What is Affirmative Action?

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There is no rigorous definition of affirmative action. This Article argues that this remarkable circumstance has distorted and undercut American antidiscrimination law.

Though affirmative action is vigorously and widely debated, it has not been defined in the rigorous manner legal commentators would normally demand. Rather, commentators have deferred to policymakers’ descriptions of affirmative action programs and employed those “definitions” to set the terms of policy debates over the propriety of affirmative action. Typically, commentators take for granted that affirmative action is “discriminatory” and seek to justify its use in certain contexts. This approach is also prominent in the United States Supreme Court’s jurisprudence, beginning with it’s Bakke decision, which equates racial classification with discrimination. Since Bakke, the Court has consistently equated “discrimination” with racial (or other) “classification,” focusing its energies on whether “discrimination” is justified. By assuming away the key “causal of harm” question, this approach denies discussions of affirmative action open-ended policy debates that turn on competing views of the value of particular affirmative action programs. This framework is duplicated in Grutter and Gratz which continue a flawed approach to affirmative action litigation that signals reduced requirements for affirmative action opponents than other discrimination claimants.

This Article develops a more rigorous definition of affirmative action around the question of discrimination, as such. The particular claim is that affirmative action disputes occur in and can be defined as being limited to situations in which either of two traditional approaches to identifying discrimination are applicable. Affirmative action disputes thus occur in “hard” discrimination cases where the Court’s and commentators’ policy-based definitions have the effect of validating, as neutral, objective decision-making devices, even those decision-making bases that are strictly underdeterminative. From this perspective, affirmative action is revealed to always be about the use or abandonment of such underdeterminative selection criteria. Attacks on affirmative action plans are less about clear-cut discrimination against one group or another than about validations of these criteria in contexts where they do little work. This problem can be mostly ameliorated by simply focusing affirmative action cases on the question of causation. Since that inquiry already typifies discrimination litigation, such a move would eliminate the perceived double standard between those areas of law, while also stemming the ongoing assault on the antidiscrimination principle that affirmative action challenges ironically represent.

I. HOW AFFIRMATIVE ACTION IS DEFINED IN THE JURISPRUDENCE ........................................................... 2124

A. Affirmative Action in the United States Supreme Court ............................................................................... 2127

1. Bakke and the Equation of Discrimination with Use of Race ...................................................................... 2131

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2. Pre-\textit{Bakke} Constitutional Definitions of Discrimination........................................2140
3. Post-\textit{Bakke} Definitions of Discrimination in Affirmative Action Cases..........................2148
   a. Affirmative Action Remedies and Consent Decrees ..............................................2149
   b. Discrimination and Voluntary Affirmative Action .............................................2151

\textit{B. What Is the Big Deal?} .....................................................................................2162
1. Classification as Discrimination ........................................................................2163
2. Classification as an Appropriate Trigger to Strict Scrutiny .....................................2165
3. Classification and Discrimination Evaluations as Equivalent .....................................2166
II. AFFIRMATIVE ACTION IN THE SCHOLARLY LITERATURE......................................2168
III. TOWARD A DEFINITION OF AFFIRMATIVE ACTION:
     DISJUNCTURE BETWEEN ANTIDISCRIMINATION AND
     AFFIRMATIVE ACTION JURISPRUDENCE .........................................................2180
IV. DEFINING AFFIRMATIVE ACTION AS A LEGAL QUESTION ..................................2190
   A. \textit{The Old Way: Discrimination as Outrages} ....................................................2191
   B. \textit{The Modern Approach: Deviation from Rational Decisional Grounds} ...............2192
   C. \textit{Easy and Hard Cases in Antidiscrimination Law} ...........................................2194
      1. Easy Cases ................................................................................................2194
      2. Hard Cases ................................................................................................2196
      3. Affirmative Action Defined ........................................................................2199
V. CONCLUSION: INTEGRATING THE HISTORICAL AND ANALYTICAL DEFINITIONS OF
   AFFIRMATIVE ACTION ......................................................................................2202

What is affirmative action? Astonishingly, the literature and case law offer little by way of a rigorous definition.\footnote{For efforts at defining affirmative action, see recently, Peter H. Schuck, Affirmative Action: Past, Present, and Future, 20 YALE L. & POL'Y REV. 1, 5-8 (2002). See, for example, books reviewed in Deborah C. Malamud, Values, Symbols, and Facts in the Affirmative Action Debate, 95 MICH. L. REV. 1668, 1691-96 (1997) (book review).} Though many offer a definition, few detail the parameters of the concept and relate it to comparable legal devices and theories.\footnote{A classic approach to defining affirmative action is to characterize it: “In the simplest form, affirmative action is a conservative remedy, a formal effort to give people of color, women, and other disadvantaged groups greater access to education, employment, and government contract. It is not a quota, a term deliberately used to inflame raw emotions.” George E. Curry, Comments before the Columbia Law School Symposium on Affirmative} Consequently, behavior tagged
WHAT IS AFFIRMATIVE ACTION? 2119


Opponents have defined affirmative action as a program of racial preferences that threatens fundamental American values of fairness, equality, and democratic opportunity. Opponents successfully depict racial preferences as extraordinary, special, and deviant—a departure from prevailing modes of selection. They also proceed on the assumption that, except for racial or gender preferences, the process of selection for employment or educational opportunity is fair, meritocratic, and functional. Thus, they have positioned affirmative action as unnecessary, unfair, and even un-American.

Susan Sturm & Lani Guinier, The Future of Affirmative Action: Reclaiming the Innovative Ideal, 84 CAL. L. REV. 953, 953-54 (1996) (footnotes omitted). A fourth approach is to simply generalize the programs, after which they can be divided into “soft” or “hard” affirmative action (a division that implies a constitutional distinction by way of definition).

See Jack Citrin, Affirmative Action in the People’s Court, PUB. INTEREST, Winter 1996, at 39, 39-40. Soft affirmative action “accepts the use of racial, gender, or ethnic considerations as ‘tie-breakers’ among qualified candidates with roughly similar test scores in circumstances where historical discrimination has caused dramatic imbalances across groups,” while hard affirmative action involves resource redistribution. Id. at 40 & n.1.

These definitions obscure the complexity of affirmative action. As former Assistant Attorney General for Civil Rights Deval Patrick’s definition reveals, the programs reflect a range of remedies:

Affirmative action is really a range of remedies. At one end of the spectrum, there is affirmative outreach and recruiting—casting a broad net, in both traditional and non-traditional quarters for qualified minorities and women to compete. Hardly anyone opposes that—at least openly. At the other end of the spectrum, there is what might be called affirmative “spoils division”—where hard and fast numbers of spaces in schools or workplaces are specifically reserved for members of certain groups, regardless of qualifications. This is perhaps the most widely opposed kind of action. Indeed, these are the quotas that I and everyone else in the Clinton Administration have denounced and that the courts have rejected fairly consistently.

The real debate, it seems to me, is over a method in the middle. This is what I will call affirmative “consideration”—where race, ethnicity or gender is a factor, but is not necessarily dispositive, in evaluating qualified candidates. This kind of affirmative action guarantees nothing. It supports merit. It emphasizes qualifications. It embodies flexibility and the aspirations of an integrated workplace or school. This kind of affirmative action is what the early proponents, Republicans and Democrats, have supported.

Deval L. Patrick, A Perspective on Civil Rights Challenges, 25 U. BALTIMORE L. REV. 169, 172-73 (1996). Even with its nod to complexity, Patrick’s definition reflects a version of the hard/soft definition. On the other hand, he admits to the problem of affirmative action of the soft variety slipping into the hard, which he says must be addressed. See id. This frankness is often absent in a final variety of affirmative action definition, which seeks to obfuscate what is at stake:

Affirmative action may be defined as modest remedial adjustments which seek to provide qualified members of minority or disenfranchised groups an equal
“affirmative action” is rendered particularly susceptible to attack on the grounds that the behavior violates more established legal doctrines. In short, the undefined affirmative action is flayed and dispatched by the well-developed equality principle in a comparison which casts affirmative action as discrimination without bothering with the ordinary proofs of the term.

Affirmative action can, of course, be defined historically, if not satisfactorily. Historically, affirmative action is the subject of a policy debate about the extent of remedies for Jim Crow. The story is not too complicated. Beginning just before the judicial repudiation of Jim Crow in Brown v. Board of Education (Brown I), a version of affirmative action emerged as a limited and moderate remedy to the extreme and widespread inequalities perpetuated by the system of official and informally enforced inequality that was Jim Crow. As the regime of antidiscrimination emerged in the 1960s, consequential choices to shield vested interests from paying the cost of remedi

opportunity to obtain employment, contracts, scholarships, and other opportunities.

The general concept of affirmative action is that minority group members in a given qualified pool should have an equal opportunity to get a job.


Each of these definitions serves an important role in structuring the policy debate about the propriety of affirmative action programs. They are not, however, adequate legal definitions of affirmative action.


5. The origins of affirmative action are modest and rooted largely in a number of Executive Orders issued by Presidents Roosevelt, Truman, Eisenhower, and Kennedy. Roosevelt’s Executive Order No. 8802 directed departments and agencies to “take special measures appropriate to assure that such programs [were] administered without discrimination.” 3 C.F.R. 957 (1938-1943). I evaluate the context that produced the need for, and limited the success of, this program in an upcoming article in the Nevada Law Review. See John Valery White, The Turner Thesis, Black Migration, and the (Misapplied) Immigrant Explanation of Black Inequality, 5 NEV. L. REV. (forthcoming 2004). This policy was extended to government contractors and subcontractors by Executive Order No. 9346 3 C.F.R. 1280 (1938-1943). These orders have been characterized as upholding only an antidiscrimination norm. See Mark R. Killenbeck, Pushing Things up to Their First Principles: Reflections on the Values of Affirmative Action, 87 CAL. L. REV. 1299, 1341 (1999). In any case, President Kennedy’s Executive Order No. 10,925 interjected the term “affirmative action” while expanding the apparent aims of the programs. 3 C.F.R. 448 (1959-1963); see also Executive Order No. 11,114, 3 C.F.R. 774 (1959-1963) (extending the obligations of Executive Order No. 10,925 to government contractors).

providing compensation for the system of American apartheid.\textsuperscript{7} In this context the "Philadelphia Plan" was conceived, providing the first affirmative action plan expressly incorporating racial "preferences."\textsuperscript{8} By the 1970s, the antidiscrimination ethic had come to dominate civil-rights-movement-generated policies.\textsuperscript{9} Affirmative action was out of step with this approach because it focused, however timidly, on remedying the structural inequality of Jim Crow as opposed to responding to individual acts of purposeful discrimination. Consequently, the mid-1970s and early 1980s became a period of much hand wringing about the extent and nature of affirmative action programs.\textsuperscript{10} By the 1990s, the whole affirmative action project had come to be questioned and mostly repudiated by a majority of the Court in \textit{City of Richmond v. J.A. Croson Co.},\textsuperscript{11} which all but subsumed affirmative action into the antidiscrimination ethic. On some level, \textit{Grutter v. Bollinger}\textsuperscript{2} and \textit{Gratz v. Bollinger}\textsuperscript{13} ask only whether affirmative action ought not be fully subsumed under that ethic. Their answer, that it should not, preserves affirmative action as a minor and often exaggerated response to the structural inequalities of Jim Crow, which, by the 1990s, had been thoroughly reconceptualized in many circles as the products of individual choices and cultures of poverty and underachievement.\textsuperscript{14}

\textsuperscript{7} The emergent principle of antidiscrimination was, of course, aimed at helping dismantle that system, but was forward looking and as noted locked in certain benefits earned through the operation of Jim Crow discrimination, like competitive seniority. To see how this approach was limited even when first conceived, see White, \textit{supra note 5}.

\textsuperscript{8} \textit{See James E. Jones, Jr., The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Policy Realities, 70 Iowa L. Rev. 901, 901-02 (1985)} ("[T]he modern concept of affirmative action is no more than fifteen years old—dating from the United States Department of Labor's issuance of the Philadelphia Plan on June 27, 1969 under Executive Order 11,246." (footnote omitted)). The plan was aimed at "blatant segregation in the construction industry." Daniel A. Farber, \textit{The Outmoded Debate Over Affirmative Action}, 82 Cal. L. Rev. 893, 896 (1994). It is apparent that the Nixon administration revived the idea of the Philadelphia Plan as part of a political calculus as well. \textit{See Malamud, supra note 1, at 1675} (reviewing \textit{John David Skrentny, The Ironies of Affirmative Action: Politics, Culture, and Justice in America} (1996)).


\textsuperscript{10} \textit{See discussion infra of Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984); United Steelworkers v. Weber, 443 U.S. 193 (1979); see also Parts I.A.1, I.A.3 (discussing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (plurality opinion)).


\textsuperscript{14} \textit{See, e.g., Stephan Thernstrom & Abigail Thernstrom, America in Black and White: One Nation, Indivisible 494-501 (1997).}
It is striking that the definition I have offered here is not a legal one. There is no discussion of what legal principle affirmative action represents, nor how it works in relation to such principles. There is the shadow of the antidiscrimination ethic, but with no concrete relationship established between the two (other than the implied conflict). Indeed, as I will show below, few writing on affirmative action even bother to offer what could pass as a doctrinal legal definition of their subject.\(^{15}\) It seems accepted that a policy definition is adequate.\(^{16}\) It is as if one talked about torts as though it only concerned insurance settlements: there is a definite relationship and some conflict, but, ultimately, the two are distinct.

This Article is about the United States Supreme Court's treatment of affirmative action. It concerns itself with the definition of affirmative action in that Court and among commentators who analyze the Court's decisions. That is, it does not make a case for or against

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\(^{15}\) By this I mean a definition that indicates both what programs are covered and what circumstances raise the question. The temptation is to say that these conditions are satisfied when an author says affirmative action consists of programs that allocate goods according to preferences. However, this is circular. If affirmative action consists of programs of a particular type, the type cannot be defined as the class of affirmative action programs. This is what makes the simple equation of affirmative action and discrimination appealing. That definition characterizes the programs by a trait outside the programs themselves—the antidiscrimination principle. That approach suffers, however, because just what constitutes discrimination is never clearly articulated. Indeed, the definition of discrimination is itself distorted by the debate over affirmative action and the Court's uncritical equation of the two. See discussion infra Part III.

\(^{16}\) To this end, many rely on the definitions offered by the Equal Employment Opportunity Commission (EEOC), Civil Rights Commission, or similar government policy making entity. See Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII*, 39 ARIZ. L. REV. 1003, 1028 (1997) ("The Glass Ceiling Commission defines affirmative action as ‘the deliberate undertaking of positive steps to design and implement employment procedures that ensure the employment system provides equal opportunity to all.’").

The EEOC defines affirmative action as "those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity." 29 C.F.R. § 1608.1(c) (2003). The Civil Rights Commission defines affirmative action as

a contemporary term that encompasses any measure, beyond simple termination of a discriminatory practice, that permits the consideration of race, national origin, sex, or disability, along with other criteria, and which is adopted to provide opportunities to a class of qualified individuals who have either historically or actually been denied those opportunities and/or to prevent the recurrence of discrimination in the future.

affirmative action.\textsuperscript{17} Indeed, affirmative action may not survive,\textsuperscript{18} though the recent decisions give it new life. Whether it survives or not, its effects on antidiscrimination will endure. These effects are the underlying motivation of this Article, especially the degree to which affirmative action has come to tacitly validate selection processes that throttle equal opportunity.

As I show below, affirmative action ought to be understood as disputes generated in impossible discrimination scenarios. Affirmative action disputes are \textit{disputes over jobs and opportunities where there is an overabundance of qualified candidates and a dearth of rational decision making grounds for allocating the scarce opportunities}. Because these jobs and opportunities are desirable, allocation devices are created, quite apart from antidiscrimination concerns. Because those devices are \textit{not} sufficiently rational grounds for denying opportunities to truly qualified candidates, they are subject to criticism for excluding minorities (especially black Americans and others structurally disadvantaged by Jim Crow). They are, then, naturally, subject to challenge. The remedies to or in anticipation of these challenges become known as affirmative action policies, though not when they are created. Instead they come to be recognized as affirmative action only when they are criticized or challenged as distorting the supposedly rational allocation grounds they supplement.

The poor definition of affirmative action conceals three crucial characteristics about affirmative action and antidiscrimination law.

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17. Indeed, many of the Court's affirmative action decisions might come to the same result using the framework I advocate.

18. Professor Peter Schuck, in an article that could represent a liberal case against affirmative action, expressly writes from a policy perspective, weighing affirmative action and judging it on the basis of whether, under the circumstances, it is good policy. \textit{See} Schuck, \textit{supra} note 1, at 1-96. He finds:

In assessing (and re-assessing) affirmative action, then, context matters. In reality, its policy context is being transformed in ways that greatly weaken its empirical, conceptual, and normative underpinnings. First, new patterns of immigration, intermarriage, and identity are ... rendering affirmative action's ethno-racial categories ever more meaningless. Second, recent studies show that the preferences ... have grown very large. Third, only a tenuous connection exists between being in a favored category and being socially disadvantaged ... Fourth, ... the policy's supposed benefits are exaggerated, imaginary, or even socially harmful, while its social costs are substantial.

\textit{Id.} at 14. Schuck carefully delimits his approach as a policy assessment of affirmative action, excluding an assessment of its constitutionality which he supports, at least in the case of congressionally enacted affirmative action plans. \textit{Id.} at 3. Unfortunately, few distinguish these two approaches, mixing their policy judgments with whether and how the programs are constitutionally judged.
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First, affirmative action jurisprudence sullies the idea of discrimination by assuming that “racial classification” equals discrimination without proof of the now well-developed elements of most discrimination causes of action. Second, the missing proof, causation, is currently required of discrimination plaintiffs in other areas but consistently assumed by the Court in affirmative action cases. Third, prior causes of action for “facial discrimination,” which allowed discrimination recovery without specific proof of causation, have been largely abandoned in both constitutional and statutory litigation, except for affirmative action challenges. Thus the current approach to affirmative action not only spells affirmative action’s doom, it also portends the transformation of antidiscrimination law, a regression really, from a system of legal rights to a vague system of equities triggered only in “outrageous” circumstances. This is the hidden effect of the poor definition of affirmative action and its sloppy jurisprudence.

The argument below is set out in four Parts. Part I surveys the Supreme Court’s affirmative action jurisprudence, showing how the Court has defined affirmative action, such as it does, only by equating all racial classification with discrimination. Part II reviews the academic definitions of affirmative action, revealing that they largely track the Court’s approach. Part III locates the basis for a satisfying definition of affirmative action in antidiscrimination law. And Part IV outlines that definition.

I. HOW AFFIRMATIVE ACTION IS DEFINED IN THE JURISPRUDECE

As the almost twenty-five year battle over affirmative action stands in repose with the Court’s recent pronouncements, something disturbing stands out. It creeps through the rancor of the debate, overshadowing the political and moral certainties of the discourse, and defies the confident conclusions that are replete in the literature. Over all this time and with all the words exchanged contesting the legality of the practices, no one seems to have said what affirmative action is. 19

19. As one commentator put it:

By 1978 affirmative action had reached its zenith. Although it had come of age, affirmative action nevertheless had developed in a piecemeal fashion as a body of law. 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.

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. It
Of course everyone defines the practices they wish to discuss. Collectively these working definitions sketch out the universe of policies, programs, and court orders that can fairly be called affirmative action. What is missing is a conceptual examination of

is neither a term of art nor of choice, but rather mere happenstance. In actuality, the term shields the reason for which the programming was instituted, given that the reason mainly involved compensation for mistreatment.


20. As Susan Sturm and Lani Guinier point out, "[e]ompeting narratives drive the affirmative action debate. Each story is propelled by different assumptions about fairness and merit." Sturm & Guinier, supra note 2, at 960.

21. My colleague Darlene Goring has noted:

In their dissenting opinion in Adarand Constructors, Inc. v. Pena, Justices Stevens and Ginsberg noted: "[T]he term 'affirmative action' is common and well understood. Its presence in everyday parlance shows that people understand the difference between good intentions and bad." The author believes, however, that the more accurate meaning of the term "affirmative action" has been lost and replaced by individual impressions, not of what affirmative action is, but of how affirmative action affects people's lives.

