still is not free; one hundred years later, the life of the Negro is still sadly crippled by the manacles of segregation and the chains of discrimination; one hundred years later, the Negro lives on a lonely island of poverty in the midst of a vast ocean of material prosperity; one hundred years later, the Negro is still languished in the corners of American society and finds himself an exile in his own land.<sup>265</sup>

When discussing the Court's civil rights record, Justice Ginsberg recognized that "[n]ot until *Loving v. Virginia*, which held unconstitutional Virginia's ban on inter-racial marriages, could one say with security that the Constitution and this Court would abide no measure 'designed to maintain White Supremacy.'"<sup>266</sup> The state and federal governments' codes, cases, regulations, and practices present a commanding case for intentional discrimination during the period between 1870 and 1970.<sup>267</sup>

Lastly, the evidence of intentional discrimination since 1970, standing alone, presents a difficult case to prove. However, this period stands on the shoulders of previous highly-discriminatory eras. Consequently, America's history of discrimination, plus authoritative admissions of continuing discrimination supported by specific facts of racial mistreatment, should constitute a persuasive case of ongoing intentional discrimination.

Evidence of continual intentional discrimination may be found in the Congressional hearings on the extension of the Voting Rights Act.<sup>268</sup> Congress has also found evidence of discrimination in major

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265. King, *supra* note 173, at 102; accord MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X 350, 361 (Alex Haley ed., 1965) (Malcolm X saw so little justice in the American system that, before he died, he was working with African leaders to "take the United States before the United Nations on a formal accusation of 'denial of human rights.'").

266. *Adarand*, 115 S. Ct. at 2135 (quoting *Loving v. Virginia*, 388 U.S. 1, 11 (1967)); accord *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (Powell, J.) ("No one doubts that there has been serious racial discrimination in this country.").

267. MOYNIHAN REPORT, *supra* note 229, at 49 ("American democracy has not always been successful in maintaining a balance between these two ideals [liberty and equality], and notably so where the Negro American is concerned. 'Lincoln freed the slaves,' but they were given liberty, not equality. It was therefore possible in the century that followed to deprive their descendants of much of their liberty as well." (alteration by author)).

268. Voting Rights Act, 42 U.S.C. § 1973c (1994) (chronicling efforts to frustrate free access to the polls). The Voting Rights Act has been extended since its passage.

areas, such as construction and media communications.<sup>269</sup> In addition, the Civil Rights Act of 1991 expressly recognizes that intentional discrimination in this country is ongoing.<sup>270</sup> Incidentally, the opinions of sensitive justices, such as Justices Marshall and Ginsberg, must also be relevant to and authoritative on the question.<sup>271</sup>

#### 4. Disparate Impact Analysis

If the intentional discrimination argument since 1970 is not compelling, the disparate impact argument is available. Under this approach, aggrieved classes must prove both that particular criteria differentiates nonwhites from similarly-situated whites and that no legitimate business or governmental necessity mandates the disparity.<sup>272</sup>

First, discrimination in this area must be understood against the backdrop of Jim Crow segregation. Dissenters, in *The Civil Rights Cases*<sup>273</sup> and *Plessy v. Ferguson*,<sup>274</sup> predicted the effect Jim Crow laws would have. In *Plessy*, Justice Harlan warned that:

state enactments, regulating the enjoyment of civil rights, upon the basis of race, and cunningly devised to defeat legitimate results of the [Civil] war, under the pretense of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned. . . . If laws of like character should be enacted in the several States of the Union, the effect would be in the highest degree mischievous. Slavery, as an institution tolerated by law could, it is true, have disappeared from our country, but there would remain a power in the States, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom; to reg-

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269. See *Fullilove v. Klutznick*, 448 U.S. 448, 458-67 (1980). In the construction industry, Congress concluded upon ample evidence a nationwide history of past discrimination had reduced minority participation in federal construction grants. In the area of communications, Congress found that "the effects of past inequities stemming from racial prejudice have not remained in the past." *Id.* at 465 (quoting H.R. REP. NO. 94-468, at 1-2 (1975)). Congress recognized that:

The very basic problem disclosed by the testimony is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transaction overtly precluded minority input. Currently we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate past inequities.

H.R. REP. NO. 94-1791, at 182 (1977).

270. The Civil Rights Act of 1991 § 2(2), 42 U.S.C. § 1981 (1994) ("The Congress finds that . . . additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace.").