Darlene C. Goring, Silent Beneficiaries: Affirmative Action and Gender in Law School Academic Support Programs, 84 Ky. L.J. 941, 943 n.6 (1996) (citations omitted) (alterations in original). This ad hoc nature is reflected in a functional and policy-based approach to the subject. One author reports that

former Chairman of the United States Commission on Civil Rights, Republican Arthur S. Flemming was asked: "What do you mean by affirmative action, and why do you feel that it is important?" His response suggested that in the public sector affirmative action has both functional and policy meanings. The functional application of affirmative action usually consists of curing a wrong after a court or administrative body has found or adjudicated liability. The policy meaning of affirmative action is derived from a determination by a public body that inequity exists in public programs that the public body chooses to cure as a condition for private participation in such programs. Another kind of affirmative action program is that administered by private companies. These programs help avoid litigation by allowing companies to remedy their own misconduct.


Before we can discuss the issue of affirmative action, it is important to define the term, which can mean many things. If it is defined as increased recruitment efforts and outreach programs targeted toward minority or other disenfranchised communities, I am in full support of affirmative action. Likewise, if it means strict enforcement of anti-discrimination laws, I also have no problems. However, affirmative action does trouble me when it specifically adopts racial and ethnic group preferences—particularly in the public sector and in education.

the nature of the legal question, issue, or phenomenon which is examined under the guise of affirmative action disputes.

In the literature, the lack of a clear, conceptual rendering of what is affirmative action is especially disturbing. Legal scholarship’s niche is its careful analysis of the legal issues related to particular social phenomena. In the case of affirmative action, commentators continue to treat affirmative action as a social phenomenon, without an independent legal character, and around which legal issues arise, even as they talk about affirmative action as though its legal character were well delineated. In other words, affirmative action is described rather than analyzed in an effort to set up an analysis of legal issues like standing, equal protection, or constitutional remedies. While this might seem a bit obscure and piddling a criticism, it is actually the portal to understanding severe consequences for “affirmative action law,” such as it is.

The lack of a serious conceptual definition of affirmative action prejudices commentators against such policies. It casts affirmative action against legal and moral principles which are given, in contrast, serious analytic attention. The most prominent case of this tendency is the moral evaluation of affirmative action, which generally asks whether affirmative action is consistent with the equality principle. The undefined former is compared with the well-examined and more clearly demarcated latter. Affirmative action, thus treated, becomes a departure from the serious and accepted principle of equality—or equity, or antidiscrimination, etc.

More importantly, the lack of an analytic examination of affirmative action obscures what is really at stake in the affirmative action debate. Attacks on affirmative action constitute attacks on and a step toward the delegitimation of antidiscrimination law in toto. This is an ironic characterization, given that opponents of affirmative action ordinarily invoke the antidiscrimination principle to support their assault on affirmative action. However, this aspect of affirmative

Consequently, many cast their definitions in terms which are suspicious of their supposed opponent’s motives:

White Americans have increasingly begun to call any government policy that helps blacks even slightly more than whites affirmative action. If affirmative action is defined that broadly, no policy that changes the relative position of black people will be seen as appropriate. The opposition to affirmative action is not built on unfairnesses to whites, but on opposition to changing the status of black people in this country.

action debates becomes readily apparent when affirmative action is understood for what it is—disputes over discrimination in contexts where discrimination itself is difficult to prove.

The root problem is in the Courts’ definition of affirmative action, however. A survey of the Court’s approach to affirmative action reveals a jurisprudence built on a tremendous, unexamined assumption—that affirmative action constitutes discrimination. Because the Court has not examined this assumption, its affirmative action decisions are packed with troubling implications for an antidiscrimination law which has grown away from the simplistic conceptions of discrimination that predominated in the early 1970s when affirmative action cases were first presented to the courts. These problems are not remedied in the literature which has treated affirmative action as though it were not a legal question so much as a policy issue. This is because, despite some hedging on the question, legal scholars have also accepted, unexamined, the assumption that affirmative action constitutes discrimination.

A. Affirmative Action in the United States Supreme Court

Justice O’Connor’s says in *Grutter*:

We are mindful, however, that “[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.” Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that governmental use of race must have a logical end point. The Law School, too, concedes that all “race conscious programs must have reasonable durational limits.”

Justice O’Connor is talking about the duration of affirmative action plans. However, the passage is revealing for what it says about the Justice’s view of affirmative action. Her initial characterization of the program in question and her impressive list of synonyms for that program reveals that she (and the Court) clearly think they are

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deciding a "discrimination" case.\textsuperscript{23} Discrimination here is "racial classification." Discrimination is also equated with "use of race," as it is, in turn, "race conscious programs." In short order, Justice
O'Connor summarizes the problem of affirmative action in the courts: courts strongly hold that any race conscious program, any use of race, and any racial classification constitute discrimination.\textsuperscript{24} In what way do these potentially quite different acts constitute discrimination? The courts rarely say.

Indeed, the Court does not seem to treat affirmative action, whether governmental or private, as it does other discrimination cases, where proof of an act motivated by race must generally be linked to harm caused by that act.\textsuperscript{25} As Professor Selmi points out, this practice in "facially discriminatory" cases is mostly the product of an assumption that the practices are discriminatory:

For facially discriminatory practices and policies, the element of intent is inferred from the language, and the Court engages in no additional inquiry to determine whether the statute or policy was discriminatory. Consequently, in the cases involving facial discrimination, the Court turns its attention to the question of whether the intentional use of race or gender was permissible. These cases, however, arise infrequently and are now generally confined to either the race-based affirmative action context or to gender-specific practices . . . .\textsuperscript{26}

In Grutter, the lower courts mostly assumed the case represented discrimination and proceeded to analyze its justification.\textsuperscript{27} But this was neither necessary nor proper.

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\textsuperscript{23} In fact the plaintiffs style their claim as such and all the courts designate the case a discrimination case. See Grutter v. Bollinger, 137 F. Supp. 2d 821, 824 (E.D. Mich. 2001), rev'd, 288 F.3d 732 (6th Cir. 2002), aff'd 123 S. Ct. 2325 (2003). This Article's claim is that, despite this, the courts do not actually analyze affirmative action claims as discriminatory but instead assume the strong proof of intent (use of the classification) constitutes discrimination.

\textsuperscript{24} See Grutter, 123 S. Ct. at 2369.


\textsuperscript{26} Selmi, supra note 25, at 290.

\textsuperscript{27} Analyzing the case under Title VI, the trial court held that discrimination required the plaintiff to show that government action "intended to treat similarly situated persons differently on the basis of race." Grutter, 137 F. Supp. 2d at 855 (quoting Hopwood v. Texas, 78 F.3d 932, 957 (5th Cir. 1996). It then found that there was "no doubt" that the Law School "treats [applicants] differently on account of their race." Id. (quoting Hopwood, 78 F.3d at 957). On the constitutional issue the court duplicated the equation of classification with discrimination. See id. at 848-49 (discussing Supreme Court precedent dealing with the constitutionality of affirmative action programs).

Despite its confidence, the trial court's conclusions are curious, if not simply wrong. Although it emphasizes that societal discrimination is not a justification for affirmative
Throughout the Grutter decision, the Court discusses the “discrimination” in the case without much mention of the plaintiffs’ injury and how that was connected to the plan in question. In fact, much of the discussion in the case concerns how nonparty minority applicants in the case were benefitted by the plan in question, as though benefit to third parties necessarily constituted harm to the plaintiffs. What is most unusual, however, is that it is commonplace, even normal, that affirmative action debates fundamentally become discussions about unjust enrichment of black and other minority beneficiaries of the programs.

Affirmative action plans are assumed to be discriminatory with little further inquiry. The policy and legal debates that ordinarily would be discussed in the process of determining whether discrimination exists are transported to debates over strict scrutiny. This is, of course, consequential because it shifts the burden of proof from the plaintiffs challenging the plans to the government or private employer defending it. But more than this, the shift departs sharply from the courts’ approach to other discrimination claims where plaintiffs must show more. This structure is rooted in the equation of

action, see id. at 868-69, presumably focusing the analysis of discrimination in the case on individual behavior, little of its discussion focuses on the plaintiffs in the case. Instead, the trial court’s opinion goes on and on discussing the benefits and costs of affirmative action plans on its intended beneficiaries who appear in the case only as intervener defendants. See id. at 855-63. This criticism is not an objection to the plaintiffs’ standing. Rather, it is aimed at pointing out that the trial court’s opinion barely discusses the key issue at bar: did the university’s admissions policy exclude the plaintiffs?

28. Represented by minority student interveners.
30. In employment discrimination law a similar approach is taken in so-called “direct evidence” cases. In those cases evidence of discriminatory intent or prejudice is employed to answer the key question of use of the protected category.

The most obvious way of showing an unlawful employment practice is to offer “evidence that can be interpreted as an acknowledgment of discriminatory intent by the defendant or its agents . . . .” When produced, such “direct” evidence will without more ordinarily suffice to show that an adverse employment condition, or limitation on an employment opportunity, was imposed “because of” the plaintiff’s protected group characteristic—that is discrimination is presumed from the admission of evidence deemed “direct.”

Harold S. Lewis, Jr. & Elizabeth J. Norman, Employment Discrimination Law and Practice § 3.2, at 115 (2001) (footnote omitted). However, courts tend to go beyond this showing to ask whether use of the protected category caused the plaintiff’s adverse employment outcome. As Harold Lewis and Elizabeth Norman note:

Circuit opinions sometimes define direct evidence as evidence that, if believed, would prove the existence of the fact without inferences or presumption. Others
"use of race" with discrimination, a formulation firmly rooted in *Regents of the University of California v. Bakke.*

*Bakke* influenced subsequent United States Supreme Court affirmative action cases in at least three ways. First, in constitutional cases racial classification is regarded as the basis for heightened scrutiny. Second, the debates among the justices turn on the level of scrutiny the cases should receive. And, third, the determinative factor in the cases seems to be the effect of the affirmative action plan on "innocent victims." The ironic consequence of these aspects of

subscribe to an "animus" position that deems any kind of evidence "direct" if it is tied to, that is directly reflects, the alleged discriminatory animus. This approach is hospitable to circumstantial evidence, but excludes evidence of "stray" remarks not sufficiently tied to the challenged decision as to shed light on the employer agent's intention in making it. Still other circuits, the "animus plus" courts, have insisted not just on evidence of animus but also that the statements reflecting animus bear squarely on the contested employment decision.

*Id.* § 3.2, at 115-16 (footnotes omitted). Although Lewis and Norman, along with the courts they cite, use intent and animus as the key factors in these cases, causation is evidently what they are talking about. Professor Selmi clarifies:

What the Court means by intent is that an individual or group was treated differently because of race. Accordingly, a better approach is to concentrate on the factual question of differential treatment. In this way, the key question is whether race made a difference in the decisionmaking process, a question that targets causation, rather than subjective mental states.


*31.* 438 U.S. 265 (1978) (plurality opinion). The influence of *Bakke* perhaps derives from the facts that the case was well briefed and argued, that *Bakke* set the law for the area, and that its specific character

represented an astute political compromise, one that was neither steeped in legal precedents nor concerned with questions involving the original intent, or purpose, of the Fourteenth Amendment. What has given [Powell's] opinion such lasting force was his—and ultimately the Supreme Court's—willingness to compromise on matters involving affirmative action. In contrast, the participants in the debate themselves have never been so willing, and Congress has likewise never been eager to enter the fray. Only the Supreme Court, with its mandate to decide cases, has been able to forge a compromise position.


*32.* *See Bakke,* 438 U.S. at 291.

*33.* *See id.*

*34.* Samuel Issacharoff says of *Bakke*:

[T]he debate over affirmative action has been saddled with the analytic concepts inherited primarily from *Bakke*, and to a lesser extent from the employment affirmative action cases of the 1980s. These cases drew an analytic divide between what Justice Powell decried as impermissible quotas and the more elusive, but acceptable, goals and timetables pointing toward an integrative future. Critics of
affirmative action jurisprudence is that in most cases the Court is heavily concerned with the effects of affirmative action plans on their intended beneficiaries and spends little time discussing the injury of the plaintiffs, much less addressing whether the plaintiff’s claims constitute discrimination in the ways defined by its nonaffirmative action jurisprudence. This is in spite of the Court’s insistence throughout that the Fourteenth Amendment governs individual rights, not group rights.

1. *Bakke* and the Equation of Discrimination with Use of Race

   Justice Powell’s consequential and influential opinion in *Bakke* takes for granted that any use of race constitutes discrimination which must be justified (according to strict scrutiny) if constitutionally permissible. This strange equation saps discrimination analysis of its crucial focus on injury and causation. Moreover, the shift to an assumption that use of race equals discrimination has come to structure affirmative action litigation and distort the role of strict scrutiny in the process. Consequential though it has been, the shift is rooted heavily in Powell’s decision writing, for as it turns out the *Bakke* court below analyzed the case in terms that address both injury and causation.\(^{35}\) Powell simply, and disastrously, failed to properly engage the question.

affirmative action programs tried to score quick victories by decrying all race-conscious programs as quota-driven and thereby triggering the constitutional prohibition inherited from *Bakke*. Supporters of affirmative action denied charges of positions or slots expressly set aside for minorities, and thereby sought the blessing conferred by Justice Powell’s favorable invocation of the Harvard Plan attached as an appendix to the *Bakke* opinion.

This battle of labels allowed the debate over affirmative action to take place at a highly abstract level of first constitutional principles, one that in turn cemented the role of *Bakke* in removing from the public eye the actual mechanisms by which a mild form of purposeful integration of higher education could proceed. Both sides in the debate had some interest in maintaining the curious abstractness of the arguments for and against. Conservative critics of affirmative action could claim to be nothing more than proponents of a color-blind ideal without responsibility for the consequences of the wholesale abandonment of affirmative action that their triumph would necessitate. Defenders of affirmative action, on the other hand, could cling to what Deborah Malamud has aptly characterized as “the polite silence that had for so long made it possible simultaneously to support affirmative action and deny how white our institutions would look without it.”


\(^{35}\) “The [trial] court concluded that the program constitutes invidious discrimination in favor of minority races and against Bakke and others whose applications were evaluated under the regular admission procedure, in violation of their rights under the Fourteenth
Amendment to the United States Constitution.” Bakke v. Regents of the Univ. of Cal., 553 P.2d 1152, 1159 (Cal. 1976) (en banc), aff'd in part & rev'd in part, 438 U.S. 265 (1978). The trial court refused to order Bakke's admission to the Medical school, finding he had not shown that he was excluded because of the program. Bakke, 438 U.S. at 270. The California Supreme Court also found discrimination in the special admissions program, but it ordered Bakke admitted. See id. at 270-71. Unlike the United States Supreme Court, however, the California Supreme Court focused on intent, injury, and causation, in coming to its conclusion. The California Supreme Court began by noting that the special admissions program had generalized racial effects:

It is plain that the special admission program denies admission to some white applicants solely because of their race. Of the 100 admission opportunities available in each year's class, 16 are set aside for disadvantaged minorities, and the committee admits applicants who fall into this category until these 16 places are filled. Since the pool of applicants available in any year is limited, it is obvious that this procedure may result in acceptance of minority students whose qualifications for medical study, under the standards adopted by the University itself, are inferior to those of some white applicants who are rejected.

Bakke, 553 P.2d at 1161 (footnote omitted). The court noted that “the fact that not all whites are excluded because of their race does not mean that some of them do not suffer such discrimination.” Id. at 1161 n.11. The court then acknowledged that the key question was not whether the program harmed white applicants generally, but whether they harmed Bakke: “In any event, Bakke alleges that he was excluded because he was white, and that the special admission program is unconstitutional for that reason; it is to this issue which we must address ourselves.” Id.

In deciding whether the program discriminated against Bakke, the court looked to whether the program caused Bakke's rejection. Bakke's rejection was based on both objective and subjective factors, but the California Supreme Court dismissed the notion that the subjective factors were significant. In doing so it made it possible to show that Bakke was rejected because of the special program. With the test scores and GPA as a guide, the court said:

The rating of some students admitted under the special program in 1973 and 1974 was as much as 30 points below that assigned to Bakke and other nonminority applicants denied admission. Furthermore, white applicants in the general admission program with grade point averages below 2.5 were, for that reason alone, summarily denied admission, whereas some minority students in the special program were admitted with grade point averages considerably below 2.5. In our view, the conclusion is inescapable that at least some applicants were denied admission to the medical school solely because they were not members of a minority race.

The fact that all the minority students admitted under the special program may have been qualified to study medicine does not significantly affect our analysis of the issues. In the first place, as the University freely admits, Bakke was also qualified for admission, as were hundreds, if not thousands of others who were also rejected. In this context the only relevant inquiry is whether one applicant was more qualified than another. Secondly, Bakke alleged that he and other nonminority applicants were better qualified for admission than the minority students accepted under the special admission program, and the question we must decide is whether the rejection of better qualified applicants on racial grounds is constitutional.

The issue to be determined thus narrows to whether a racial classification which is intended to assist minorities, but which also has the effect of depriving those who are not so classified of benefits they would enjoy but for their race, violates the constitutional rights of the majority.
Bakke had been denied admission to medical school at the University of California's Davis Medical School. As Justice Powell's *Bakke* opinion indicates, the California Board of Regents did not appeal the trial court's finding that they bore the burden of proof that the discriminatory program was justified. While this is not exactly the same as saying the defendants did not appeal the finding of discrimination, it does seem to lead Justice Powell to gloss over whether the program in question was discriminatory. Instead, he focuses almost exclusively on evaluating the proffered justifications for the special admission program.

What discussion Powell offers on discrimination is confused and concludes, somewhat contradictorily, by arguing that discrimination is found on racial "classifications." In a long discussion of why Title VI of the 1964 Civil Rights Act incorporated the constitutional standard of the Fourteenth Amendment, Justice Powell hints at his view of discrimination. He argues that discrimination under Title VI is subjected to varying interpretations, is similar to constitutionally defined discrimination, and, despite some support for a "color-blind" definition of discrimination, the statute embraces a less narrow view that must be drawn from the "context" under which the statute was

*Id.* at 1161-62. There are abundant problems with the California Supreme Court's analysis. But it does, in any case, focus on how the special admissions program caused Bakke's rejection. Despite its very generalized last paragraph, the court took seriously the showing that Bakke was injured at the hands of the state.

Only after this analysis did the California Supreme Court turn to whether "racial classifications" can be justified. *Id.* at 1162. While this surely constituted a mixed approach, the court at least engaged the question of causation.

37. *Id.* at 275.
38. *Id.* at 279 n.12; see *Bakke*, 553 P.2d at 1159.
39. *Bakke*, 438 U.S. at 280 n.13; see Bakke, 553 P.2d at 1172.
40. It may also be that this failing was due to the defendants' conduct. Though there were apparent causation problems with Bakke's claim, these issues were effectively waived by the University "when it stipulated that Bakke would have been admitted absent consideration of race." Selmi, *supra* note 31, at 986.
41. See *Bakke*, 438 U.S. at 305-20.
42. See *id.* at 289-90.
43. *Id.* at 284-87.
44. *Id.* at 284.
45. *Id.*
46. *Id.; see also id.* at 284 n.19.
enacted”—that is, the race-conscious context under which the statute was enacted.48

The context through which Title VI's concept of discrimination must be understood included, for Justice Powell, “discrimination against Negro citizens,” the “evils of segregation in federally funded programs,” and the “plight of Negroes seeking equal treatment in such programs.”49 This context is then dismissed by Justice Powell, even as he invoked it to equate Title VI with the Fourteenth Amendment, as he says “[t]here simply was no reason for Congress to consider the validity of hypothetical preferences that might be accorded minority citizens.”50 Notwithstanding the fact that the federal government operated some limited affirmative action programs at the time Congress enacted Title VI—which might have implied that Congress had considered the validity of such programs—Justice Powell's reading effectively casts Title VI as a blank slate onto which he can impose a view of discrimination. The problem is that his rendering of discrimination, drawn presumably from his view of the Fourteenth Amendment, never takes shape.51 He concludes his Title VI discussion, arguing that the standard for discrimination Title VI presumably shares with the Fourteenth Amendment “is to give fellow citizens—Negroes—the same rights and opportunities that white people take for granted.”52

Justice Powell's constitutional discrimination contradicts the “context” he says informed Title VI. He says that decisions “based on race” are “reviewable” under the Fourteenth Amendment, but not “all racial or ethnic classifications are per se invalid.”53 Thus the question is framed as the “level of judicial scrutiny to be applied to the special admissions program,” which he finds “undeniably a classification based on race and ethnic background.”54 Fourteenth Amendment “discrimination” is thus defined as “classification” based on race or ethnic background. Powell's explanation of this on the facts of Bakke emphasizes the segregatory nature of the classification: “white

47. Id. at 285.
48. Id.
49. Id.
50. Id.
51. See id. at 284 (comparing the language of Title VI to the Equal Protection Clause). In fact, the Court was aware that black citizens had been demanding just such remedies as far back as 1948. Hughes v. Super. Ct., 339 U.S. 460 (1950).
53. Id.
54. Id. at 287, 289.
applicants could compete only for 84 seats . . . rather than the 100 open
to minority applicants. However, he summarizes the practice in
terms focusing on line drawing: "[I]t is a line drawn on the basis of
race and ethnic status." The gulf between segregation and
classification is much greater than Powell seems to realize.
Segregation supplies a causal element, in that any injury suffered is
linked to the classification that separates workers, applicants, and
people. Mere classification may or may not be causally linked to
cognizable injury. Justice Powell ignores this difference.

Justice Powell further distinguishes this "definition" of
discrimination from disparate impact, highlighting that he regarded
his discussion of the Fourteenth Amendment applied to the Bakke
facts as a definition of discrimination on par with the theories of proof
established in employment discrimination cases: "This is not a
situation in which the classification on its face is racially neutral, but
has a disproportionate racial impact." More than just elevating his
vague discussion of discrimination to the level of employment
discrimination theories, Justice Powell's language indicates that the
"discrimination" in Bakke is facial discrimination which obviates the
plaintiff's obligation to "establish an intent to discriminate." This is
surely correct, but says nothing of any causal connection between
intentional use of race and injury. For Bakke the answer to the
causation question is readily available—the segregation of the medical
school applications according to race links Bakke's injury (incomplete
consideration of his application) to the racial intent (the facial use of
race). Because for Justice Powell use of race is defined as equal to
discrimination, he can say that the "program involves a purposeful,
acknowledged use of racial criteria," with the verve that he had just
located an admission of discrimination.

Thus the structure of the discrimination argument about
affirmative action is set out. Most of the focus and debate at the time
of Bakke and up until Croson had been on the nature of intent. Justice
Powell's Bakke decision held that discriminatory intent need not be
shown because the categorization is facial. However, this "finding" is
unremarkable and superfluous; there is actually little dispute that

55. Id.
56. Id.
57. See Rubenfeld, supra note 29, at 458-62.
58. Bakke, 438 U.S. at 289.
59. Id. at 289 n.27 (emphasis added)
60. Id.
61. Id.
affirmative action programs reflect discriminatory intent. The question is whether a particular program causes cognizable constitutional harm. The language in Bakke focusing on intent goes to the argument that the Fourteenth Amendment should not treat programs aimed at benefitting minorities and those aimed at harming them differently. The need to address that question comes from the widely understood fact that the civil rights revolution in law was triggered, as Justice Powell’s Title VI discussion acknowledged, by an intent to aid minorities, especially black Americans. So it is reasonable to assume that the distinction between malign and benign uses of race is crucial to defining discrimination. Unfortunately, the “semantic distinction is beside the point.”

Justice Powell’s view of the specific harm found below in Bakke obviated the need for a more careful definition of discrimination. He noted that “[t]he court below found—and petitioner does not deny—that white applicants could not compete for the 16 places reserved solely for the special admissions program.” This characterization establishes “causation.” That is, the program led to Bakke’s exclusion from the medical school class because he was excluded from competing for the special admissions program which were segregated on the basis of race. Of course, in a broader view Bakke had not shown that he would have been admitted but for the special admissions program. That is, Bakke is in part a decision on causation because it decides that the causal offense is the exclusion of white applicants from the special admissions program as opposed to the creation of the program. This distinguished Bakke from United Steelworkers v. Weber decided a year later. The program in Weber was created to increase opportunity for all workers but set aside some of those new opportunities for previously excluded black workers. In the end, even

62. The only debate is over whether there exists a constitutionally relevant distinction between “benign” and “malignant” intentional use of race.

63. This argument is often unduly dismissed. Because discriminatory intent analysis is not a true civil “intent” focus (all government action subject to constitutional challenge is “intentional” behavior in the tort sense), the focus of the inquiry is already on the nature of the purpose underlying the action. As the quality of the government’s purpose is in question, it is not irrational to distinguish permissible and impermissible programs on the basis of the nature of their purposes. This question remains misplaced (however much it has dominated discussion of affirmative action) because it points discussion away from the legal issues and toward a policy conception of the question.

64. See id. at 284-87.

65. Id. at 289.

66. Id. at 288 n.26 (citing Bakke v. Regents of the Univ. of Cal., 553 P.2d 1152, 1159 (Cal. 1976) (en banc), aff’d in part & rev’d in part, 438 U.S. 265 (1978)).

the *Bakke* program might have been justified under certain views of strict scrutiny or if, as the dissent argued, such programs were subjected to lighter scrutiny. 68 Nevertheless, the key issue, which *Bakke* should not have ignored, concerned just what about the special admissions program constituted discrimination.

It may be that Justice Powell was not even trying to talk about discrimination, as such. Indeed, he said that Fourteenth Amendment strict scrutiny is applicable whenever race is used, presumably even if it causes no harm whatsoever. In particular he said, "[r]acial and ethnic *classifications*, however, are subject to stringent examination without regard to these additional characteristics [whether a racial group constitutes a discrete or insular minority]." 69 This suggests that "discrimination" under the Fourteenth Amendment might be defined to *include* the strict scrutiny analysis, as opposed to that analysis being triggered by a preliminary finding of discrimination—at least in affirmative action cases. In such a case, it would seem that the ambiguity in *Bakke* derives from post-*Bakke* understandings of affirmative action as discrimination in need of justification.

Justice Powell finds support for his construction in the landmark cases of *Hirabayashi v. United States* 70 and *Korematsu v. United States*, 71 though the language he quotes is from only *Hirabayashi*. That case noted, "*Distinctions* between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." 72 *Hirabayashi*'s use of the term "distinction" adds to the view that Fourteenth Amendment discrimination is defined by mere classification, even if the classification is not causally connected to any harm. Justice Powell's quote from *Korematsu*, on the other hand, seems on the verge of anticipating a harm and causation requirement: "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny." 73 This language implies that racial classification (singling out a race) must *cause* a deprivation of civil rights, or presumably at least cause some recognized harm. Perhaps Justice Powell was reading

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68. See *Bakke*, 438 U.S. at 357 n.30, 361-62 (Brennan, J., dissenting).
69. *Id.* at 290 (emphasis added).
70. 320 U.S. 81 (1943).
71. 323 U.S. 214 (1944).
72. *Hirabayashi*, 320 U.S. at 100 (emphasis added & internal quotations omitted), quoted in *Bakke*, 438 U.S. at 290-91.
such a requirement out of Korematsu. In any case, he invoked the two cases to proclaim that classification is discrimination—"Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination"—seeming to ignore the more complicated implications of the Korematsu dicta he quotes.

The irony is that Powell's flippant equation of classification with discrimination emerged in his effort to cabin Fourteenth Amendment analysis on "legal" rather than "variable sociological and political analysis"—even as he failed to articulate a "legal" definition of discrimination which addresses act, intent, cause, and damage. Justice Powell waived on intent, at times embracing general intent to act as a means to escape the malign/benign distinction, but at other times speaking as though classification on the basis of race equals malign intent. In either case, Justice Powell assumed classification causes damages by drawing on the historical circumstances of segregation.

Perhaps it is unfair to read so much positive theory into Justice Powell's refutation of the malign/benign distinction, because he seemed to reveal his view of damage and causation. That is, he suggested generally that the harm of "benign" categories follows from individual group members being burdened in order to benefit their group, the individual suffering because his achievement is discounted because of the reinforcement of "common stereotypes," and innocent victims having to bear the responsibility of "redressing grievances not of their making." But as a definition of damage and causation this argument is misplaced, not least because the first two points involve nonclaimants, indeed beneficiaries of the challenged plan. The level of abstraction is great, distorting any conclusions about Justice Powell's view of cause and damage. Each of these "harm" are better

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74. The language is important because it turns on harm to the group, rather than requiring a showing of harm to the individual. Thus it might establish that classification of a group is sufficient to trigger strict examination without any showing of individual harm. On the other hand the facts of Hirabayashi and Korematsu were sufficiently unique to cast doubt on such a reading. A showing of individual harm was unnecessary in those cases as the harm to the plaintiffs was obvious and obviously caused by the Japanese curfew and internment orders, respectively. See Korematsu, 323 U.S. at 216; Hirabayashi, 320 U.S. at 83.

75. Bakke, 438 U.S. at 291. Justice Powell clearly believed that classification equals discrimination, and calls it so much, see id. at 294 n.34, even if the overt link between these notions comes as an effort to divine a distinction between benign and malignant uses of race.

76. Id. at 297.

77. Id. at 284-87 (discussing the standard for a Title VI cause of action).

78. Id. at 298.

79. Id.

80. Id.

81. Id.
viewed as second-order consequences of racial classifications than as
delimiting the bases for the finding of discrimination. Ought not
individuals who are subjects of racial classifications have to show
more specific harm caused by classification to establish
discrimination?

Justice Powell does not give a specific answer. Rather his
discussion reinforces the structure implied earlier by becoming more
general. Focusing on the nature of the political process, Justice Powell
says:

Political judgments regarding the necessity for the particular
classification may be weighed in the constitutional balance, but the
standard of justification will remain constant. This is as it should be,
since those political judgments are the product of rough compromise
struck by contending groups within the democratic process. When they
touch upon an individual's race or ethnic background, he is entitled to a
judicial determination that the burden he is asked to bear on that basis is
precisely tailored to serve a compelling governmental interest.82

This is the "right" the Fourteenth Amendment protects according to
Justice Powell.83

Despite Justice Powell's emphasis on individualized consideration
as the goal of Fourteenth Amendment analysis, his own discussion of
discrimination forsook any such approach. Rather, his Bakke opinion
talked of classification by the government as equivalent to
discrimination without ever saying what harm an individual must
experience or show. His only references were to generalized effects of
classification, some of which might occur independent of any
individual harm from the government behavior,84 the others of which
are independent of the harm that might be shown. All one can take
away from Bakke is the view that classification is a constitutional
harm itself.85 In affirmative action cases, the role of this argument has
been substantial. Nevertheless, it represents a sharp departure from
the Court's treatment of discrimination in other areas and the Court's
emergent employment discrimination jurisprudence at the time Bakke

82. Id. at 299 (footnote & citation omitted) (citing Korematsu v. United States, 323
U.S. 214 (1944)).
83. Id. (citing Shelley v. Kraemer, 334 U.S. 1, 22 (1948); Missouri ex rel. Gaines v.
Canada, 305 U.S. 337, 351 (1938)).
84. Consider Powell's impression of beneficiaries of affirmative action suffering. Id.
at 298.
85. Professor Jed Rubenfeld and Professor Michelle Adams are both strongly critical
of this approach. See Michelle Adams, The Last Wave of Affirmative Action, 1998 Wts. L.
Rev. 1395, 1436-45; Rubenfeld, supra note 29, at 434-35.
was decided. It begs the question whether the Powell approach was perhaps mandated by prior decisions, particularly those cited by Powell.

2. Pre-\textit{Bakke} Constitutional Definitions of Discrimination

Justice Powell's opinion in \textit{Bakke} is crucial because, contrary to what might be thought at this late date, the Court's civil rights decisions prior to \textit{Bakke} were mostly unclear as to what constituted discrimination, outside of the employment discrimination area.\textsuperscript{86} Indeed, Justice Powell's opinion is not completely out of line with those earlier cases when it treats use of race as triggering the Court's heightened analysis.

The Court's early approach to defining discrimination focused on identifying purposeful acts \textit{causing} bad effects, an approach made necessary by the fact that segregation was not deemed unconstitutional.\textsuperscript{87} Thus, in \textit{Yick Wo v. Hopkins} the Court found that a neutral law can be discriminatory if applied in a prejudicial way (with an "evil eye") to cause harm (affect "material rights").\textsuperscript{88} Thus \textit{discrimination} followed from the singling out of Chinese laundries and prohibiting their operation.\textsuperscript{89} It is after this finding, which the paragraph below calls discrimination, that the Court concerned itself with possible justification—which it finds lacking because of the force of the ill motive underlying the application of the regulation of cleaners.

And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except

\begin{itemize}
\item \textsuperscript{86} Also, his is the only of the plurality opinions to address the constitutional question. For the understanding of discrimination prior to \textit{Bakke} in employment discrimination cases, see \textit{Griggs v. Duke Power Co.}, 401 U.S. 424, 425-36 (1971); and McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-07 (1973).
\item \textsuperscript{87} \textit{See} Civil Rights Cases, 109 U.S. 3 (1883).
\item \textsuperscript{88} 118 U.S. 356, 373-74 (1886): Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.
\item \textsuperscript{89} \textit{See id.} at 374.
\end{itemize}
hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. 90

_Yick Wo_ represented more than mere classification. Rather, it was classification which caused material harm. This fact is obscured somewhat by the Court’s heavy focus on whether a “neutral” statute could violate the Constitution as well as the Court’s emphasis on the “hostility to the race” as a basis for making the “discrimination” illegal. 91

Years later, in dealing with Jim Crow practices, the Court found discrimination in _inaction_ which relied on Jim Crow social conventions to deny black Americans’ rights. Reviewing a Texas prosecution which systematically excluded black citizens from juries, the Court stated:

Discrimination can arise from the action of commissioners who exclude all negroes whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve. In such a case, discrimination necessarily results where there are qualified negroes available for jury service. With the large number of colored male residents of the county who are literate, and in the absence of any countervailing testimony, there is no room for inference that there are not among them householders of good moral character, who can read and write, qualified and available for grand jury service. 92

There was no question there existed causation and injury in this construction. The injury was caused by the reliance on Jim Crow mores to ensure that the jury remained segregated. 93 Of course, the context makes the causal link a bit attenuated; however, it is clear from the passage that the Court sees a causal connection between the commissioners’ inaction and the absence of black jurors. “[D]iscrimination necessarily results where there are qualified negroes available for jury service.” 94

The Court’s shift to its current construction seemed to occur in _Hirabayashi_, the case which Justice Powell drew upon to support his _Bakke_ construction. In _Hirabayashi_ the Court stated:

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90. _Id._
91. _See id._ at 368, 373-74.
93. _Id._ at 401-03.
94. _Id._ at 404.
Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.  

Thus, the court equates “distinction,” “classification,” and “discrimination.” Despite the citation to Yick Wo and Hill, the construction of discrimination in those cases (focusing on injury, causal connection, and harm) is abandoned. Instead the offending behavior is reduced to mere classification. This is perhaps because, unlike those cases, where the construction was used to identify illegal discriminatory behavior, this passage in Hirabayashi is a prelude to justifying the shameful and obviously discriminatory imposition of a Japanese-specific curfew.

We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas.

That is, the Court believed that,

[b]ecause racial discriminations are in most circumstances irrelevant and therefore prohibited, it by no means follows that, in dealing with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which are relevant to measures for our national defense and for the successful prosecution of the war, and which may in fact place citizens of one ancestry in a different category from others.

The references to “distinction” and “classification” ought to be viewed in this context as euphemisms intended to obscure the harsh discrimination prior to justifying it. Rather than rehearse the injuries suffered and the weak justificatory basis for them, the Court softens them with vague terms that expand the scope of the cases beyond those troublesome facts. The Court establishes a low threshold for triggering heightened scrutiny in Hirabayashi because the Court was

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95. Hill, 316 U.S. at 405-06; Yu Cong Eng v. Trinidad, 271 U.S. 500, 528 (1926); Hirabayashi v. United States, 320 U.S. 81, 100 (1943) (citing Yick Wo, 118 U.S. at 374.
96. This fact is emphasized by the Court’s insistence the next year that this justification for the relatively mild injury of house arrest could be extended to the much more extreme concentration of Japanese Americans in prison camps. See Korematsu v. United States, 323 U.S. 214, 220-24 (1944).
97. Hirabayashi, 320 U.S. at 100.
98. Id.
about to justify the race-specific curfew.\textsuperscript{99} Distinction and classification are terms that seem amenable to justification; discrimination, read as including the element of racial prejudice, seems not to be justifiable. Thus, in \textit{Korematsu} a year later, the Court went to pains (challenging credulity) to deny that the relocation of Japanese Americans was informed by racial prejudice:

Korematsu was not excluded from the Military Area because of hostility to him or his race. He \textit{was} excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short.\textsuperscript{100}

The constructions in \textit{Hirabayashi} and \textit{Korematsu} turn out to be of crucial importance, as they distort the discussion of discrimination through \textit{Bakke} and on to today’s affirmative action cases. Four years after \textit{Korematsu}, the Court’s \textit{Shelley v. Kraemer} decision seems to return to the \textit{Yick Wo} construction of discrimination, implying that the racially restrictive covenants in question there caused the exclusion of black occupants of the homes covered by them.\textsuperscript{101} However, this is never clear because the Court’s main focus remains on whether court enforcement of the racially restrictive covenants constituted state action.\textsuperscript{102} The Court’s emphasis on “because of” seems, still, to support a causation focused construction:

\textsuperscript{99.} \textit{Id.} at 101.
\textsuperscript{100.} \textit{Korematsu}, 323 U.S. at 223-24.
\textsuperscript{101.} \textit{See} Shelley \textit{v. Kraemer}, 334 U.S. 1, 11-12 (1948).
\textsuperscript{102.} \textit{See id.} The Court stated:

\textit{It is likewise clear that restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance. We do not understand respondents to urge the contrary. In the case of \textit{Buchanan v. Warley}, a unanimous Court declared unconstitutional the provisions of a city ordinance which denied to colored persons the right to occupy houses in blocks in which the greater number of houses were occupied by white persons, and imposed similar restrictions on white persons with respect to blocks in which the greater number of houses were occupied by colored persons. During the course of the opinion in that case, this Court stated: “The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and}
We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color. The Fourteenth Amendment declares “that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color.”

In Loving v. Virginia, however, the jurisprudence becomes quite confused, and in no small part because of reliance on Hirabayashi and Korematsu. Loving initially refused to equate classification with discrimination, viewing the relationship between the two concepts as the question to be answered. “[T]he Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.” On the next couple of pages, however, any clarity was lost as the Court’s quotation of Hirabayashi and reference to Korematsu reintroduced the idea that it is classification and distinction that trigger heightened judicial scrutiny and, impliedly, describe discrimination. The Court stated:

There can be no question but that Virginia’s miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated “[d]istinctions between citizens solely because of their ancestry” as being “odious to a free people whose institutions are founded upon the doctrine of equality.” At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the “most rigid scrutiny,” and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial

Id. (citation omitted) (citing Buchanan v. Warley, 245 U.S. 60, 79 (1917)).
103. Shelley, 334 U.S. at 20-21 (footnote omitted) (emphasis added).
104. 388 U.S. 1 (1967).
105. Id. at 10.
discrimination which it was the object of the Fourteenth Amendment to eliminate. Indeed, two members of this Court have already stated that they "cannot conceive of a valid legislative purpose . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense."\footnote{106}

The year before Bakke, the confusion was complicated by the Court's refusal to view racial classification in reapportionment as a per se violation of the Constitution. In United Jewish Organizations of Williamsburgh, Inc. [UJO] v. Carey, the Court held that "neither the Fourteenth nor the Fifteenth Amendment mandates any per se rule against using racial factors in districting and apportionment."\footnote{107} Indeed, the UJO Court sounds as though it has gone back to requiring not just act, cause, and injury, but prejudice to sustain a constitutional violation.\footnote{108} This construction offers little by way of saying what

\footnote{106. Id. at 11 (citations omitted). The Court continues, finding the challenged prohibition unjustifiable: There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.}

\footnote{107. 430 U.S. 144, 161 (1977).}

\footnote{108. There the Court dismisses the deliberate use of race because of the lack of an intent to harm: There is no doubt that in preparing the 1974 legislation, the State deliberately used race in a purposeful manner. But its plan represented no racial slur or stigma with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment nor any abridgment of the right to vote on account of race within the meaning of the Fifteenth Amendment. It is true that New York deliberately increased the nonwhite majorities in certain districts in order to enhance the opportunity for election of nonwhite representatives from those districts. Nevertheless, there was no fencing out of the white population from participation in the political processes of the county, and the plan did not minimize or unfairly cancel out white voting strength.}

\footnote{Id. at 165. This construction foreshadows the Court's disposition in Personnel Administrator v. Feeney, 442 U.S. 256, 279-81 (1979).}
constitutes discrimination, much less identifying the potential claimants who might assert such a claim.