271. See *supra* Part II.B.

272. See *International Bd. of Teamsters v. United States*, 431 U.S. 324 (1977).

273. *The Civil Rights Cases*, 109 U.S. 3 (1883).

274. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

ulate civil rights, common to all citizens, upon the basis of race; and to place in a condition of legal inferiority a large body of American citizens, now constituting a part of the political community called the People of the United States, for whom, and by whom through representatives, our government is administered . . . .<sup>275</sup>

These effects of which Justice Harlan warned persist and government officials have substantiated Justice Harlan's concerns. For example, some Presidents have conceded the history of, at least, disparate treatment. President Kennedy stated:

Through these long one hundred years, while slavery has vanished, progress for the Negro has been too often blocked and delayed. Equality before the law has not always meant equal treatment and opportunity. And the harmful, wasteful and wrongful results of racial discrimination and segregation still appear in virtually every aspect of national life, in virtually every part of the Nation.

. . . .

The cruel disease of discrimination knows no sectional or state boundaries. The continuing attack on this problem must be equally broad. It must be both private and public—it must be conducted at national, state and local levels—and it must include both legislative and executive action.<sup>276</sup>

President Johnson summarized the history of disparate treatment in his 1965 speech at Howard University.<sup>277</sup> The Moynihan Report speaks in further support.<sup>278</sup> Similarly insightful information is found

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275. *Id.* at 560-61 (alteration by author).

276. President's Special Message to the Congress on Civil Rights, 82 PUB. PAPERS 222 (Feb. 28, 1963).

277. Remarks of the President at Howard University (June 4, 1965), reprinted in LEE RAINWATER & WILLIAM L. YANCEY, *THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY* 125, 126 (1967):

In far too many ways American Negroes have been another nation: deprived of freedom, crippled by hatred, the doors of opportunity closed to hope. . . . [The] beginning is freedom . . . [b]ut freedom is not enough. . . . You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair. Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.

President Johnson further recognized that the history of disparate treatment of African Americans created visible inequalities:

These differences are not racial differences. They are solely and simply the consequence of ancient brutality, past injustice, and present prejudice. . . . Nor can we find a complete answer in the experience of other American minorities . . . [f]or they did not have the heritage of centuries to overcome. They did not have a cultural tradition which had been twisted and battered by endless years of hatred and hopelessness. Nor were they excluded because of race or color — a feeling whose dark intensity is matched by no other prejudice in our society.

*Id.* at 128-29 (alteration by author).

278. MOYNIHAN REPORT, *supra* note 229, at I:

in Congress's debates on the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965.<sup>279</sup>

Second, the Court has clarified that disparate impact may be proven statistically.<sup>280</sup> In the 1980s and 1990s, most major cities and a number of states conducted at least one racial disparity study. Where properly conducted, these studies taken together constitute overwhelming evidence.

Presenting a disparate treatment justification for affirmative action demands voluminous study and preparation. It requires expert information to explain how facially-neutral practices or laws may actually be discriminatory. Historians,<sup>281</sup> sociologists,<sup>282</sup> legal scholars<sup>283</sup> and literary artists<sup>284</sup> may also contribute specialized knowledge on the subject. Some of these scholars may have created models which depict and dramatize the effects of such discriminatory acts on minorities.

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Being Americans, [African Americans] will now expect that in the near future equal opportunities for them as a group will produce roughly equal results, as compared with other groups. This is not going to happen. Nor will it happen for generations to come unless a new and special effort is made.

There are two reasons. First, the racist virus in the American blood stream still afflicts us: Negroes will encounter serious personal prejudice for at least another generation. Second, three centuries of sometimes unimaginable mistreatment have taken their toll on the Negro people.

279. See *supra* notes 268-70 and accompanying text.

280. See *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977) ("Where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination." (citing *International Bd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977))).

281. The following is a brief list of scholars with specialized knowledge, who have important works on discriminatory practices in the United States: John Hope Franklin, James Forman, Cornell West, Lerone Bennett, Jr., Taylor Branch, John Henrik Clarke, and Paula Giddings.

282. The following is a short list of scholars with specialized knowledge who have important works on the subject: Wade Nobles, Douglass Massey, Nancy Denton, Andrew Hacker, Daniel Moynihan.