Unsurprisingly, then, the question of discrimination in the one affirmative action case predating *Bakke* was confused. Though the Court avoided deciding *Defunis v. Odegaard* on controversial mootness grounds, the lower court opinion there revealed the troubled state of Fourteenth Amendment jurisprudence on the question of discrimination.\(^{109}\) The Washington Supreme Court analyzed the case, predominately under the influence of *Brown I* and the secondary education desegregation cases then prominent.\(^{110}\) These decisions, it found, did not bar the use of race “where the purpose is to bring together, rather than separate, the races.”\(^{111}\) Having decided that race can be used, the court built on the desegregation law distinction between de jure and de facto discrimination in order to assess how the use of race should be analyzed.\(^{112}\) In this way the Washington Supreme Court meandered its way to a result not unlike Justice Powell’s in *Bakke*. It determined that addressing de facto discrimination (presumably caused by the state) gave the state a compelling government interest\(^ {113}\) to use race in a narrowly tailored way.\(^ {114}\) Like Justice Powell’s opinion in *Bakke*, it focused much of its discussion on how the plan impacted the plaintiff and other nonminority applicants.\(^ {115}\)

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111. *Defunis*, 507 P.2d at 1181. This language could be understood as an injury argument, defining what constitutional injury follows from government use of race. As such, it is surely a correct implication that persons required to attend integrated schools have suffered no constitutional harm even if the desegregation is based on race. However, this does not really address the claim of the plaintiff in *Defunis*; he can still be said to have been injured as he was not “brought together.” The court adds, however, that “we see no reason why the state interest in eradicating the continuing effects of past racial discrimination is less merely because the law school itself may have previously been neutral in the matter.” *Id.* at 1183. This last statement reflects a standard the United States Supreme Court would ultimately reject in school desegregation cases. See Miliken v. Bradley, 418 U.S. 717, 745 (1974).
112. *See Defunis*, 507 P.2d at 1183-85. The court found that in the case of de jure discrimination the use of race is required if necessary to make the plaintiff whole. *Id.* at 1179. In the case of de facto discrimination the court found that the use of race was permitted, but only if satisfying strict scrutiny. *Id.* at 1182-83.
113. *Id.*
114. *Id.* at 1183-85.
115. *Id.* at 1185-87. This analysis was couched in a discussion of whether the use of race was arbitrary and capricious. But it turned on the flexibility of the plan, its indirect effect on the plaintiff, and the import of a departure from rank ordering of the objective admissions criteria. *Id.*
The discussion departed sharply from the clear discrimination analysis of the trial court which the Washington Supreme Court summarized:

The trial court found that some minority applicants with college grades and LSAT scores so low that had they been of the white race their applications would have been summarily denied, were given invitations for admission; that some such students were admitted instead of plaintiff; that since no more than 150 applicants were to be admitted to the law school, the admission of less qualified students resulted in a denial of places to those better qualified; and that plaintiff had better "qualifications" than many of the students admitted by the committee.\(^\text{116}\)

This language shows the trial court's determination of discrimination was based on careful analysis of the facts, rather than a response to either the use of race alone or "classification" of some type. The racial classification here was found to have caused specific harm to the plaintiff.\(^\text{117}\) One can dispute the findings, taking issue with the precarious causal chain that links DeFunis's rejection to the admission of applicants who, if white, would have been rejected. Indeed, that someone else benefitted does not mean that their benefit in fact harmed the plaintiff. This is especially true given the nature of the admissions program.\(^\text{118}\) Moreover, one might take issue with the trial court's uncritical embrace of rank ordering as the basis for admission when the structure of the University of Washington plan rejected such use of LSAT and undergraduate GPA, even as applied to the general applicant pool.\(^\text{119}\) What is important, however, is that the trial court sought to show how DeFunis's injury (rejection of his application) was causally connected to the affirmative action plan in question.

Rather than addressing these cause and injury elements, the Washington Supreme Court conceived of the case in the generalized context of secondary school desegregation and sought justification for the use of race, such as supplied in that area in *Swann v. Charlotte Mecklenburg Board of Education*.\(^\text{120}\) The Washington Supreme Court

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116. Id. at 1176-77.
117. Id.
118. The trial court linked the benefit to the underqualified minority admits to DeFunis's rejection by emphasizing the limited number of seats. What it ignored is the flexible, multifactor admissions process which, even with more seats available, was unlikely to result in admission of DeFunis. Admission simply did not turn on the rank ordering of the objective criteria.
119. See id. at 1173-77 (discussing admissions procedures).
120. 402 U.S. 1, 25 (1971); see DeFunis, 507 P.2d at 1180-81 (discussing Swann).
might have wished to avoid difficult aspects of the University of Washington Law School admissions process—like their segregation of applications—and turned away from a discrimination analysis in order to uphold the affirmative action program. Or it may have felt that DeFunis was discriminated against, but justifiably so. In any case, its approach turned the affirmative action question away from a focus on discrimination and toward an assessment of the circumstances that might justify use of race. The decision suddenly ceased to be about Marco DeFunis and became about the minority admits with the LSAT/GPA combinations.

When, in *Bakke*, Justice Powell rejected societal discrimination (and therefore de facto discrimination) as a basis for justifying use of race, the only question was when use of race could be justified, if ever. The consequence would be the confused affirmative action jurisprudence that has existed since.

3. **Post-Bakke** Definitions of Discrimination in Affirmative Action Cases

The confusion of *Bakke* provided little guidance for subsequent decisions. Combined with the politically charged nature of affirmative action and the shadow of doubt *Bakke* cast on such programs, one might have expected an incomprehensible jurisprudence to emerge. On the contrary, the Court's affirmative action jurisprudence developed around the nature of the entity creating the program to create a coherent whole. *Bakke*'s assumption that such programs constituted discrimination remained an influential aspect of the jurisprudence and a prominent part of how opponents characterized them.

Following *Bakke*, the Court's decisions would come to turn on effects of plans on "innocent victims." Post-*Weber*, voluntary affirmative action cases came to turn on whether the plan in question unduly impacted "innocent victims" (did it cause injury?) and whether it was flexible enough to avoid creating a quota. Like *Bakke*, however, these inquiries were included in an analysis of the justification of behavior assumed to be discriminatory. In consent decree cases, the focus on effects on innocent victims, along with a concern about flexibility, came to characterize the programs. Since the consent decree implied some degree of culpable behavior, the strict need to prove discrimination was inappropriate and the focus on the effects on third parties unexceptional. Similarly, the Court's later discussion of its own powers to impose affirmative action remedies followed, by
definition, a finding of discrimination. It was appropriate then for the Court to limit its concern to the effects of its orders on innocent victims, at least after deciding the plan was necessary to remedy the plaintiffs' injuries.

a. Affirmative Action Remedies and Consent Decrees

For several of the Court's post-*Bakke* decisions, the discriminatory implications of the affirmative action plan were subsumed in well-documented or proven discrimination by the subject institution. The question in those cases turned, then, on whether affirmative action could be used in a consent decree or as a court ordered remedy if it effected nonminority incumbent workers or applicants. In these cases the structure of Justice Powell's analysis in *Bakke* is more clearly appropriate, turning as it does on what effect the plan has on "innocent victims."

In the 1984 decision, *Firefighters Local Union No. 1784 v. Stotts*, the Court was asked to decide whether an injunction prohibiting the City of Memphis from laying off workers according to the seniority system it had bargained with the applicant was proper. The City had just a year before the layoffs signed a consent decree to settle a Title VII suit alleging discrimination against black workers and applicants. The injunction was meant to preserve the gains made under the consent decree, but the Court found the injunction unjustified. It found that, because Title VII immunized bona fide seniority systems (which this one was), an affirmative action plan could trump a seniority system only for individual, proved cases of discrimination.

Although Justice White's opinion for the Court closely tracks the bona fide seniority system provision of Title VII, one can easily

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121. Two cases not discussed below are of some relevance. In *Local No. 93 International Ass'n of Firefighters v. City of Cleveland*, the Court rejected the implications of *Stotts*, upholding a consent decree that granted seniority benefits to individuals who were not identified victims of discrimination. 478 U.S. 501, 524-28 (1986). *But see* Martin v. Wilks, 490 U.S. 755, 761-69 (1989) (holding that incumbent workers affected by a consent decree may challenge the decree if they did not participate in the initial proceedings). And, in *United States v. Paradise*, 480 U.S. 149, 166-86 (1987), the Court upheld the power of courts to impose affirmative action as a remedy to discrimination, following *Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 480-81 (1986).


123. *Id.* at 565.

124. *Id.* at 564-67.

125. *Id.* at 577.

126. *Id.* at 577-82 (relying in part on Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 352 (1977)).

incorporate it into *Bakke*’s construction: it fails because of its harsh effect on “innocent victims.” 128 The plan involved layoffs, demotions, and loss of seniority by incumbent workers, especially highlighted by the City’s departure from the “last hired, first fired” principle incorporated in the collective bargaining agreement. 129 It therefore operated neither flexibly, nor with limited effect on “innocent victims.”

In 1986, the Court considered whether affirmative action could be used as a component of a court-ordered remedy in a class action. 130 *Stotts* played a role in *Local 28 of the Sheet Metal Workers’ International Association v. EEOC*, as the remedy was alleged to violate section 706(g), Title VII’s seniority system provision, which *Stotts* said could not be trumped by the modification to the consent decree. 131 The Court held that affirmative action “relief may be appropriate where an employer or a labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination.” 132 The decision can easily be said to turn on the recalcitrance of the defendants to complying with the district court’s prior remedial orders and the egregious nature of the discrimination that prompted those orders in the first place. 133 However, much of the decision is focused on the flexibility and limited nature of the affirmative action plan in the Court’s view. 134 Unlike *Stotts*, *Sheet Metal Workers* went beyond Title VII to discuss the propriety of the plan under the Fifth Amendment. 135 In deciding it did not violate the Fifth Amendment, the Court focused on the same factors of flexibility, necessity, duration, and impact on nonminority “innocent victims” it employed in discussing the Title VII claim. 136

This similarity to Justice Powell’s opinion in *Bakke* was apparently insufficient for Justice Powell, who rendered the key section of Justice Brennan’s opinion a plurality opinion by writing

129. See id.
131. Id. at 444-45, 471-75.
132. Id. at 445.
133. Id. at 476-77.
134. See id. at 475-79. The Court argued that the plan is flexible, see id. at 475-77, necessary to remedy pervasive and egregious discrimination, see id. at 476, turned on “benchmarks” rather than quotas, see id. at 477-78, was temporary, and did not unnecessarily trammel the interest of white employees, see id. at 479.
135. See id.
136. See id. at 479-81.
separately. In his opinion, Justice Powell added nothing, focusing on the egregious nature of the defendant's discrimination and resistance to prior remedial orders, as well as the effect on "innocent victims." Justice Powell's motivation, it seems, was solely to insist that these factors should be analyzed as components of strict scrutiny.

b. Discrimination and Voluntary Affirmative Action

The Court inaugurated its post-Bakke analysis of affirmative action with one of the most difficult cases in the area. In United Steelworkers v. Weber, the Court confronted an affirmative action challenge to a craft training program that had been negotiated between the employer and the workers' union. The program reserved half of its seats for black trainees, and the plaintiff claimed a violation of Title VII. Because the case was a Title VII case, the Court was freed from concerning itself with the consequences of its opinion on constitutional interpretation. Nevertheless, the case remained difficult because both the union and the employer had been recently found to have engaged in a pattern of discrimination at a nearby facility in the same state and because the program was created in anticipation of oncoming litigation.

In the end, the Court upheld the affirmative action program, finding that it was not inconsistent with Title VII. Crucial to this determination were the findings that Title VII encouraged voluntary remediation of illegal activity, that the plan did not unduly harm innocent victims, and that the program was limited in term.

The crucial finding, though not fussed about, was the determination that the program did not unduly impact innocent victims. Thus the most important fact in Weber was that the program was created solely to expand the pool of black workers possessing craft training, a pool that had been distorted by Kaiser and the union.

137. See id. at 483 (Powell, J., concurring).
138. Id. at 485 (Powell, J., concurring).
139. See id. at 486 (Powell, J., concurring).
140. See id. at 484-85 (Powell, J., concurring).
142. Id. at 197-200.
146. Id. at 201-02, 2-04, 208-09.
defendant’s previous discriminatory behavior. In this sense, *Weber*, and the later case, *Sheet Metal Workers*, are similar.

After *Weber* the key determinant for evaluating affirmative action plans is, as in *Bakke*, whether they cause unnecessary harm to innocent victims. Flexibility was also cited to emphasize that these were not quota programs, but limited measures to remedy the discrimination of the employer and union—proven in *Sheet Metal Workers*; unproven in *Weber*, but recognized by the finding that Title VII promotes voluntary compliance. This is similar to the inquiry that the Court would have to undertake to judge whether the plan discriminated against the plaintiff challenging the plan. However, it has the substantial consequence of turning the analysis away from the plaintiff in the case and toward the general class of “innocent victims.”

*Weber* was followed by *Fullilove v. Klutznick* where the Court confronted the alleged unconstitutionality of minority set-asides in a federal contracting program. Though *Fullilove* squarely presented constitutional issues, the Court treated it much like it did Title VII in *Weber*. That is, it cast the important questions to turn on whether the programs caused undue harm to innocent victims and whether they were flexible and time limited. These issues stood out because the majority deferred to Congress’ general remedial power to enforce the Fourteenth Amendment. In effect, the *Fullilove* Court also foreshadowed *Sheet Metal Workers*’ deference to affirmative action

147. “Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice.” *Id.* at 198 n.1.


149. See *id.* at 448-52; *Weber*, 443 U.S. at 201-04.


151. *Id.* at 460, 484, 489. The court emphasized that “[a]lthough the proposed MBE provision on its face appeared mandatory, requiring compliance with the 10% minority participation requirement ‘[n]otwithstanding any other provision of law,’ its sponsor gave assurances that existing administrative practice would ensure flexibility in administration.” *Id.* at 460.

152. “[W]e are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to ‘provide for the . . . general Welfare of the United States’ and ‘to enforce, by appropriate legislation, the equal protection guarantees of the Fourteenth Amendment.” *Id.* at 472. This required the Court to accord “great weight to the decisions of Congress.” *Id.* (quoting Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm., 412 U.S. 94, 102 (1973)).

153. “It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees.” *Id.* at 483.
plans as remedial devices by treating Congress as the appropriate institution for remedying continuing economic inequality. 154

Focusing on the programs in question,155 the Court emphasized that Congress and the President had authorized massive spending as an economic stimulant.156 Like the Weber Court, the Fullilove Court treated the program as a gratuitous benefit, which it said Congress could decide to ensure was accessible to disadvantaged groups.157 In effect the Court held that there was no undue harm to innocent victims because the program was a giveaway.158

Still, the decision was haunted by Justice Powell’s Bakke construction equating classification with discrimination.159 In addition

154. "The legislative objectives of the MBE provision must be considered against the background of ongoing efforts directed toward deliverance of the century-old promise of equality of economic opportunity." Id. at 463. Moreover, the Court quoted the House Subcommittee on SBA Oversight and Minority Enterprise as saying:

The subcommittee is acutely aware that the economic policies of this Nation must function within and be guided by our constitutional system which guarantees equal protection of the laws. The effects of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system.

Id. at 465 (quoting HOUSE SUBCOMM. ON SMALL BUS. ADMIN. OVERSIGHT AND MINORITY ENTER., MINORITY ENTERPRISES AND ALLIED PROBLEMS OF SMALL BUSINESS, H.R. DOC. NO. 94-468, at 1-2 (1975)).


156. The Act was, like the 1976 Act that preceded it, "a short-term measure to alleviate the problem of national unemployment and to stimulate the national economy by assisting state and local governments to build needed public facilities." Id. at 457. It contained several conditions on the spending, including the Minority Business Enterprises (MBE) provision in question. Id. at 456-58.

157.

The device of a 10% MBE participation requirement, subject to administrative waiver, was thought to be required to assure minority business participation; otherwise it was thought that repetition of the prior experience [under the 1976 Act] could be expected, with participation by minority business accounting for an inordinately small percentage of government contracting.

Id. at 462-63.

158. The Court said that firms “innocent of any prior discriminatory actions” who might fail to get contracts because of the MBE program did so as “an incidental consequence of the program.” Id. at 484. The Court relied here on a construct famously employed in the discrimination case Personnel Administrator v. Feeney, 442 U.S. 256, 278-80 (1979), emphasizing that such harm is not caused by the program because it is not an objective of it, just as past exclusion of minority businesses might have been an incidental consequence of “business as usual.” Fullilove, 448 U.S. at 463, 484. The Court went further, challenging the very notion of “innocence” claimed by majority businesses who may have benefitted from discrimination in the past, while not discriminating themselves. Id. at 484-85.

159. This was in part a consequence of the fact that the discriminatory effect of the program was conceded. See id. at 484 ("It must be conceded that by its objective of
to Justice Powell’s concurring opinion, which rehearses his *Bakke* opinion, the majority opinion states that “[a] program that employs racial or ethnic criteria, even in a remedial context, calls for close examination.” Indeed, it is perhaps improper to conceive of *Fullilove* as even raising a discrimination issue in the first instance. It is a “facial” challenge, asking whether the use of race in the program violated the Constitution. In this sense the analysis is anticipatory. Thus, it focuses on classification, as such, and speaks generally of Congress’s power under the Constitution, never seeking to link that classification to harm caused by it. Consequently, the Court could say, in terms drawn from *Bakke*, “Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees,” even as it refused to endorse *Bakke’s* application to the case at bar.

*Bakke* influenced the *Fullilove* Court to view searching analysis as necessitated by racial classification. At one point, the Court seemed prepared to construct a discrimination analysis to explain why the program did not offend the Constitution. The Court noted: “Failure of nonminority firms to receive certain contracts is, of course, an incidental consequence of the program, not part of its objective.” This sounds reminiscent of the Court’s then recent decision in *Personnel Administrator v. Feeney*, where the Court held that “[d]iscriminatory purpose… implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker… selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” The *Feeney* Court did not cite *Bakke*, perhaps because the decision had confined itself specifically to cases involving “non-facial” discrimination. Indeed, *Feeney* shows how deeply seeded the view of classification as discrimination had become after

remedying the historical impairment of access, the MBE provision can have the effect of awarding some contracts to MBE’s which otherwise might be awarded to other businesses . . . .”)

160. *Id.* at 472, 495.
161. *Id.* at 480-81, 490-92.
162. “Congress may employ racial or ethnic classifications in exercising its Spending or other legislative powers only if those classifications do not violate the equal protection component of the Due Process Clause of the Fifth Amendment.” *Id.* at 480.
163. *Id.* at 491-92.
164. *See id.* at 463-67.
165. *Id.* at 484.
166. 442 U.S. 256, 279 (1979) (citation omitted).
167. *See id.* at 274.
Much of *Feeney* was dedicated to explaining how discrimination is to be proved in constitutional cases. However, the discussion was appropriate in *Feeney* only after a two part inquiry:

When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionately adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination.