283. Judges have contributed to the body of pro-affirmative action law. See, e.g., A. Leon Higginbotham, Jr., et al., *Civil Rights and the New Federal Judiciary: The Retreat from Fairness*, 14 HARV. J.L. & PUB. POL'Y 142, 143 (1991) ("In case anyone is in doubt, civil rights laws were enacted to eradicate generations of invidious discrimination against minorities — discrimination that has left, still today, a searing scar of injustice across the face of America."). The following is a short list of others who have also contributed: Derrick Bell, Herman Schwartz, Eric Schnapper, Lani Gunier, James E. Jones, Jr., Myrl L. Duncan, Stephen Carter, Mary Frances Berry, Eleanor Holmes Norton, Beverly Johnson-Grant, Arthur Fletcher and Ann Fagan Ginger. E.g., Schwartz, *supra* note 26, at 60-62 ("[S]omehow we must undo the cruel consequences of the racism and sexism that still plague us, both for the sake of the victims and to end the enormous human waste that costs society so much. . . . The plight of black America not only remains grave, but in many respects, it is getting worse. . . . We must close these gaps so that we do not remain two nations, divided by race and gender.").

284. The following is a brief list of scholars with specialized knowledge who have important works on the subject: Maya Angelou, bell hooks, August Wilson, Toni Morrison, and Henry Louis Gates.

## 5. Tailored Remedies

Proof of damages is a necessary element to establish affirmative action as a remedy. However, once injury is proven, the existence of damages may be assumed. If not, proponents of affirmative action may show that slavery, Jim Crow apartheid, ongoing discrimination, and their effects have impacted African Americans economically,<sup>285</sup> socially,<sup>286</sup> and politically.<sup>287</sup> Although difficult to quantify, the harm from such discrimination is real. Moreover, the negative impact on African Americans has been of such great magnitude that the African-American experience starkly contrasts that of the majority of Americans.

Certainly, the extent of the damages resulting from pervasive discrimination is suggested by literature that documents the dual nature of American society.<sup>288</sup> However, the resulting damages may best be understood by examining the troubled African-American family. The Moynihan Report, issued by the U.S. Department of Labor, explained the effects of "three centuries of exploitation":

*[T]here is a considerable body of evidence to support the conclusion that Negro social structure, in particular the Negro family, battered and harassed by discrimination, injustice, and uprooting, is in the deepest trouble. While many young Negroes are moving ahead to unprecedented levels of achievement, many more are falling further and further behind.*

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At the heart of the deterioration of the fabric of Negro society is the deterioration of the Negro family.

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285. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 395 (1978) (Marshall, J., dissenting); *Adarand*, 115 S. Ct. at 2135 (Ginsberg, J., dissenting) (recognizing that "persistence of racial inequality"); MOYNIHAN REPORT, *supra* note 229, at 66 ("Work is precisely the one thing the Negro family head in such circumstances has not received over the past generation. The fundamental, overwhelming fact is that *Negro unemployment*, with the exception of a few years during World War II and the Korean War, *has continued at disaster levels for 35 years*. Once again, this is particularly the case in the northern urban areas to which the Negro population has been moving.").

286. MOYNIHAN REPORT, *supra* note 229, at 76 ("It was by destroying the Negro family under slavery that white America broke the will of the Negro people. Although that will has reasserted itself in our time, it is a resurgence doomed to frustration unless the viability of the Negro family is restored.").

287. *Bakke*, 438 U.S. at 392-94 (Marshall, J.) (chronicling, *inter alia*, political rights denied under Jim Crow); *Croson*, 488 U.S. at 550-51 (Marshall, J., dissenting) (noting Richmond's history of political exclusion of African Americans).

288. See generally W.E.B. DU BOIS, *SOULS OF BLACK FOLKS* (1903); MOYNIHAN REPORT, *supra* note 229; ANDREW HACKER, *TWO NATIONS* (1992).