This passage is concerned with clarifying how evidence of discriminatory effect can be used to show discriminatory purpose in light of the Court's rejection of effect-based proofs of discrimination under the Fourteenth Amendment. But it clearly treats classification as discrimination and regards facially explicit use of race as establishing racially discriminatory purpose and, presumably, causation. Of course, *Fullilove* involves so general a challenge that a specific analysis of individual discrimination is also perhaps inapposite. Nevertheless, this generalized analysis emphasizes that mere classification triggered heightened scrutiny. The legal contexts of *Weber* and *Fullilove* thus conspire to amplify *Bakke*’s classification-as-discrimination approach because neither case requires the Court to say what constitutes constitutional discrimination.

In *Johnson v. Transportation Agency* the Court finally came to analyze affirmative action in the context of its then-prevailing discriminatory proof structure. In large part because the plaintiff challenged the affirmative action plan in question only on Title VII grounds, the Court embraced the analytical frame of disparate treatment to evaluate the legality of the challenged plan. *Johnson* was a replay of *Weber*, but it structured that analysis with prevailing discrimination proofs.

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168. *See id.* at 271-73.
169. *See id.* at 271-78.
170. *Id.* at 274.
172. *See Feeney*, 442 U.S. at 274.
174. *Id.* at 620, 626 (“[T]he ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative-action program,’ and we see no basis for a different rule regarding a plan’s alleged violation of Title VII. This case also fits readily within the analytical framework set forth in *McDonnell Douglas Corp. v. Green.*”) (citation omitted) (quoting Wyant v. Jackson Bd. of Educ., 476 U.S. 267, 277-78 (1986)).
This approach is significant because it leads the Court to an overt causation analysis. The plaintiff is required to show that race or sex had been taken into account in producing an adverse employment decision, "the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision."

The Court, drawing undoubtedly on the implications of Weber, noted that an affirmative action plan provides such a nondiscriminatory rationale. Because the employer's burden is only to articulate such a plan, the burden remains on the plaintiff to show that "the employer's justification is pretextual and the plan is invalid." Thus the employee is held to the burden of showing that the plan was not really used to make the decision (and, supposedly, that some other, ordinary discriminatory decision was taken) or that the plan, though used, was an invalid plan.

Invalidity is determined in Johnson in terms drawn from Weber: effect on innocent victims, flexibility of operation, and limited duration of the plan. Importantly, it is not classification as such that leads to this analysis, but the initial showing that the use of racial or gender classifications caused an adverse employment decision. At all points the employer is capable of challenging the presumptions of that primary showing with a substantive rebuttal that shows some other ground for the adverse decision or the absence of any adverse decision.

The Court's leanings in Johnson toward fully analyzing affirmative action as discrimination were quickly lost in Wygant and Croson where the harms caused the plaintiffs were relatively apparent.

175. Id. at 626. The Court found this established by the evidence: "It is clear that the decision to hire Joyce was made pursuant to an Agency plan that directed that sex or race be taken into account for the purpose of remedying underrepresentation." Id. at 634.

176. Id.

177. Id.

178. Id. at 626-27.

179. The Court asked "whether the Agency Plan unnecessarily trammeled the rights of male employees or created an absolute bar to their advancement." Id. at 637-38. It found it did not because "the Plan sets aside no positions for women," the plan "resemble[d] the 'Harvard Plan' approvingly noted ... in [Bakke]," "require[d] women to compete with all other qualified applicants," did not "automatically excluded [anyone] from consideration," and "unsettled no legitimate, firmly rooted expectation" of the plaintiff. Id. at 638.

180. Id. at 635-37, 640.

181. Id. at 639-40. The time limitation, along with the flexibility component of this analysis goes to avoiding quotas. Thus the Court focused on the Plan's goal of attaining a balanced workforce as opposed to maintaining one.

182. See id. at 626-27.

183. Id.
In *Wygant* the challenged plan called for layoffs out of order of seniority in order to preserve progress on racial integration of the school district’s faculty. In *Croson* the plaintiff lost a government contract because of his inability to comply with the affirmative action plan involved in the case. Because harm is apparent neither decision says much about how the plan constituted discrimination. However, *Bakke*’s influence lives through Justice Powell’s plurality opinion in *Wygant*. Powell reprises his discussion of race “classifications” and “distinctions” triggering strict scrutiny. In the end, however, he relies on the *Weber v. Fullilove* “reasonableness” analysis of the affirmative action plan, despite claiming that reasonableness “has no support in the decisions of this Court.” That is, he finds the Jackson County plan defective because it involves layoffs and a departure from seniority expectations, factors which mean it placed too heavy a burden on innocent victims and was not flexible.

In *Croson*, the absence of discussion of discrimination is similarly unsurprising, given the facts of the case. The decision, nevertheless, adds to the rhetoric that equates classification with discrimination. “We simply note,” the Court says, “what should be apparent to all—§ 1 of the Fourteenth Amendment stemmed from a distrust of state legislative enactments based on race . . . .” It then declares that “[c]lassifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.” This language implies that it is classification that mandates the closer inquiry, not the fact that the plan caused the J.A. Croson Co. to lose the bid because of its owners’ race.

Both *Wygant* and *Croson* seem to invert discrimination analysis. Injury is not used to determine if the classification should be subject to strict scrutiny but to define within strict scrutiny if the classification is

187. See *id.* at 279-84.
188. *Id.* at 279.
189. *Id.* at 281; see also *id.* at 282 (“[N]one of [the court’s cases upholding affirmative action plans] involved layoffs.” (citing Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 574-76, 578-79 (1984)); *id.* at 283 (“[L]ayoffs impose the entire burden of achieving racial equality on particular individuals . . . That burden is too intrusive.”)).
190. *Croson*, 488 U.S. at 491.
191. *Id.* at 493-94 (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978)).
narrowly tailored so as to avoid undue harm to innocent victims.\textsuperscript{192} It seems that, even from a strict policy perspective, injury should be evaluated as a part of the determination of discrimination, leaving the question of whether the program is justified to the more open ground of compliance with constitutional values, remedial needs, and the genesis of the particular program.

In any case, the confusion in \textit{Croson} extends beyond this construction. At points Justice O'Connor's opinion employs contrary language, such as when it says that a "searching judicial inquiry" is needed into the "justification[s] for such race-based measures" in order to determine if they are "benign" or "remedial."\textsuperscript{193} The opinion seems to be arguing that the searching inquiry will determine if there is discrimination, rather than determining if a discriminatory plan is justifiable. Contrary to this paragraph, Justice O'Connor's analysis of Justice Marshall's dissent seems to emphasize that the Court believes that classification constitutes discrimination.\textsuperscript{194} In rejecting his distinction between benign and malign uses of race,\textsuperscript{195} Justice O'Connor's opinion argues that making the distinction would be impossible without doing what strict scrutiny already requires—a searching inquiry.\textsuperscript{196} Since benign and malign racial classifications are indistinguishable without such analysis, all racial classifications ought to be viewed as suspect, or perhaps discriminatory, and in need of justification.

The Court's debate over levels of scrutiny was replayed the next year in \textit{Metro Broadcasting, Inc. v. FCC}.\textsuperscript{197} In \textit{Metro Broadcasting}, the majority opinion by Justice Brennan emphasizes that, for federal government programs, \textit{Fulilove} demanded a lightened scrutiny—not \textit{Croson}'s strict scrutiny.\textsuperscript{198} The Court found that \textit{Fulilove}'s standard was met in that the FCC's preferences for minority broadcasters' applications for broadcast licenses were supported by an important governmental interest and were substantially related to achieving that interest.\textsuperscript{199}

\textsuperscript{192} See \textit{Wygant}, 476 U.S. at 270-73.
\textsuperscript{193} \textit{Croson}, 488 U.S. at 493.
\textsuperscript{194} See \textit{id.} at 493-95.
\textsuperscript{195} See \textit{id.} at 552 (Marshall, J., dissenting).
\textsuperscript{196} \textit{Id.} at 495.
\textsuperscript{198} \textit{Id.} at 563-66.
\textsuperscript{199} \textit{Id.} at 566-79.
This debate is misleading in my estimation, however. What is more important from the perspective of this Article, at least, is that none of the Justices take up the question of whether the plaintiffs were subject to discrimination. Of course, with the exception of Johnson, none of the post-Bakke cases have framed their analysis in this way. But it is in Metro Broadcasting that we see most clearly the consequence of declaring all racial classification as discrimination. In Metro Broadcasting the cases of two different plaintiffs are consolidated for discussion. 200 In one, that of Shurberg Broadcasting of Hartford, Inc., the plaintiff neither applied for the license in question nor showed that the preference given minority applicants in situations involving distressed broadcasters would have affected the company’s chance at obtaining the license. 201 In the second case, the application of Metro Broadcasting, at least Metro Broadcasting lost the license to a minority applicant who received preferences. 202 Even then, no Justices discuss whether Metro Broadcasting would have received the license if the other applicant, Rainbow Broadcasting, had not received the preference. It is clearly the case that Rainbow Broadcasting benefited from the preference, 203 but this is not the same as the preference causing Metro Broadcasting harm. 204

200. See id. at 552, 558-63.
201. See id. at 561-63, 599 n.51.
202. See id. at 558-61.
203. It is clear that affirmative action programs award benefits, sometimes dramatic benefits. Professor Schuck emphasizes this benefit in his critical assessment of affirmative action. “The magnitude of FCC preferences is huge” and because of lack of controls often results in abuse. Schuck, supra note 1, at 12. Schuck quotes liberal editor and commentator Michael Kinsley’s very critical assessment of the FCC program as “especially farcical. . . . The policy amounts to the simple anointment of black millionaires.” Id. (quoting Michael Kinsley, The Spoils of Victimhood, NEW YORKER, Mar. 27, 1995, at 62, 69).
204. The most the justices talk about is the plaintiff’s handicap in the process: “Although the nonminority challengers in these cases concede that they have not suffered the loss of an already-awarded broadcast license, they claim that they have been handicapped in their ability to obtain one in the first instance.” Metro Broad., 497 U.S. at 596. None of the justices deem it necessary to describe whether these handicaps made any difference in the denial of the plaintiff’s licensing applications, indeed Shurberg did not even make one. Id. at 561-62.

This argument is not the same as the claim that the plaintiffs lack standing. Standing can be more easily established than discrimination because standing turns more heavily on identification of injury in fact. The “nexus” component of standing requires a “link” between the challenged behavior and the injury. This “nexus” is not equivalent to the causation required to proved discrimination. Neither is redressibility, the third prong of standing, the same as any substantive proof of discrimination. That is, one can agree that Metro Broadcasting had injury related to the preference program, which can be eliminated completely by the termination of the preference program. None of this means that Metro or Shurberg would have received the license with or without the program. This latter point is what ought be prove to show discrimination.
Perhaps because of the weak link between the plaintiffs’ injuries and the challenged programs, the discussion in *Metro Broadcasting* turns on views about the intended *beneficiaries* of the programs, especially that analysis of whether the programs rely on stereotyping.\(^{205}\) This is, of course, a product of the “narrow tailoring” discussion, but the relative paucity of discussion of those injured by the programs, or the plaintiffs in particular, is striking and troubling. What little discussion there is of the plaintiffs is found in the *Bakke*-inspired “innocent victim” analysis of Justice Brennan.\(^{206}\) There he still speaks most generally about the minimal effects the preference program had on “nonminorities,” rather than discussing the plaintiffs. Since we might have expected Justice Brennan to have found advantage in discussion of the minimal impact on the particular plaintiffs in the case, the minimal discussion of effects on nonminorities is striking and explained most effectively by the distortions wrought by *Bakke*'s equation of classification with discrimination.

Until this summer’s decisions, the last word on affirmative action had come in *Adarand Constructors, Inc. v. Pena*. *Adarand* is most noteworthy for putting to rest the debate over the proper standard for review in affirmative action cases.\(^{207}\) It did so, however, by sticking to the *Bakke* construction of classification equals discrimination and extending *Croson* to federal government affirmative action by overruling *Fullilove* and *Metro Broadcasting*.\(^{208}\) By the time of *Adarand* the flippant use of classification, distinction, and discrimination had become pandemic. This was unfortunate because the facts of *Adarand* suggested that the case could have been profitably

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A similar argument on standing is made by Justice O’Connor in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 210-12 (1995). Her argument concerns standing to seek a prospective injunction, however, and is far less compelling as a result. The problem is not that Adarand was not injured nor that his injury could not be traced to the program, but that his claim is much more like *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-04 (1983), than Justice O’Connor acknowledges it is. Her distinction of that case is far from compelling. The *Adarand* discussion is most noteworthy for its broad description of the cognizable injury here, “[t]he injury in cases of this kind is that a ‘discriminatory classification prevent[s] the plaintiff from competing on an equal footing.’” *Adarand*, 515 U.S. at 211 (citation omitted) (quoting N.E. Fla. Chapter of the Assoc. Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 667 (1993)).

\(^{205}\) *See Metro Broad.* 497 U.S. at 579-84; *id.* at 614-15 (O’Connor, J., dissenting).

\(^{206}\) *Id.* at 596-600.

\(^{207}\) 515 U.S. at 235-37.

\(^{208}\) *See id.* at 227, 231-35.
analyzed as discrimination and because the Court remanded the case, leaving the lower court with little guidance on the matter.\footnote{209}

Much of *Adarand* is devoted to establishing the proper standard for reviewing federal government affirmative action programs, giving Justice O’Connor occasion to review much of the jurisprudence discussed above. In doing so, she demonstrates the now considerable interchangeability of terms in affirmative action decisions, an interchangeability that equates classification with discrimination. At the onset of her Part III, Justice O’Connor calls the subject of the Court’s inquiry “classifications based explicitly on race,” distinguishing the case from harder cases involving “facially race neutral” programs that “result in racially disproportionate impact and are motivated by a racially discriminatory purpose.”\footnote{210} For Justice O’Connor, classification is discrimination.

As noted above, this construction finds support in now heavily quoted language from *Hirabayashi*: “‘[D]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality,’ and ‘racial discriminations are in most circumstances irrelevant and therefore prohibited.’”\footnote{211} This language, referring generally to “distinctions” and “discriminations,” clearly views the Fourteenth Amendment as violated by classification. Justice O’Connor also quotes language in *Hirabayashi*\footnote{212} and *Korematsu*\footnote{213} that turns on something more akin to discrimination, but it is clear that the Justice sees no distinction between discrimination and classification as she uses some of these same passages interchangeably just a paragraph

\footnote{209. See id. at 204-10. Adarand’s low bid as a sub-contractor was rejected by the general contractor in the general contractor’s effort to receive the financial bonuses attached to awarding subcontracting work to minority businesses. In describing the background of the case at least, Justice O’Connor conceives of the plaintiff’s claim as one of discrimination: “Adarand claims that the presumption set forth in that statute discriminates on the basis of race in violation of the Federal Government’s Fifth Amendment obligation not to deny anyone equal protection of the laws.” Id. at 205-06 (emphasis added).

210. Id. at 213.

211. Id. at 214 (emphasis added) (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

212. “[T]he Fifth Amendment ‘restrains only such discriminatory legislation by Congress as amounts to a denial of due process.’” Id. at 214 (emphasis added) (quoting *Hirabayashi*’s discussion of Detroit Bank v. United States, 317 U.S. 329 (1943)); see *Hirabayashi*, 320 U.S. at 100.

213. Korematsu v. United States, 323 U.S. 214, 216 (1944) (“[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect”. (emphasis added)).}
Similarly, she quotes language from *Bolling v. Sharpe*, which talks about “discrimination,” but she follows that by an extended quote from *McLaughlin v. Florida* that cites *Bolling, Korematsu*, and *Hirabayashi* while saying that the case is about “a classification based upon the race of the participants,” in the context of the “central purpose of the Fourteenth Amendment ... to eliminate racial discrimination,” thus “render[ing] racial classifications ‘constitutionally suspect.’”

What is remarkable about the conflation of discrimination and classification is its incongruence with the Court’s insistence that the Fourteenth Amendment applies only to individuals. Why then does the Court not speak directly of discrimination, which seems to invoke the treatment of individuals and, instead, bespeaks classifications, which, by definition, talks of groups. So, though she says “the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups” and should “ensure that the personal right to equal protection of the laws has not been infringed,” she concedes that the foregoing cases “involved classifications burdening groups that have suffered discrimination in our society” and speak generally of heightened scrutiny being triggered by “classification” and “distinction.”

*Adarand*, therefore, holds “that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”

### B. What Is the Big Deal?

On some level much of what I have demonstrated above might be rejected with a “so what?” That is, the distinction between

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217. *Id.* at 192 (quoting *Bolling*, 347 U.S. at 499).
218. *Adarand*, 515 U.S. at 227, 218; see, e.g., *id.* at 213-23, 235.
219. *Id.* at 227 (emphasis added). It is perhaps Justice Thomas who takes the rhetoric of classification as discrimination to the greatest extreme. He says “government-sponsored racial discrimination” is “noxious” whether benign or malicious, then provides a note to explain that “[i]t should be obvious that *every racial classification* can help or hurt someone, depending on their position. *Id.* at 241 (Thomas, J., concurring) (emphasis added). It appears that all racial classifications are equivalent to the worst prejudice to Justice Thomas. Indeed, Justice Scalia’s two paragraph concurrence displays similar rhetorical flourish. *See id.* at 239 (Scalia, J., concurring). What is troublesome about both is that the general statements they make could be accepted by most, but many would object to their application to any particular sets of facts. Neither bothers to tell us much about when discrimination occurs, though both imply it always exists in the presence of affirmative action plans. *See id.* at 239-41 (Thomas, J., concurring; Scalia, J., concurring).
discrimination and the looser "classification" (or "distinction" and "discrimination") could be little more than a nomenclature dispute. Similarly, it might be a reflection of poor opinion writing in a contentious and politically charged area of law. Or, it may be that "classification" really reflects a lightened standard for invoking judicial review over state action. In any case, the value of this investigation lies in discovering the implications of this loose language. A close look at some potential justifications for the equation of classification with discrimination reveals contradictions and fractures in the jurisprudence.

Three main arguments could be advanced to undercut the relevance of the distinction. First, the term "classification" might be used by the Court to mean discrimination. Second, a heightened suspicion of government use of race might justify the burden shifting and close scrutiny of "classifications," quite apart from whether they represent discrimination. Third, the distinction between discrimination and classification might not matter because the same "causation" analysis occurs under the rubric of "strict scrutiny" (or any heightened scrutiny for that matter). Unfortunately, all of these arguments suffer from near-fatal limitations that expose the troubled nature of affirmative action litigation and beg the question whether there is an understanding of what affirmative action is in the first place.

1. Classification as Discrimination

It is possible that when the justices use "classification" they really regard it as equivalent to "discrimination." This argument claims more than simply that the justices view the words as synonyms. Rather, it embraces the view that all of the cases discussed involved classifications that did in fact cause injury. Under this view, that causal relationship is not discussed because, except in Johnson, causation is either so clear or has been established below and the Court is taking that finding for granted. Neither of these arguments is especially persuasive, however.

Discrimination might be clear in only a subset of the cases discussed above. In Bakke, Justice Powell emphasized that the admissions process is segregated, supporting a presumption that the classification caused the injury. Similarly, in Fullilove and Weber the challenges were to set aside programs that restrict access to opportunity (federal contracts in Fullilove, training in Weber) in a way.

220. Of course, on some level the craft of the law is taking words seriously.
similar to the restriction of graduate school seats in *Bakke*. And in *Croson* and *Adarand* the challenged programs had operated to deprive a general contractor and subcontractor of contracts on which they had bid and had tentatively been awarded or would have been awarded. In all these cases the Court might have discussed discrimination rather than classification and established discrimination as the trigger for strict scrutiny. Rather, the Court spoke of discrimination and classification interchangeably, suggesting that classification might refer to discrimination.

However, in *DeFunis* (before the Washington Supreme Court), *Metro Broadcasting*, and *Grutter*, the plaintiffs were far less capable of showing discrimination, in the sense of establishing a causal connection between their rejection and the racial classification. In *DeFunis* the defendant law school’s admissions program made it less than clear that *DeFunis* would have been admitted even if no preference program existed. This issue is discussed, but only as a standing argument, one that seems misplaced and less strong. The question is not whether DeFunis was injured or if the preference program caused harm, but whether the program caused DeFunis’s harm. That is not clear. In *Metro Broadcasting*, it is not clear whether one of the two plaintiffs did or even planned to compete for the license. The other was in competition for the license, but it is not clear that he would have been awarded it if the preference program did not exist. And in *Grutter* the named plaintiff seemed similarly to have not made the showing that the preference program caused her injury.

Even if these findings were specifically made by the lower courts, such as in *Bakke*, the Court should have discussed them. At a minimum, the Court should have noted that the causal connection was found by the court below or remanded the case for the lower court to make such findings. Instead, the clear sense of the opinions is that the Court regards strict scrutiny as triggered by something far less than discrimination. Some might be tempted to dismiss this argument as academic. After all, class action practice would allow someone to represent a widely spread injury that *is* caused by the program, or

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221. This is also true in *Bakke* but for the medical school’s stipulation that he would have been admitted but for the preference program. See Selmi, supra note 31, at 986.


complaints might be amended to include different plaintiffs until an appropriate one is found. But as will be shown below, the failure to discuss discrimination works to distort discrimination law.225

2. Classification as an Appropriate Trigger to Strict Scrutiny

Rather than equating classification with discrimination, the Court could be establishing racial classification as the appropriate trigger for heightened scrutiny under the Constitution.226 This view of classification would be consistent with a suspicion of government use of race and perhaps consistent with comparisons between judicial review of other types of government action and similar private action. Under the Court’s view of the Fourth Amendment, for example, most government restraint of an individual constitutes a seizure which must be justified by a warrant, probable cause, or one of several exceptions to the warrant requirement. The tort of false imprisonment on the other hand typically requires a showing of confinement, knowledge of confinement, lack of consent, and absence of reasonable escape. The prima facie case for government action is much lighter than that for private tortfeasors in an effort to ensure Fourth Amendment values. Similarly, efforts to ensure the equal protection interest of limiting governmental use of race would justify triggering strict scrutiny on the basis of mere governmental race classification.

In Part III.B. of Croson, Justice O’Connor makes an argument that implies this view of classification. “The factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary. But when a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification’s relevance to its goals.”227 In this construction, the use of race triggers strict scrutiny but is not itself a determination of discrimination or even illegal behavior. Rather, the strict scrutiny analysis determines if the behavior is illegal. Unfortunately, this is not how affirmative action cases are really treated, even by Justice O’Connor. Many observers view racial

225. See infra Parts III-IV.
226. See Rubenfeld, supra note 29, at 433-36.
classification as discriminatory with strict scrutiny analysis meant to determine whether that discrimination is justifiable. 228

Supreme Court practice shows a contrary approach. In Weber, Sheet Metal Workers, and Johnson the Court sticks with its classification construction, even though the parties in the case are private ones. Certainly, in all three cases the Court upheld affirmative action plans, and the power of the courts to impose affirmative action was a key issue in all of the cases. But the power of courts to uphold specific types of remedies is a part of all litigation. The Court just doesn’t seem to have treated government behavior especially different from private behavior where affirmative action is in question. Indeed, to the extent Title VI is implicated, it would suggest that a heightened showing would be necessary to trigger strict scrutiny in those cases; this is something the Court has not decided yet.

3. Classification and Discrimination Evaluations as Equivalent

Another prominent candidate for understanding the role of classification in the Court’s affirmative action jurisprudence is that the analyses of cases under an approach where classification triggers strict scrutiny and one where the Court looks for proof of discrimination proceed along identical lines of analysis. This argument suggests that the question of causation in discrimination cases is subsumed in the narrow tailoring component of strict scrutiny analysis. At the least, if the plan is unduly burdensome to innocent victims, it causes those victims cognizable injuries. Similarly, inquiries into the flexibility and duration of an affirmative action plan go to whether it is de facto segregatory. Finally, the burden shifting that strict scrutiny represents is similar to the direct evidence cases where direct evidence of discrimination shifts the burden of justifying discrimination onto the defendant. 229

The direct evidence cases, however, highlight the limitation of this analysis. In direct evidence cases, causation remains a vital component of the plaintiff’s prima facie case. 230 Before the burden

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228. See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) ("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.").


230. Explaining the difficulty of identifying the line between direct evidence cases and “stray remarks” cases, Harold Lewis and Elizabeth Norman quote Tyler v. Bethlehem Steel Corp: “Even a highly probative statement like ‘You’re fired, old man’ still requires the factfinder to draw the inference that the plaintiff’s age had a causal relationship to the
shifts to the defendant, the plaintiff must show that the purportedly "direct" evidence actually caused her injury. "[E]ven in the case of express, racially discriminatory hiring barriers, plaintiff must show that his particular harm was experienced as a result of an application of the policy." In the end, the Court's failure to require or discuss proof of causation means that nonminority plaintiffs challenging affirmative action plans need not do what all other discrimination plaintiffs must: show how the defendant's behavior caused their injuries.

Overall, it seems that the Court simply does not have a clear theory of the relationship between classification and discrimination. To some extent the use of classification is historical, drawn out of Hirabayashi in Bakke and reproduced in a number of intermediary and subsequent decisions. On some level it reflects a policy choice to subject certain uses of race to especially high scrutiny. In yet another sense, it is reflective of a view that there is no practical distinction between classification which triggers strict scrutiny and discrimination proofs turning on causation.

The Court's use of classification to trigger strict scrutiny is, nevertheless, quite consequential. First, it expands the category of challengeable action to the widest possible reach. Professor Michelle Adams has shown how the use of classification as a triggering device has called into question "soft" affirmative action, such as sending notice of opportunities to minorities and women. These challenges reflect a move beyond merely attacking racial preferences. Rather, these challenges go to the heart of the equal opportunity aspects of antidiscrimination law, completely foreclosing any equality-promoting aspects of that law. As Professor Adams shows, these threats derive directly from the treatment of racial classification as discrimination. If any use of race is a constitutional violation, unless justified, such plans might be invalidated even if they cause injury to no one.

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231. Id. § 3.2, at 115 n.2 (citing Perry v. Woodward, 199 F.3d 1126, 1134 (10th Cir. 1999)). As the courts have recognized in recent years, direct evidence cases are cases where inferences need not be drawn to show the elements of discrimination, not the modification of the elements of discrimination. See, e.g., Boyd v. State Farm Ins. Cos., 158 F.3d 326, 328-30 (5th Cir. 1998); Troupe v. May Dep't Stores Co., 20 F.3d 734, 736 (7th Cir. 1994); Alexander v. Gardner-Denver Co., 519 F.2d 503, 505-06 (10th Cir. 1975).

232. Adams, supra note 85, at 1436-45.

233. See id. at 1397-98.

234. See id. at 1408-13.

235. Id. at 1398.
Professor Jeb Rubenfeld also argues against the use of classification as a trigger for heightened scrutiny. He specifically contends that such an approach distorts the very operation of strict scrutiny analysis.236 "[C]lassification ... [is] a talisman which—without regard to the rights involved or the persons affected—calls into effect a heavier burden of judicial review."237 According to Rubenfeld, use of classification to trigger strict scrutiny transforms strict scrutiny into a cost-benefit analysis, leading the Court to say something is illegal but justified.238 But this is an awkward construction, at best.

Unconstitutional race discrimination is unconstitutional not because its costs generally outweigh its benefits, with strict scrutiny serving to pick out the exceptions. Rather, unconstitutional race discrimination is unconstitutional because laws with racist purposes are constitutionally forbidden, with strict scrutiny helping to determine whether such racist purposes are in play.239

Treating classification as discrimination allows the Court to avoid this basic question, leaving Rubenfeld to conclude that "[t]he Court's classification-driven framework is illogical and untenable."240

II. AFFIRMATIVE ACTION IN THE SCHOLARLY LITERATURE

The academic literature offers no better understanding of what affirmative action is.241 Indeed, very little effort is made to define

236. See Rubenfeld, supra note 29, at 432-35.
237. Id. at 434-35 (quoting Craig v. Boren, 429 U.S. 190, 220 (1976) (Rehnquist, J., dissenting)).
238. See id. at 437-44.
239. Id. at 441-42.
240. Id. at 435.
241. "The academic debate over affirmative action has become a bitter stalemate." Farber, supra note 8, at 893. Indeed, its contours are well known:

Opponents consider affirmative action to be reverse discrimination, charging that racial discrimination is equally wrong regardless of the race of the victim. Supporters retort that the relationship between African Americans and whites is hardly symmetrical, and that racial preferences are necessary to remedy discrimination, to provide role models for the disadvantaged, and to increase diversity. Opponents, in turn, attack these arguments as normatively wrong or empirically false. Although little new can be said about these arguments, the dispute continues with no sign of resolution.

Id. at 893-94 (footnote omitted). Predictably there is a gigantic scholarship on affirmative action, rendering any attempt to characterize it limited in some respects. This discussion is not immune to such problems.

A rough estimate of scholarly visions of discrimination was gathered through redundant database searches by the author and his research assistant. The author conducted two searches on the LEXIS database: the first, <define! w/5 ("affirmative action")>, produced 310 articles; the second, <defin! w/5 ("affirmative action")>, produced 96 overlapping

HeinOnline -- 78 Tul. L. Rev. 2168 2003-2004
affirmative action, and no serious conceptual definition appears in the literature in recent years. A widespread approach is to cite to the definitions of the EEOC, the Civil Rights Commission, or more recently the Affirmative Action Review conducted during the Clinton Administration (the \textit{Clinton Review}).\footnote{A California Appellate Court surveyed several dictionary definitions (internal quotations omitted).} Some commentators resort to dictionaries, legal and otherwise, for help.\footnote{The obvious limitations of the database restrict the search to articles after 1980. The author focuses on law review articles because books in the area are likely aimed at a broader audience and more likely to contain policy-oriented definitions. Law review articles, on the other hand, are directed at law professors, presumably allowing for a more detailed technical assessment of the subject.} Otherwise there are articles. The obvious limitations of the database restrict the search to articles after 1980. The author focuses on law review articles because books in the area are likely aimed at a broader audience and more likely to contain policy-oriented definitions. Law review articles, on the other hand, are directed at law professors, presumably allowing for a more detailed technical assessment of the subject.


243. A California Appellate Court surveyed several dictionary definitions (internal quotations omitted).

"The term ‘affirmative action’ . . . is rarely defined . . . so as to form a common base for intelligent discourse." (\textit{Dawn v. State Personnel Board}) (1979) 91 Cal. App. 3d 588, 593, 154 Cal. Rptr. 186 (conc. opn. of Paras, J.). Most definitions of the term would include not only the conduct which Proposition 209 would ban, i.e., discrimination and preferential treatment, but also other efforts such as outreach programs. (See, e.g., \textit{Random House Dict. of the English Language} (2d ed. 1987) p. 34, c. 1 ["the encouragement of increased representation of women and minority-group members, esp. in employment."]); \textit{American Heritage Dict.}, New College Ed. (1976) p. 22, c. 1 ["Action taken to provide equal opportunity, as in hiring or admissions, for members of previously disadvantaged groups, such as women and minorities, often involving specific goals and timetables."]; \textit{Black’s Law Dict.} (5th ed. 1983), p. 29, col. 2 ["Employment programs required by federal statutes and regulations designed to remedy discriminatory practices in hiring minority group members; i.e. designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination . . . ."]; Garner, Bryan A. \textit{Dict. of Modern Legal Usage} (2d ed. 1995) p. 36, c. 1 ["The phrase is sometimes used generically to denote ‘a positive step taken,’ as well as more specifically to denote ‘an attempt to reverse or mitigate past racial discrimination. . . .’]; see also 59 Ops. Cal. Atty. Gen. 87, 90-91 [1976].) Accordingly, any statement to the effect that Proposition 209 repeals affirmative action programs would be overinclusive and hence “false and misleading.” (Elec. Code, § 9092.)

references to definitions in two popular articles, one by Professor James Jones,\(^{244}\) the other by David Oppenheimer.\(^{245}\) Ultimately, the literature consistently approaches affirmative action from a policy perspective, articulating the dimensions of the programs that exist in order that their legality can be judged.\(^{246}\)

It is not surprising that the policy-making agencies to which many articles refer—the EEOC, the Civil Rights Commission, and the President’s Commission—forsake a rigorous legalistic approach. Instead they offer a policy definition, that is, one which defines the kinds of programs under review and seeks to link them by some common denominator. The EEOC’s guideline on affirmative action defines affirmative action as “those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity,” describing what affirmative action programs do.\(^{247}\) For the authors of the *Clinton Review*, “affirmative action’ is any effort taken to expand opportunity for women or racial, ethnic and national origin minorities by using membership in those groups that have been subject to discrimination as a consideration.”\(^{248}\)

The Commission on Civil Rights says affirmative action is

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244. See Jones, *supra* note 8, at 903, 926-28.


Professor Michelle Adams, for example, draws on both Jones and Oppenheimer for her sophisticated definition. See Adams, *supra* note 85, at 1401-03; see also Anna Larson, Comment, *The California Civil Rights Initiative: Why It’s Here, Its Far Reaching Effects, and the Unique Situation in Hawai’i*, 22 U. HAW. L. REV. 279, 289 (2000) (citing Oppenheimer).

246. For an overt policy examination of affirmative action, see generally Schuck, *supra* note 1, at 1-65 (discussing affirmative action policy, arguments surrounding the issue, and ultimately questioning the wisdom of affirmative action public policy).

247. Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, 29 C.F.R. § 1608.1. This definition is similar to the Glass Ceiling Commission’s: affirmative action is “the deliberate undertaking of positive steps to design and implement employment procedures that ensure the employment system provides equal opportunity to all.” McGinley, *supra* note 16, at 1028 (internal quotations omitted) (quoting the Glass Ceiling Commission).

248. See *CLINTON REVIEW, supra* note 242, at 1 n.1 (emphasis omitted). The *Clinton Review* also categorizes affirmative action plans in an effort to reflect the broad scope of the review: “These programs range from outreach efforts . . . to procurement regulations that set aside particular contracts for competitive bidding limited largely to minority-owned, economically disadvantaged small businesses.” *Id.* at 1.
a contemporary term that encompasses any measure, beyond simple termination of a discriminatory practice, that permits the consideration of race, national origin, sex, or disability, along with other criteria, and which is adopted to provide opportunities to a class of qualified individuals who have either historically or actually been denied those opportunities and/or to prevent the recurrence of discrimination in the future. 249

The Clinton Review effectively states what binds affirmative action programs to one another—they take race, national origin, or sex into consideration to expand opportunity. And while the Commission on Civil Rights’ definition has a very legalistic ring, it mostly does the same, although it attempts to separate out ordinary antidiscrimination practice from the category and offer justifications for the programs.

These definitions are largely adequate and appropriate to their task. These are policymaking entities trying to describe the parameters of programs that are subject to legal attack and which they must locate in the terrain of permissible constitutional behavior. It is troubling, however, that these definitions are apparently adequate to many commentators seeking to analyze the programs as legal phenomena. This reliance on the policy-making bodies’ definitions perhaps grows from the habit of citing the legislative definition of programs under review in constitutional and administrative law surveys. 250 However, these entities are not legislative, nor are they attempting to describe a single program they enacted. Instead, they are striving to summarize a

249. Office of General Counsel, Briefing Paper supra note 16, at 1. For other definitions of affirmative actions, see U.S. Comm’n on Civil Rights, Affirmative Action in the 1980s, supra note 242, at 19; U.S. Comm’n on Civil Rights, Statement on Affirmative Action, supra note 242, at 6. The following definition bears a strong resemblance to the Department of Labor Guidelines:

Affirmative action is not mere passive nondiscrimination. It includes procedures, methods, and programs for the identification, positive recruitment, training, and motivation of present and potential minority and female (minority and nonminority) apprentices including the establishment of goals and timetables. It is action which will equalize opportunity in apprenticeship so as to allow full utilization of the work potential of minorities and women. The overall result to be sought is equal opportunity in apprenticeship for all individuals participating in or seeking entrance to the Nation’s labor force.

29 C.F.R. § 30.4(b).

250. It may also grow out of the approach of litigants and the Court. Professor Selmi notes, “In reading the [amicus] briefs, the most striking and lasting impression is how much of the discussion was overtly political or sociological in nature . . . .” Selmi, supra note 31, at 989. This was also apparent in the Court’s deliberations. “Reading the memoranda stripped of their identifying characteristics, one would be hard pressed to determine whether the views had been stated in the pages of the Congressional Record or in the halls of the Supreme Court.” Id. at 995.
whole area of institutional practice—and are being defeated by those efforts. The Clinton Review prefaces its definition with a statement of frustration with the lack of definitional consensus: ""Affirmative action' enjoys no clear and widely shared definition. This contributes to the confusion and miscommunication surrounding the issue." Desperate as the policy makers seem for a conceptual definition of affirmative action, legal commentators have not only failed to offer a satisfactory definition, many have come to rely on the policy-making summaries for their operative definition.

Among some commentators examining affirmative action, the definitions offered by Professors Jones and Oppenheimer seem to have well summarized the extant affirmative action programs around which the legal and policy debates have occurred. Professor Michelle Adams describes these definitions, showing how they compliment one another to characterize the field:

Professor James E. Jones, Jr. suggested affirmative action be defined 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."

... Professor David Benjamin Oppenheimer asserts the practice of affirmative action is comprised of five methods: quotas, preferences, self-studies, outreach and counseling, and anti-discrimination. Each of these five methods would fit easily within the broad definition suggested by Professor Jones.

Professor Adams also notes that, as an extension of Professor Oppenheimer's categorization-based definition, affirmative action can and often is divided into "hard" and "soft" affirmative action, with the former consisting of quotas and preferences and the latter encompassing various outreach, self-evaluations, marketing, and labor market development.

Along the lines of Professor Adams' approach, we might identify the primary approach of commentators to defining affirmative action as a categorization approach. Affirmative action is understood under this approach to be policies aimed at "providing opportunities," a good that is taken for granted, and attention is focused on the propriety of the various ways of achieving this goal. The definition has the

251. Clinton Review, supra note 242, at 1 n.1.
252. See Jones, supra note 8, at 903, 926-28.
254. Adams, supra note 85, at 1401-02 (footnotes omitted).
255. Id. at 1402-03.
advantage of providing for supporters and opponents of affirmative action alike some ground for agreement about the laudatory aspirations of the programs while still disagreeing about particular ones. This reflects the political compromise Professor Selmi argues *Bakke* was able to produce in the area.\(^{256}\) That is, the categories of affirmative action represent a continuum, from those with minimal collateral consequences on nonminority incumbents and competitors for opportunities to those with significant effect.\(^{257}\) The category frames the question in a way consistent with the post-*Bakke* vision of programs needing to be flexible, temporary, and with minimal effects on "innocent victims."

Accordingly, outreach through special advertising increases the pool of potential applicants while effecting nonminorities only by stiffening the competition for opportunities. Outreach and dedicated recruitment are similar but raise the stakes by employing resources to actually bring in minority and women applicants.\(^{258}\) Presumably such applicants develop a special relationship or advantage in the process that makes these efforts more invasive. Employment or admissions preferences give a tangible advantage to the minority candidate, thus implying (though not establishing) a reciprocal tangible harm to nonminority competitors. The pursuit of goals and targets raises the stakes further until quotas make virtually definite that the program causes harm to its nonbeneficiaries.

What is certain about this type of definition, however, is that it is, at best, a rough corollary to a demonstration of discrimination. If these definitions reflect commentators' views of affirmative action, it shows them in general accord with the approach in *Bakke*—that is, focused on the consequences of affirmative action plans for the general class of citizens and particularly for "innocent victims." The plans are, it

\(^{256}\) Selmi, *supra* note 31, at 983-84.

\(^{257}\) Professor Schuck is critical of this conception of affirmative action in his policy analysis of the programs. According to Schuck, such approaches cloud the distinction between affirmative action and nondiscrimination. See Schuck, *supra* note 1, at 6-7. While it is true that a line between "outreach" and "preferences" is false, according to Schuck, he ultimately adopts a similar approach, identifying preferences allocated according to race as his subject of inquiry: "Under ... various pressures, three related distinctions—between nondiscrimination and affirmative action, equality of opportunity and equality of result, and goals and preferences—blur at the edges.... I view these distinctions as foundational (though again, blurry at the borders) and believe that they condemn affirmative action." *Id.* at 7.

\(^{258}\) Nevertheless, such programs have been challenged. See Adams, *supra* note 85, at 1398, 1408-13.
seems, implied to be discriminatory, but justified in some circumstances.