*There is probably no single fact of Negro American life so little understood by whites.* The Negro situation is commonly perceived by whites in terms of the visible manifestations of discrimination and poverty, in part because Negro protest is directed against such obstacles, and in part, no doubt, because these are facts which involve the actions and attitudes of the white community as well. It is more difficult, however, for whites to perceive the effect that three centuries of exploitation have had on the fabric of Negro society itself. Here the consequences of the historic injustices done to Negro Americans are silent and hidden from view. *But here is where the true injury has occurred:* unless this damage is repaired, all the effort to end discrimination and poverty and injustice will come to little.<sup>289</sup>

Affirmative action is in trouble, but it is not extinct. The *Adarand* Court further explained that affirmative action is still viable:

Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. As recently as 1987, for example, every Justice of this Court agreed that the Alabama Department of Public Safety's "pervasive, systematic, and obstinate discriminatory conduct" justified a narrowly tailored race-based remedy. When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.<sup>290</sup>

The Court requires civil rights proponents to present more than bald assertions of racism.<sup>291</sup> In other words, if civil rights advocates do not argue a convincing compensatory justice case, it must watch the precipitous demise of affirmative action.

#### E. Institutional Coordination And Mobilization

"We also note that *Metro* . . . has been consistently criticized by commentators."<sup>292</sup>

Justice Sandra Day O'Connor

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289. MOYNIHAN REPORT, *supra* note 229, at 50-51 (second & third emphasis added).

290. *Adarand*, 115 S. Ct. at 2117 (citations omitted).

291. *Croson*, 488 U.S. at 503 (O'Connor, J.) ("The mere fact that black membership in these trade organizations is low, standing alone, cannot establish a *prima facie* case of discrimination." (emphasis added)).

292. *Adarand*, 115 S. Ct. at 2115 (O'Connor, J.).

Affirmative action has been *the* civil rights issue of the last three decades. It is imbued with jurisprudential, constitutional, and moral issues bedeviling society, and which will bite at our heels well into the future. Thus, the issue is worthy of serious law school investment.

## 1. Establishing a Law School Base

Many law schools around the nation have a department devoted to civil rights. Some schools even have a journal, or other association, dedicated to civil rights advancement. In contradistinction, there are a number of newer, conservative law school organizations, working actively to bring affirmative action to an expeditious end. Some student organizations have journals, chairs, or departments as well as strong connections to powerful, national organizations and prominent figures.<sup>293</sup> Given this opposing activism and the historical significance of affirmative action, at least one law school should actively coordinate and mobilize an effort to establish affirmative action as a compensatory justice remedy.<sup>294</sup> If a law school does not do this *sua sponte* and in a serious way, the civil rights community must press for this result.

Seminars, symposia and studies could be formulated after Columbia University's *Defunis* symposium in 1975 or Harvard University's Civil Rights symposium in 1991.<sup>295</sup> Additionally, a great deal of assimilating, coordinating, and consensus-building work is necessary.<sup>296</sup>

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293. The Federalist Society epitomizes the point that certain of the more anti-affirmative action organizations are well supported, whether for this reason or another.

294. Even Justice Thomas - who opposes race-based affirmative action - recognized the need and constitutionality of historically African-American colleges and universities. *United States v. Fordice*, 505 U.S. 717, 745 (1992) (Thomas, J., concurring). Certainly, a historically African American law school would be well-suited to house such a department. Students from historically African-American schools, particularly in Atlanta, played a key role in the Civil Rights Movement of the 1960s. See generally TAYLOR BRANCH, *PARTING THE WATERS* (1988). Moreover, Charles Hamilton Houston, former Dean of Howard University School of Law, played a central role in the NAACP's strategy to urge the Court to overturn *Plessy*. In tandem, at least one non-historically-African-American law school should do the same.

295. Harvard University hosted a similar seminar on *Frontiers in Civil Rights*. Articles concerning it were published in volume 14 of the *Harvard Journal of Law & Public Policy*. Columbia Law School had an impressive *DeFunis* Symposium in 1975. A number of articles related to it were published in its law review in volume 75.

296. The existence of two, three, or four different affirmative action plans need not spell defeat of the consensus-building process. For it is likely more progressive professors may agree on one, more conservative professors on another, the NAACP on a third, and the Rainbow Coalition on a fourth. Notwithstanding the number, the differences are likely to be solvable. What is more important is political power which will result from even that degree of unity, and the information behind each plan which the various groups may make available to interested parties.