A second approach to defining affirmative action is apparent in the literature. This approach organizes the programs according to the institution from which the plan originated. Affirmative action plans are thus defined as programs taking race into account to remedy past discrimination, or as part of a consent decree aimed at remedying discrimination or opening closed opportunities, or as a voluntary plan addressing prior patterns of discrimination.\(^{259}\) This approach reflects the pre-\textit{Croson} debates over the level of scrutiny to be given affirmative action plans, as the categories suggest greater or lesser justification for the plans. It also implies a hierarchy of constitutionally acceptable programs. Court-ordered affirmative action is least problematic because discrimination is proven; voluntary affirmative action is most troubling because no one has shown the existence of discrimination. There is also an implied fourth category—cases where no particular discrimination by the institution has occurred. Such affirmative action is presumptively invalid.

The organizational approach to defining affirmative action is broadly consistent with the Court's suspicion of affirmative action plans that do not seek to remedy discrimination by the particular institution. Under the influence of Powell's opinions, voluntary affirmative action was the most difficult to justify, particularly because Powell rejected "societal discrimination" as a basis for affirmative action. On the other hand, \textit{Weber} justified affirmative action plans aimed at addressing prior discrimination by the defendant or in satisfaction of an affirmative duty to desegregate. Consent decree based plans stood on yet more solid ground since they grew out of ongoing litigation, suggesting that there was a good chance that the defendant had engaged in some prior discrimination or was at least fulfilling the hope of Title VII that employers would voluntarily comply with the act's remedial goals. Finally, affirmative action plans crafted by the courts to deal with especially egregious or difficult discrimination cases stood as the most justifiable. Though objections to such plans still exist, affirmative action came to be regarded as an

\(^{259}\) In his examination of affirmative action as policy, Professor Schuck offers a supplement to his detailed definition of affirmative action. See Schuck, \textit{supra} note 1, at 5-6. That supplement, labeled "Designs" is a version of an organizational definition of affirmative action. Schuck identifies five designs: programs are designed around "favored groups" protected, "kinds of actions" covered, whether the program is "mandatory, voluntary, or prohibited," how much weight is given preferences, and the variable "Methodolog[ies], exemptions, and duration" standards employed. \textit{Id.} at 8-9.
essential tool in the arsenal of courts enforcing the antidiscrimination ethic in the context of widespread or long-lasting discrimination.

Though the organization approach remains influential, its appeal has been reduced as Bakke's influence has expanded. Over time affirmative action cases came to be analyzed uniformly according to their effect on "innocent victims." After Croson, the imposition of strict scrutiny on affirmative action cases reinforces the Bakke-based focus on "innocent victims" and reinforces the distinction between soft and hard affirmative action. In this context, the organization of affirmative action plans appears artificial and misplaced.

Even if not superceded by the categorization approach, the organization approach already duplicated the primary problem of that approach. At no point was there a focus on whether the challenger to the plan had shown discrimination. Categorization definitions seem mostly efforts to employ the posture of the case generating the affirmative action plan to justify or criticize it.

Recently a couple of commentators have attempted to define affirmative action broadly. Professor Peter Schuck devotes a lengthy passage to defining affirmative action. His definition, though appealing,\(^{260}\) is expressly delimited as a policy assessment of affirmative action and is not aimed specifically at determining how affirmative action should be judged constitutionally.\(^{261}\) Of some significance, however, is his recognition that the distinction between nondiscrimination and affirmative action is the terrain on which much of the battle over affirmative action has been fought.\(^{262}\) This distinction implies that affirmative action cases of some type are (or are not) discriminatory. And, it is for this reason that Justice Scalia in Adarand

\(^{260}\) Shuck defines affirmative action this way:

By affirmative action, I mean a program in which people who control access to important social resources offer preferential access to those resources for particular groups that they think need special treatment. In this context, then, I use the terms "affirmative action" and "preferences" interchangeably. By affirmative action, I also refer to its typical programmatic forms—more or less systematic, continuous, bureaucratized, rule- or routine-governed, and often outcome-determinative. I also focus on ethno-racial preferences rather than those based on income, age, gender, or disability, although some of my arguments also apply to them. Unless the context indicates otherwise, I use race to include the ethnicities favored by affirmative action.

Id. at 5 (footnotes omitted). Shuck continues, distinguishing affirmative action from nondiscrimination and indicating how partisans in the battles of affirmative action often distort the definition of nondiscrimination to the advantage of their arguments. Id. at 5-8.

\(^{261}\) Id. at 3.

\(^{262}\) See id. at 5-6.
can boldly declare affirmative action affirmative discrimination.\textsuperscript{263} Schuck recognizes that the question of discrimination is always present in these debates, though the parallelism is generally lost with discrimination (a departure from nondiscrimination) largely implied rather than proved.\textsuperscript{264}

Neither have all commentators eschewed defining affirmative action in a more complicated way. As Professor Deborah Malamud summarizes in her 1997 review of books on the subject, “for most of the authors under review here, the affirmative action concept is either considerably broader or considerably narrower than affirmative action as popularly conceived. And the definitional differences seem clearly strategic in their motivation.”\textsuperscript{265} So John David Skrentny posits a complicated set of “unit ideas” that produce a sliding scale of affirmative action in contrast to an idealized “color blind model.”\textsuperscript{266} The other authors Professor Malamud reviews also offer complicated definitions, but ultimately all are versions of the categorization approach, under which the authors categorize the programs that might be called affirmative action as being permissible or not, preferences or not.\textsuperscript{267} Malamud expresses little patience with these definitions, offering her own definition, one based on the organizational approach:

One would think this a relatively easy question to answer, at least within the core areas of education, employment, and contractual set-asides—areas that define the boundaries of the Supreme Court’s affirmative action jurisprudence. The current controversy over affirmative action is a battle over the use of preferences or set-asides in the allocation of positions, benefits, or contracts.\textsuperscript{268}

Professor Malamud’s confidence reflects a view that the basic question in affirmative action cases is well understood and that the controversy lies in the underlying legal, political, and moral issues. In this way, affirmative action is treated as similar to the abortion controversy.\textsuperscript{269} The biology of pregnancy sets the terms of a debate

\textsuperscript{264} See Schuck, supra note 1, at 4-8.
\textsuperscript{265} Malamud, supra note 1, at 1691-92.
\textsuperscript{266} Id. at 1692.
\textsuperscript{267} See id. at 1692-96.
\textsuperscript{268} See id. at 1691.
\textsuperscript{269} “[T]he debate over affirmative action has developed in a peculiarly American way, as it melds the American obsessions over race, meritocracy, and individualism, thereby creating an unwinnable controversy.” Selmi, supra note 31, at 1022.
with no easy answers. For better or worse the legal, political, and moral questions require a choice between the interests of the child and those of the mother. Affirmative action is similarly constructed: the limits of nonpreference decisionmaking are mostly unacceptable while the harms ascribed to considering race, even for benign purposes, are no more acceptable.

This view of affirmative action hides several problems, however. Fundamentally, only the political and moral questions are presented, and those are presented in ways that prejudice the debate against the very idea of affirmative action. First, the debate focuses on identifying the "better" policy. How much opportunity is created becomes a primary concern, refocusing discussion on the collateral effects of the programs on their intended beneficiaries. Bakke and Grutter go on and on, evaluating the implications of affirmative action plans for black recipients of benefits while discussing the circumstances of the named plaintiffs almost not at all. This curious aspect of affirmative action cases derives from the underlying fixation on whether the plans achieve their goals—a valid concern if the programs are deigned problematic per se.

The focus on identifying the better policy also directs the analysis toward searching for alternative plans to achieve the underlying policy goals. This includes but is not limited to identifying nonrace based alternatives. Alternatives, even wildly speculative ones, are offered as replacements, even as those alternatives continue to be judged on the grounds of their ability to produce racially identifiable results. Thus, "class-based" affirmative action is advanced in the name of serving the purposes of advancing racial equality, even as the reason for doing so is that government programs should be agnostic (at best) to racial results. Each of these reasons make the policy definition of affirmative action troublesome, directing the debate as it does toward obsession with side issues and away from the legal question underlying affirmative action challenges—discrimination and equality.

Such as the debate is framed as a moral or ethical debate by this policy focus, affirmative action discourse is similarly degraded. Affirmative action litigation and discourse alike become focused on

270. The basis of the debate pits fundamental values against one another. Conception initiates a process that culminates in a viable child; but viability, even with the significant medical advances of recent years, requires a significant gestation period inside a woman.

271. Professor Schuck evaluates many of these alternatives, finding most unappealing. See Schuck, supra note 1, at 78-91.

272. On class based affirmative action, see id. at 80-81.

273. See id. at 78-94.
whether it is justifiable to use discrimination to fix discrimination. However, the “discrimination” component of this question is unbalanced. For plaintiffs to show discrimination, whether under Title VII or the Constitution, they must comply with relatively stringent proof requirements. Opponents of affirmative action plans, on the other hand, seem never to have to prove much, as the Court, at least, appears satisfied with classification as discrimination. Thus, the moral debate rages about a situation relatively removed from the facts of particular affirmative action programs, and presenting issues not necessarily generally implicated.

The debate is further complicated by defenders of affirmative action questioning the very appropriateness of debating affirmative action as discrimination. They ask whether an equal treatment model is ethical, given the advantages earned by years of discrimination, often invoking the well known “starting-line” argument. The goal is to cast doubt on an argument about discrimination that is granted too much credit. Because affirmative action programs are wide reaching, it is natural to debate them in broad strokes. The problem is that the debate is bereft of the structure provided by the litigation of cases on well defined legal grounds. If a court found program X nondiscriminatory in application to Y, its finding says something different from that court saying program X is discriminatory but justified. The value of deciding concrete cases, the very value of adjudication, is lost in the affirmative action context. These kinds of generalized responses constitute little more than a reflection of this limitation in debates about affirmative action.

The key issue in these debates is whether groups or only individuals can be proper subjects of ethical inquiry. If it is only individuals, moral judgments must focus on present-time issues and disadvantage is determined ahistorically. However, the policy orientation of scholarly definitions glosses over the fact that the courts talk about discrimination with little reference to the individuals involved. Rather than discuss the causal link between the affirmative action program and the plaintiff’s injury, the courts more often than not rhapsodize on the harms caused to beneficiaries, society, and tradition by permitting affirmative action; or they caution on the dire consequence that will follow from abandonment of such programs. The reality that both of these statements can be true highlights the troublesome nature of the highly generalized analysis that pervades discussion of affirmative action cases.
Finally, affirmative action has become the area where vague notions of political theory are debated with reckless abandon. Questions about the propriety of government involvement in discrimination are raised as potentially problematic issues (particularly under public choice theories that suggest that government power could be corralled and focused on oppressing others by cohesive groups) and offered as reasoned bases for invalidating or upholding an affirmative action plan. On some level, these are all appropriate debates. The flaw, however, is that they bear only a tangential relationship to the kinds of questions rigorous legal analysis is normally concerned with.

Even such as there is a legal debate, it has a strange tone to it. The debate’s focus on whether this policy is “legal” is hampered by several included foci. First, focus on meaning of equal protection—invariably seeking to determine the meaning and force of Justice Harlan’s colorblind interpretation in his Plessy dissent and Brown Is rejection of separate but equal—cannot escape the categorical difference between affirmative action and Jim Crow. Whatever scrutiny ought be applied to benign programs, and even if it is impractical for courts to try to distinguish the malign from the benign, there can be no doubt that the total system of racial subordination cannot be fairly compared to the widespread but interstitial operation of affirmative action.

Moreover, a troublesome legislative history haunts the debate. The Congress that drafted the Fourteenth Amendment clearly meant it as authorization and justification for its Reconstruction programs, many of which included race-exclusive remedial programs. At the same time, this legislative history was invoked in support of separate but equal during the debates over Brown I, and had been used specifically to justify Jim Crow in Plessy. That is, there is plenty of ammunition for anyone to support their position in the debate. In the end, the “legal” analysis of affirmative action hardly seems legal at all.

Ultimately, all three of these approaches are “open textured,” permitting free-flowing debates with neither means for structuring the debates nor mechanisms for resolving them. Predictably, debates rage unabated with the parties arguing past the other side. Issues are neither framed nor resolved. And some commentators long for a magical

275. See Rubenfeld, supra note 29, at 430-32.
276. See Brown I, 347 U.S. at 489-90; Plessy, 163 U.S. at 542-44.
resolution of the now tired debate. That resolution begins in an analytic definition.

III. TOWARD A DEFINITION OF AFFIRMATIVE ACTION: DISJUNCTURE BETWEEN ANTIDISCRIMINATION AND AFFIRMATIVE ACTION JURISPRUDENCE

Judicial and scholarly confidence in the generalized definitions of affirmative action follow from the assumption, even among many defenders of affirmative action, that it constitutes discrimination. For the Court, that assumption is found in its leap from classification to discrimination; for commentators it is generally taken for granted. I have already implied that there is a disjuncture between classification and the need to show intent, cause, and injury in order to establish discrimination. A closer look at the relationship between the evolution of antidiscrimination law and affirmative action is necessary to show both the degree of disjunction between the two and to expose the implications for both.

As with all things related to civil rights, it is appropriate to begin with Brown I to understand antidiscrimination law. In Brown I, the Court’s most prominent holding was its declaration that “separate but equal” was an abomination.\(^\text{277}\) The consequences of Brown I’s repudiation of Plessy v. Ferguson were not truly apparent until Brown II, where the Court declared a general, affirmative duty to desegregate public schools.\(^\text{278}\) This holding implied an affirmative duty to desegregate generally; however, interpretations of Title VII make clear that subsequent courts did not hold private employers to such an obligation at least until the 1964 Civil Rights Act took effect.\(^\text{279}\) Brown I’s duty to desegregate was self-executing and required neither a showing of affirmative acts to segregate, motive, nor causal connection between the two.

In subsequent cases, however, federal courts generally confronted challenges to diabolical efforts to avoid Brown I’s mandate. When the

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The judgments below, except that in the Delaware case, are accordingly reversed and the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.
Court finally decided such a case in *Green v. County School Board*, its desegregation jurisprudence was immediately complicated. Causation did not emerge as a requirement just yet, but in dealing with a "freedom of choice" plan, the Court showed a marked impatience with the pace of desegregation. *Green* also complicated the affirmative duty aspects of *Brown I*. The Court suggested that a freedom of choice plan might have been permissible at some point, but that more than a dozen years after *Brown I* it reeked of obstruction. In *Green*, the Court focused for the first time on what the defendants did.

By its decision in *Swann v. Charlotte-Mecklenburg Board of Education*, three years later, the Court had fully transformed *Brown I* 's antisegregation approach to an antidiscrimination approach, but it continued to conceive of government steps that perpetuate segregation as discriminatory. The harm of segregation was connected to the plaintiff's particular harm by an assumption that the latter was caused by the government's inaction in eliminating segregation. In this way, the question of discrimination versus affirmative duty was confused. But in another three years, in *Milliken v. Bradley*, the discrimination model had fully ascended, with the Court rejecting a desegregation order applicable to suburban school districts that had not been shown to have operated segregated school systems—i.e., discriminated.

Consequently, in *Defunis*, the Washington trial and Supreme Courts framed the affirmative action challenge in terms of the desegregation of higher education. The Washington Supreme Court's opinion draws on this jurisprudence and *Swann*'s distinction between de jure and de facto segregation. The Washington Supreme Court correctly recognized that de facto segregation still required affirmative steps to desegregate under *Brown I*. But by *Swann* de facto segregation had been subsumed in a distinct antidiscrimination approach that seemed to require at least a prior period of de jure segregation to trigger the affirmative duty. This shadow over the

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281. See id. at 441-42.
282. Id. at 435-40.
283. Id. at 437-39.
285. Id. at 14-21.
288. Id. at 1183-85.
Washington Supreme Court’s opinion casts some doubt on it and perhaps predicts the Supreme Court’s refusal to adopt that approach four years later in *Bakke*.

*Brown I*’s affirmative duty to desegregate can be extended to the 1964 Civil Rights Act, especially its Title II ban on segregation in public accommodations. However, much of the Act, especially Title VII’s protection of bona fide seniority systems and injunction against achieving an integrated workforce at the expense of incumbent employees, supports the view that those titles that became most prominent (Title VI and Title VII) reflected an antidiscrimination model. The 1971 and 1973 decisions, *Griggs v. Duke Power Co.* and *McDonnell Douglas v. Green*, formally adopted that model. As importantly, they interject a focus on cause into discrimination cases by emphasizing that the employer’s adoption of nondiscriminatory devices could be discriminatory if it caused an artificial restriction on employment opportunities for protected groups or if the decision, motivated by one of the protected classifications in the Act, was the true causal basis for the plaintiff’s harm.

Despite *Griggs* and *McDonnell Douglas*, a *Brown I*-like construction of Title VII persists into the early 1980s—the proof of “facial discrimination,” also known as direct evidence cases. In

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290. *See id.* § 703(h), 78 Stat. at 257 (current version at 42 U.S.C. § 2000e-2(h)).

291. The *Teamsters* Court quotes an interpretative memorandum inserted during the debates over Title VII to make this point:

Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, *if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer’s obligation would be simply to fill future vacancies on a nondiscriminatory basis*. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.

Teamsters v. United States, 431 U.S. 324, 350-51, (1977) ((internal quotations omitted)


296. *See*, e.g., Reeb v. Marshall, 626 F.2d 43, 46 (8th Cir. 1980) (opining that plaintiff would prevail if the reason for her discharge “was her failure to conform to her supervisor’s stereotype of a professional woman—a docile unaggressive female” is true).
cases where an employer expressed prejudicial views against particular employees, courts often found those views to be "direct evidence" of discrimination.\textsuperscript{297} Eventually, "direct evidence" cases would, like Brown's affirmative duty to desegregate, be subsumed in the antidiscrimination proof.\textsuperscript{298} The key shift was the Court's demand that plaintiffs show a causal link between the prejudiced behavior and the adverse employment decision.\textsuperscript{299} Many courts would come to recognize cases, termed "stray remark" cases, where a prejudicial statement was made, sometimes even threatening an adverse employment decision, but where no proof was shown that the animus of the employer or coworker caused the adverse employment

\textsuperscript{297} "[T]here was a definite causal relation between [supervisor] Pohasky's apparently discriminatory conduct [statements to the effect that black workers 'clean better' and ought to 'stay in their place'] and the firings." Slack v. Havens, 7 Fair Empl. Prac. Cas. (BNA) 885, 889-90 (S.D. Cal. 1973), aff'd as modified, 522 F.2d 1091 (9th Cir. 1975).


\textsuperscript{299} This shift is reflected in General Electric Co. v. Gilbert, 429 U.S. 125, 134-35 (1976). As Lewis & Norman relate:

[T]here remains rampant disagreement and confusion in the appellate decisional understanding of what evidence is "direct." It is even sometimes difficult to determine whether an employer policy may be said to discriminate expressly or facially on the basis of race, color, sex, religion or national origin. In the notorious Gilbert decision that prompted Congress to spank the Court by enacting the Pregnancy Discrimination Act of 1978, the Court held that an employer rule that denied disability benefits for pregnancy but no other physical conditions did not discriminate "because of gender" .... The rule, the Court explained, treated pregnant women differently, relative to benefits, not only from men but also from nonpregnant women. The rule therefore did not draw a distinction on the basis of gender, even though its sting was felt only by women.

\textsuperscript{297} Lewis & Norman, supra note 30, § 3.2, at 117 (footnote omitted). Though the defect in Gilbert is a failing in showing both intent and cause, the two tend to run together in failed direct evidence cases. So in Galdieri-Ambrosini v. National Realty & Development Corp., the plaintiff's proof that she was assigned stereotypical women's work failed because she did not show such assignments would not have been given men. 136 F.3d 276, 290 (2d Cir. 1998). That is, she failed to show her assignment was because of her sex.
decision. In *Price Waterhouse v. Hopkins* the Court would debate causation explicitly, with Justice O'Connor complaining in her concurrence that the Court had abandoned proof of cause. However, a fair reading reflects disagreement over the type of causation needed to be shown, with all the justices arguing for some proof of causation. The case was difficult because there was evidence admitting to the use of the illegal factor, sex, in the decision, but also evidence that other factors played a role; there was a mixed-motive. The Court found that mixed-motive evidence could be used to avoid liability altogether if the employer could show by a preponderance of the evidence that it would have come to the same decision.