The civil rights community should compile the extant information and circulate it to proponents in as many venues as possible, as soon as practicable.<sup>297</sup> The information should be disseminated to legislative<sup>298</sup> and executive<sup>299</sup> bodies at the national, state, and local levels that are considering or working to maintain affirmative action related legislation or regulations. Also the widespread effect of racial discrimination in the United States makes general legislation in this area appropriate.<sup>300</sup>

Affected classes have a right to demand the federal government consider specific affirmative action legislation.<sup>301</sup> Moreover, when

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297. To assist states or local governments, such centers may provide guidance concerning constitutionally sufficient disparity studies and legislation. In order to move Congress to act, much more extensive work is needed. The various studies around the nation must be compiled and assimilated, other historical disciplines coordinated, models prepared, and new research commissioned to assist in the independent scholarly, legislative, and litigation processes. Also, tracking and showcasing successful programming may be necessary. All of this will be helpful in the event the proper case is brought.

298. See *Fullilove*, 448 U.S. at 502 ("The special attribute [of Congress] as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation."); Jones, *supra* note 8, at 418 ("What this nation needs now is additional clarity from the Court and a clear mandate from Congress. There is no doubt that an act of Congress requiring affirmative action for government contractors and specifically authorizing affirmative action plans as remedy for employment discrimination would pass constitutional scrutiny.").

299. Higginbotham, *supra* note 283, at 144 ("One of the saddest days in our nation's history occurred when the Justice Department switched from advocating the rights of the disadvantaged and oppressed to representing white males in reverse discrimination suits."); see also Schwartz, *supra* note 26, at 58-59, 73:

Until 1981 all of our presidents, to a greater or lesser extent, contributed to this effort, even when, like Richard Nixon, they were less than enthusiastic.

The Reagan administration vigorously supported tax exemption for schools that discriminate against blacks. It crusaded for a specific intent rule that would have greatly handicapped both federal enforcement and private plaintiffs in voting rights and housing cases, and grudgingly surrendered on voting rights when Congress overwhelmingly declined to go along. It has consistently been permissive regarding voting law changes that blacks have questioned . . . . It has approved previously rejected proposals by Louisiana, Mississippi, and North Carolina regarding compliance with federal court orders to rid their higher education systems of racial discrimination . . . .

Judicial and other appointments have gone overwhelmingly to white males, even in the heavily black District of Columbia, where only 3 of 14 judges appointed by Reagan have been members of racial minorities.

This is, after all, an administration which does not include . . . a single person with a record of leadership or even of supporting activity on behalf of civil rights and minority advance. That could not have been said of any previous administration of the past 50 years.

The Bush administration continued in President Reagan's tradition. The Clinton administration has an improved, but still mixed, record. By design, President Clinton has positioned himself as a more conservative democrat.

300. *Contra* Nickel, *supra* note 147, at 534.

301. If proof of the present discriminatory effects of slavery, Jim Crow apartheid, and the resultant deprived conditions are not enough for this country to dutifully award compensatory

one taps into the vicissitudes of the national discussion on affirmative action, one sees the need for the government to formulate a determining answer to the issue. A referendum on affirmative action is necessary for clarity and closure.

Lastly, the civil rights community should engage the judiciary. Scholars should accumulate evidence of discrimination to be used when defending affirmative action.<sup>302</sup> As a reminder that scholarship is influential, the Court buttressed its argument that *Metro Broadcasting* should be overruled by citing four law review articles<sup>303</sup> which criticized the *Metro Broadcasting* decision: "We also note that *Metro Broadcasting's* application of different standards of review to federal and state racial classifications has been consistently criticized by commentators."<sup>304</sup> Furthermore, the *Croson* majority cited two law review articles when it flirted with the notion that the race-conscious remedies "would be contrary to the intentions of the Framers of the Fourteenth Amendment."<sup>305</sup>

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justice, at least groups like African-Americans can hold their heads high knowing they zealously attempted remediation, appreciating the history compiled of their more recent oppression, and consoling themselves in the knowledge that—like their ancestors—they waived nothing which could benefit their children but for institutionalized force. The issue should be pressed even if it is too late. See Schwartz, *supra* note 26, at 60 ("Insofar as affirmative action is designed to compensate the disadvantaged for past racism, sexism, and other discrimination, many understandably believe that today's majority should not have to pay for their ancestors' sins.").

302. *Contra* Higginbotham, *supra* note 283, at 142 ("Sadly, if we are to avoid the rapid unraveling of the progress we have made over the past forty years, we can no longer rely on the federal judiciary."). Louis Henkin, *Defunis: An Introduction*, 75 COLUM. L. REV. 483, 483 n.4 (1975) ("Among the organizations submitting amicus briefs were the Anti-Defamation League of B'nai B'rith, the AFL-CIO, the National Association of Manufacturers, the Association of American Law Schools, the Association of American Medical Colleges, the President and Fellows of Harvard College, and the NAACP Legal Defense and Education Fund.").

303. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2115 (1995) (citing Charles Fried, comment, *Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107 (1990); Neal Devins, *Metro Broadcasting, Inc., v. FCC: Requiem for a Heavyweight*, 69 TEX. L. REV. 125 (1990); Douglas O. Linder, *Review of Affirmative Action After Metro Broadcasting v. FCC: The Solution Almost Nobody Wanted*, 59 UMKC L. REV. 293 (1990); Lucy Katz, *Public Affirmative Action and the Fourteenth Amendment: The Fragmentation of Theory After Richmond v. J.A. Croson Co. and Metro Broadcasting, Inc. v. Federal Communications Commission*, 17 T. MARSHALL L. REV. 317 (1992)).

304. *Id.* at 2115 (second emphasis added).

305. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 468, 490-91 (O'Connor, J.) (citing Drew S. Days III, *Fullilove*, 96 YALE L.J. 453, 474 (1987); Robert A. Bohrer, Bakke, Weber, and Fullilove: *Benign Discrimination and Congressional Power to Enforce the Fourteenth Amendment*, 56 IND. L.J. 473, 512-13 (1981)). Justice Marshall, in his dissenting opinion, criticized the *Croson* majority for the lack of judicial precedent or legislative history as support for the decision:

Tellingly, the sole support the majority offers for its view that the Framers of the Fourteenth Amendment intended such a result are two law review articles analyzing this Court's recent affirmative-action decisions, and a Court of Appeals decision which relies upon statements by James Madison. Madison, of course, had been dead for 32 years when the Fourteenth Amendment was enacted.

*Id.* at 560 n.13.

The Court's repeated reliance on law review articles demonstrates the influence scholarly writing continues to have when the arguments are clear, compelling, and timely. Perhaps affirmative action proponents will use the Court's retreat from affirmative action as a wake-up call and heed the message implicit in the lament of Professor Jones: "After nearly two decades of debate, the 'scholarly community' is still mired in its ideological and philosophical dialogue."<sup>306</sup>

## CONCLUSION

If scholars in the civil rights community act with *only* common valor, Americans will probably witness the premature end of affirmative action. The United States had an extended Slavery era,<sup>307</sup> followed by a short Reconstruction Era,<sup>308</sup> and subsequently a long Jim Crow Era.<sup>309</sup> Around 1970, the Jim Crow Era ended and was replaced by what can best be termed the "Affirmative Action Era."<sup>310</sup> Like the Reconstruction Era,<sup>311</sup> the Affirmative Action era appears destined to be another short attempt to correct a long injustice.

A number of justices and scholars share the view that the retraction of affirmative action could possibly ameliorate the inequities between the races in this country.<sup>312</sup> Alternatively, many scholars

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306. Jones, *supra* note 8, at 386.

307. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1856) (African Americans "had for more than a century before [the Declaration of Independence] been regarded as beings . . . so far inferior . . . that the Negro might justly and lawfully be reduced to slavery for his benefit.").

308. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 391 (1978) (Marshall, J.) ("That time, however, was short-lived.").

309. *Id.* at 395 (Marshall, J.) ("The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment.").

310. STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 4,7 (1991) (labeling post-1970 period as "era of affirmative action" and "affirmative action era").

311. Assuming the Affirmative Action Era is irreversibly ending, parallels between it and the Reconstruction may be tentatively drawn—and even now they are remarkable. Legislation in the Reconstruction era was, like the Affirmative Action era, piecemeal, evolutionary, and ad hoc. In both periods, no consensus formed as to the scope of the remedies. Moreover, as evidenced below, opponents fought each other as special treatment. Both President George Bush and President Andrew Johnson attacked race-specific legislation. *Cf.* President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632 (Oct. 22, 1990) (vetoing the Civil Rights Act of 1990), with 5 MESSAGE AND PAPERS OF THE PRESIDENTS 3596 (Feb. 19, 1866) (vetoing the Freedman's Bureau Act); *see also* The Civil Rights Cases, 109 U.S. 3, 25 (1883) ("When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws . . .").

312. *E.g.*, *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 637 (1990) (Kennedy, J., dissenting) ("Though the racial composition of this Nation is far more diverse than the first Justice Harlan foresaw, his warning in dissent is now all the more apposite: 'The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common

believe ending affirmative action now is premature and is likely to make America more vulnerable to racial tensions.<sup>313</sup> Admittedly, such arguments mix compensatory justice with social utility, and distributive justice concerns.<sup>314</sup> In this regard, Professor Jones noted,

The only way to put racism behind us is to be race conscious in our remedies. . . . If sustained sufficiently over time, [affirmative action] could help to cleanse our country of the effects of its sordid history. If we do not address this issue, racism will continue to be a strain and a drain upon our corporate resources.<sup>315</sup>

Similarly, Professor Ginger issued a warning: "And, in the broader sense, affirmative action and equal protection are the only insurance available against a continuation of the bloody racial clashes that have occurred in this century in Atlanta, St. Louis, Detroit, Harlem, Los Angeles, and Cairo, Illinois."<sup>316</sup> All hope against racial conflict large

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government of all shall not permit the seeds of race hate to be planted under the sanction of law.'" (quoting *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting)); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 527-28 (1989) (Scalia, J., concurring) ("When we depart from this American principle we play with fire, and much more than an occasional *Defunis*, *Johnson*, or *Croson* [white citizens]. It is plainly true that in our society blacks have suffered discrimination immeasurably greater than any directed at other racial groups. But those who believe that racial preferences can help to 'even the score' display, and reinforce, a manner of thinking by race that was the source of the injustice and that will, if it endures within our society, be the source of more injustice still."); see also Graglia, *supra* note 152, at 76-77:

The imposition of racial preferences in employment, therefore, can serve only to create the interracial hostility that proponents of preferences assert already exists and use to justify such preferences. The result is a vicious and potentially disastrous cycle of racial hostility.

[T]here is no guarantee that this nation will survive, and if it tears itself apart in the near future, it will surely be because of the enhanced racial consciousness and conflict that is the inevitable result of our present course on "civil rights." Perhaps America will then finally have paid the full price for the terrible mistake of bringing in Africans in chains.

Ironically, Professor Graglia believes the nation's "peace and security, to say nothing of our ideals," require that we "act to improve the situation of the black underclass." *Id.* at 75. However, whatever is done, Professor Graglia wants it to be without racial preferences.

313. MOYNIHAN REPORT, *supra* note 229, at 49 ("The principal challenge of the next phase of the Negro revolution is to make certain that equality of results will now follow. If we do not, there will be no social peace in the United States for generations."). Whether the retraction helps or hurts relations turns most on the opinion of and demand made by the affected groups. If groups like African Americans come in compelling numbers to the belief affirmative action — especially as compensatory justice — is no longer necessary or practicable then the retraction should help. However, if affected groups view the retraction as premature and, even, further victimizing, then all that happened is that one generation passed another problem to the subsequent one; albeit in this case, a much aggravated problem.

314. *Id.* ("The principal challenge of the next phase of the Negro revolution is to make certain that equality of results will now follow. If we do not, there will be no social peace in the United States for generations.").

315. Jones, *supra* note 8, at 418.

316. Ginger, *supra* note 12, at 279 (footnote omitted); see also NATIONAL RESEARCH COUNCIL, *A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY* 31 (Gerald D. Jaynes & Robin M.

or small; but whether it happens has more to do with how we prepare than with what we hope.

Now is the time for affirmative action proponents to rally in order to bring critical mass to bear on this issue. With only two confirmed affirmative action naysayers on the United States Supreme Court, time still remains within which to mend and extend this compensatory remedy. But one wonders whether enough will be done before it is too late. As in a grand case cast in society at large, affirmative action opponents have advanced a politically compelling, but legally vulnerable, presentation of reverse discrimination. The proponents are mainly transfixed, unprepared to go forward despite their legally compelling case for compensatory justice. Instead, affirmative action proponents should be amassing evidence in proof of discrimination and presenting anew the case for remedial programming. For it is on these two fronts that affirmative action is on trial.

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Williams, Jr., eds., 1989) ("We cannot exclude the possibility of confrontation and violence. . . . The ingredients are there: large populations of jobless youths, an extensive sense of relative deprivation and injustice, distrust of the legal system, frequently abrasive police-community relations, highly visible inequalities, extreme concentrations of poverty, and great racial awareness.").