Justice Powell's opinion in *Bakke* basically imports the early direct evidence cases into constitutional law, drawing on the language of *Hirabayashi* to establish that classification equals discrimination. In doing so, Justice Powell drew strength from *Brown*’s injunction to affirmatively eliminate segregation but directed that force at preserving incumbent interest by calling it discrimination. Classification is viewed in this construct as facial, de jure segregation—a kind of discrimination violating the antidiscrimination ethic and needing to be flexible, limited, and temporary if it is to be

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300. See, e.g., Tyler v. Bethlehem Steel Corp., 958 F.2d. 1176, 1185-87 (2d Cir. 1992) ("Even a highly-probable statement like 'You're fired, old man' still requires the factfinder to draw the inference that the plaintiff's age had a causal relationship to the decision"); see also Sanders v. Village of Dixmoor, 178 F.3d 869, 870 (7th Cir. 1999) (finding that the statement "Nigger, you're suspended" did not create triable issue of discrimination); Eilam v. Children's Hosp. Ass'n, 173 F.3d 863 (10th Cir. 1999) (unpublished opinion) (demanding that a Jewish worker provide a rabbi's note in support of religious holidays and pro-Christian remarks fail to raise a jury question of religious discrimination); Woodson v. Scott Paper Co., 109 F.3d 913, 916 (3d Cir. 1997) (permitting racist graffiti in the workplace is not direct evidence of employer's motive); Oates v. Discovery Zone, 116 F.3d 1161, 1172 (7th Cir. 1997) (refusing to remove a depiction of black American employee as a monkey did not evidence disparate treatment, despite reflecting prejudice).

301. See 490 U.S. 228, 261 (1989) (O'Connor, J., concurring). Justice O'Connor argues that mixed motives proof, a departure from *McDonnell Douglas*, should be limited to direct evidence cases, such as the case at bar, and that those cases could be identified according to three factors: decision maker makes remarks, those remarks were related to the decision making process, and they were not “stray.” See *id.* at 277-78 (O'Connor, J., concurring). The recent *Costa* decision rejects the requirement for direct evidence to trigger a mixed motives analysis. See *Costa*, 123 S. Ct. at 2153-55.

302. *Price Waterhouse*, 490 U.S. at 240-42 (Brennan, J.); *id.* at 261 (O'Connor, J., concurring); *id.* at 281-86 (Kennedy, J., dissenting).

303. See *id.* at 250-52.

304. *Id.* at 258. Congress modified this approach, allowing for limited relief upon such a showing. 42 U.S.C. § 2000e-5(g)(2)(B) (2000). The ability to avoid liability in mixed motive cases requires an initial showing of direct evidence of discrimination, according to some courts.

HeinOnline -- 78 Tul. L. Rev. 2184 2003-2004
permissible. However, antidiscrimination law has proceeded to abandon the facial discrimination construct Justice Powell employed and which Grutter reproduced. Rather, discrimination claimants are required in direct evidence cases to prove multiple elements to establish discrimination—intent,\textsuperscript{305} harm,\textsuperscript{306} and especially causation.\textsuperscript{307}

\textsuperscript{305} Intent is proved in most affirmative action cases. Dispute around this question mostly reflects a confusion about the nature of intent and its exaggerated role in discrimination law. George Rutherglen points out:

The phrase “intentional discrimination” is a redundancy according to the ordinary sense of “discrimination.” All discrimination is intentional in the sense that anyone who discriminates acts on the ground for the discrimination. It is conceptually impossible to discriminate on the basis of race without taking race into account. Conversely, most forms of affirmative action explicitly require consideration of race or sex. They plainly involve discrimination in the ordinary sense: they require race or sex to be taken into account in awarding benefits or advantages.


Rather what supporters of affirmative action wish to argue is that the causal element of a proof of discrimination is insufficiently established. Michael Selmi observes the same tendency in the Supreme Court’s discrimination jurisprudence:

What the Court means by intent is that an individual or group was treated differently because of race. Accordingly, a better approach is to concentrate on the factual question of differential treatment. In this way, the key question is whether race made a difference in the decisionmaking process, a question that targets causation, rather than subjective mental states.

See Selmi, supra note 25, at 289. The express purpose of most programs is to open opportunities to people identified by race, sex, or national origin, all protected classifications. The strength of this evidence is the basis for the typical assumption that discrimination exists. Because the key debates over discrimination law have had to do with the propriety of intentional versus nonintentional discrimination, the presence of uncontroverted evidence of intent leads many to assume that discrimination undoubtedly exists.

\textsuperscript{306} Harm is also usually established in most cases, with perhaps two key exceptions—the reapportionment cases, where the plaintiff is forced to argue that being in a majority black district is a harm, as such, compare United States v. Hays, 515 U.S. 737, 744-47 (1995) (finding the plaintiff’s injury is generalized in part because they do not live in challenged district) and the contractor association cases where the plaintiffs can show some lost business but not necessarily harm. But cf. N.E. Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 663-66 (1993) (locating harm in being categorized by race). These cases have been, improperly perhaps, analyzed as standing questions where the presence of third party standing makes the latter case easier, and the citizen standing suits make the former more difficult. In any case, one can accept the collective harm arguments from Associated General Contractors and its application in Shaw v. Reno, 509 U.S. 630, 642-49 (1993), and Grutter v. Bollinger, 123 S. Ct. 2325, 2332-33 (2003), without being satisfied that classification equals discrimination, because of defects in causation.

In the general affirmative action case harm is eloquently articulated by challengers to those plans who describe how their business was effected or their life plans changed by the disappointment of losing a contract or being denied admission. Defenders of affirmative action often mistakenly attack the harm claims of affirmative action plaintiffs. This misplaced argument is more a claim about causation that leads to pointless debates about whose pain is greater, more legitimate, etc. Rather the key questions tend to be whether some harm exists, whether there is a nexus between that harm and the alleged constitutional
In fact constitutional law has also developed in this direction, leaving Justice Powell's *Bakke* opinion and much of the affirmative action jurisprudence behind. In *Personnel Administrator v. Feeney*, the Court confronted a preference awarded to veterans that had the effect of precluding women who had scored well on the civil service examination from getting hired. Because a rank order was used and because women were not generally veterans, women who scored well were bumped down the list by veteran men. The Court said, however, that the plaintiffs had failed to prove discrimination. While the legislature understood that the plan would have this effect on women, this was not enough. The plaintiff was required to show that the legislature adopted the plan because of, not merely in spite of, its effects on women. *Feeney* is usually viewed as an intent case; this is a mistake. The real issue in *Feeney* is causation. The legislation did not cause the harm to women; the paucity of women veterans did. For this reason, the otherwise adequate intent showing—that the legislature understood that the plan would favor men over women—was inadequate. The plaintiffs needed to show that the legislature sought to harness the external condition (lack of women veterans) to disfavor women.

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violation, and whether the injury can be remedied by declaring the behavior in question invalid. See *Allen v. Wright*, 468 U.S. 737, 751 (1984). Cognizable injury is easily shown:

The injury they identify—their children's diminished ability to receive an education in a racially integrated school—is, beyond any doubt, not only judicially cognizable but, as shown by cases from *Brown v. Board of Education*, to *Bob Jones University v. United States*, one of the most serious injuries recognized in our legal system.

*Id.* at 756 (citation omitted).

Whether the harm constitutes a constitutional harm is more difficult to show, see *Paul v. Davis*, 424 U.S. 693, 712-13 (1976) (finding defamation is not a violation of due process), but is probably capable of being shown in most affirmative action challenges. The difficult question, and the area where the Court can be said to have allowed affirmative action plaintiffs flexibility is the showing that the injury is subject to being remedied. Even here, the Court's willingness to require the institutions in question to admit the named plaintiffs resolves this problem of standing. It does not resolve the substantive issue of causation of injury, however. Causation does and should require much more than *Allen*'s nexus and remedial connection elements for standing.


309. See *id.* at 261-64.
310. *Id.* at 276-80.
311. See *id.*
312. *Id.* at 278-80.
313. *Id.*
314. *Id.* at 276-80.
It is very difficult to reconcile Justice Powell’s construction in *Bakke* with *Feeney*. The same is true for most of the Court’s affirmative action decisions. As indicated above, there is a need to show that the affirmative action plan, as such, caused the injury at question in the case to comply with *Feeney*. Otherwise, the plaintiffs should be required to show, as the plaintiff in *Feeney* was, that the affirmative action plan was adopted because of, not merely in spite of, the effect it would have on nonminority applicants. To persist in ignoring *Feeney* the Court must emphasize that *Bakke* involves facial discrimination and *Feeney* was a nonfacial program. But this distinction goes only to the proof of intent, and comparison with *Feeney* reveals that the Court is using the strong proof of intent to imply that causation exists. *Feeney* itself shows that this assumption is probably not warranted.

This departure from *Feeney* leaves the discomforting impression that the Court has a special law for the nonminority opponents of affirmative action. Michael Selmi argues that results of this type turn, not so much on the elements of discrimination proofs, especially intent, but rather on the Court’s general belief that discrimination exists:

>[T]he Court now sees unlawful discrimination in the affirmative use of race, as occurs in the affirmative action cases or through racial redistricting, but is much less likely to identify discrimination in cases in which African-Americans are the victims of subtle discrimination. Indeed, despite a broad consensus that discrimination today is generally perpetrated through subtle rather than overt acts, the Court continually refuses to adapt its vision to account for the changing nature of discrimination; as a result, it appears unable to see discrimination that is subtle rather than overt. In this way, the Court has never moved beyond its view of the world prior to the passage of civil rights legislation in the 1960s when explicit barriers prevented African-Americans and women from fully participating in social and economic life. As long as such blatant barriers do not exist, the Court has difficulty seeing discrimination.315

In order to move beyond this view, the Court will have to dispense with the excessive weight it has placed on the now anachronistic facial/nonfacial distinction in discrimination cases that provides a bare fig leaf for the inconsistency between the Court’s affirmative action and discrimination jurisprudence.

In this way, Bakke is like the Court’s decision in Shaw v. Reno.\textsuperscript{316} Both decisions strain to trigger strict scrutiny (in contexts where it was perhaps unnecessary in the sense that the Court might have been able to analyze the case as a discrimination one).\textsuperscript{317} In both cases, the Court then engages in a very abstract strict scrutiny analysis that bears little resemblance to the plaintiffs’ claims of injury. However, in this sense at least, reapportionment cases have recovered from Shaw’s errors, while general affirmative action cases remain burdened by them.

In Miller v. Johnson the Court abandoned Justice O’Connor’s Shaw formula for identifying “racial gerrymander” with a focus on whether the district was discriminatory.\textsuperscript{318} Shaw had sought to trigger strict scrutiny when districts departed too greatly from traditional district drawing principles.\textsuperscript{319} This approach seemed to create a disparate-impact-type test for proving discrimination, contrary to the Court’s holdings on the Fourteenth Amendment requiring proof of discriminatory intent.\textsuperscript{320} In Miller, the Court reformulated the claim, structuring it around Feeney.\textsuperscript{321} A reapportionment plan was

\textsuperscript{316} 509 U.S. 630 (1993).

\textsuperscript{317}.

A Shaw claim would arise, according to the Shaw opinion when plaintiffs could show that the reapportionment plan “cannot be understood as anything other than an effort to segregate citizens into separate voting districts,” that is, one could argue, where the government simply classifies persons on the basis of race. According to the Court, this claim was recognized because such “bizarre” apportionment schemes reinforce the racial stereotype that voters of the same race think alike and signal to elected officials “that they represent a particular racial group rather than their constituency as a whole.” This claim, however, did not require any particular plaintiff to show that he or she was personally denied equal treatment. Instead, the claim would seem to exist where the shape of the reapportioned district itself was so bizarre that it provided sufficient probative force to suggest a racial gerrymander had occurred.

Adams, supra note 85, at 1441 (footnotes omitted) (quoting and citing Shaw, 509 U.S. at 650, 652).


\textsuperscript{319} Shaw, 509 U.S. at 644-49.


\textsuperscript{321} The Court says:

The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature’s redistricting calculus. Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process. The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race. The plaintiff’s burden is to show, either through circumstantial
discriminatory, the Court said, when it was drawn because of, not merely in spite of, race.\textsuperscript{322} \textit{Miller} is still a tricky decision, because it is not very clear what discriminatory acts caused the plaintiffs' injury in the cases.\textsuperscript{323} but the Court correctly emphasizes that the key factor is that the district was motivated by a desire to disadvantage some voters—both intent and cause.\textsuperscript{324}

I believe that the approach in \textit{Miller} is still problematic\textsuperscript{325} and have great concerns about how the test developed there was applied to the facts in that case and in \textit{Bush v. Vera}.\textsuperscript{326} But the decision at least highlights the important role of causation.\textsuperscript{327} As in \textit{Feeney} the plaintiffs in \textit{Miller} cannot claim merely that the plan advantages some and disadvantages others because those relative advantages derive from external factors.\textsuperscript{328} Rather, the plaintiff must show that the legislature harnessed those factors to produce a racial result for its own sake.\textsuperscript{329}

No such "correction" has been made in affirmative action cases. Though \textit{Johnson} does employ such language, it has not been widely followed.\textsuperscript{330} Instead, \textit{Grutter} duplicates Justice Powell's approach in

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Evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.

\textit{Miller}, 515 U.S. at 915-16 (citations omitted) (citing \textit{Shaw}, 509 U.S. at 646; Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979)).

322. See id.
323. In \textit{Miller}, the Court continued to emphasize some classification-as-discrimination aspects of \textit{Shaw}. See id. at 905, 910-23. As Professor Adams argues:

Although the district lines in \textit{Miller} were racially neutral, the Court found they were a "deliberate attempt to bring black populations into the district" and therefore were subject to strict scrutiny. In doing so, the Court opined that the Equal Protection Clause's "central mandate" is racial neutrality in government decision-making and that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." \textit{Miller} underscored \textit{Shaw}'s concern with classification, that is, with sorting individuals into racial or other kinds of groups.

\textit{Adams}, \textit{supra} note 85, at 1441-42 (footnotes omitted) (citing \textit{Miller}, 515 U.S. at 917, 919).

325. "Justice Kennedy's 'theory would apparently find a constitutional violation in even those instances in which race has a fairly minimal input into government decision making.'\textit{ Adm's}, \textit{supra} note 85, at 1443 (footnote omitted).
327. See id. at 976-81.
329. See id.
Bakke, giving it the strength of a majority opinion. Grutter's assumption of discrimination from classification seems to suggest that nonminority plaintiffs are freed of the normal proofs of discrimination when challenging affirmative action programs. This is problem enough. However, the larger problem of this approach to discrimination is how it distorts ordinary discrimination litigation.

IV. DEFINING AFFIRMATIVE ACTION AS A LEGAL QUESTION

Defining affirmative action requires that its relationship to discrimination be established. Discrimination is, however, not so easy to pin down. George Rutherglen provides a typical definition, identifying discrimination "in the ordinary sense" as taking race or sex "into account in awarding benefits." He notes that this definition breaks down precisely when needed most.

The technical legal sense of "discrimination" bears a close relationship to the ordinary sense of the term in easy cases, but in progressively harder cases the relationship becomes more and more attenuated. In these harder cases, such as those involving disparate impact and affirmative action, the technical legal usage invites the question whether it is similar enough to ordinary usage to support a different sense of the same term.

Some confidence is placed on constructions focusing on decisions made "because of" or "on the basis of" a protected category, but the fluidity of the meaning of protected categories, particularly social constructs like race, and the concealed, fundamentally subjective nature of use of such categories undercuts the power of this definition.

331 Rutherglen, supra note 305, at 128. This construction can, of course, be applied to other protected categories, but gets substantially more complicated when accommodation duties are added to the formula, such as is the case with religious and disability discrimination.

332. Id. Similarly, Vincent Blasi notes the fluidity of definitions of discrimination: "One can argue forever about what should properly be considered 'discrimination'—in legal circles, the term normally is used to mean 'consideration of a trait in an illegitimate way,' which still requires a judgment about when consideration of the trait really is illegitimate ...


334. Rutherglen, supra note 305, at 127.
that has been rendered as various proof structures. These structures are employed to structure analysis of intent, causation, and harm.

Underlying the various proofs of discrimination have been two general approaches: the first locates discrimination in conscience shocking aspects of extreme cases; the second presumes discrimination where there exists substantial deviations from rational decisional grounds. The former characterized discrimination in the pre-\textit{Brown I} era and continued to inform \textit{Brown Is} antisegregation injunction; the latter drew on \textit{Brown Is} rejection of the legacy of racial separation and has defined discrimination litigation since the mid-1960s. The persistent reliance on the former model in affirmative action cases puts that jurisprudence out of step with discrimination proofs generally and can be seen as part of a reaction to antidiscrimination law generally. This reaction at least seeks to merge the two models (if not return discrimination proofs to the older regime of outrages). The reaction has been triggered by increasing doubts about what Professor Calloway called the “basic assumption” of discrimination law—that departures from rational decisionmaking grounds evidence discrimination. And it reflects a slow transformation of antidiscrimination law into a system more akin to equity than law.

\textbf{A. The Old Way: Discrimination as Outrages}

Discrimination-as-outrage cases are easily discussed, because they represent a pre-\textit{Brown I}, substantive-due-process-like approach. As evidenced in cases like \textit{Yick Wo} and \textit{Hill v. Texas}, the Court found discrimination where the evidence reflected extreme prejudice or

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335. Selmi, supra note 25, at 283-84.
336. See id.
337. Deborah A. Calloway, St. Mary’s Honor Center v. Hicks: Questioning the Basic Assumption, 26 CONN. L. REV. 997, 997-98 (1994). Professor Calloway explains that, because direct evidence of discrimination rarely is available, Title VII’s success in rooting out disparate treatment has been due, in large measure, to methods of proof based on the assumption that, absent explanation, adverse treatment of statutorily protected groups is more likely than not the result of discrimination. Throughout the history of Title VII, this basic assumption has served as a cornerstone of disparate treatment actions.

Recently, however, the Supreme Court has questioned this basic assumption. With its decision in Saint Mary’s Honor Center v. Hicks, the Court joined academics, judges, and a growing segment of the American population that has come to believe that discrimination no longer exists.

\textit{Id.} at 997-98 (footnote omitted).

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complicated schemas for the exclusion of minority groups. In those cases, as in *Norris v. Alabama*,\(^{339}\) the Court's decisional ground is ultimately the extreme, conscience-shocking nature of the behavior. It is for this reason that the *Korematsu* Court goes through great pains to dismiss (unconvincingly) the charge that the internment was as much based on a racist frenzy stirred up by the Japanese Americans' neighbors as on detached military planning.\(^{340}\) Where the behavior is conscience-shocking and related to a protected category, discrimination could be found even in a system of official racial segregation.\(^{341}\)

In finding that separate but equal cannot stand, *Brown I* draws from this approach, tacitly characterizing segregation as conscience-shocking.\(^{342}\) By extension employers who in the 1970s made employment decisions on the basis of prejudiced statements could be viewed as engaged in conscience-shocking behavior.\(^{343}\) In the demise of the direct evidence and facial discrimination proofs model, this showing of discrimination has largely been supplanted by another model, though there is some evidence that the direct evidence and facial discrimination proofs model may be on the return.

B. The Modern Approach: Deviation from Rational Decisional Grounds

Most contemporary discrimination cases turn on departures from rational decisional grounds.

[T]he Court's jurisprudence relating to proving discrimination developed primarily in the early 1970s based on loose assumptions that discrimination provided an explanation for otherwise unexplained deviations from what would be expected in a race-neutral world. Based on this assumption, the Court not only developed a formal and now familiar model of proof to adjudicate employment discrimination cases, but also created similar models to identify discrimination violative of the Equal Protection Clause in jury selection, voting, and housing.

\(^{339}\) 294 U.S. 587 (1935).


\(^{341}\) It is probably noteworthy, then, that the Court was forced to confront few lynching related cases, as the scourge of lynching would have forced the Court to deal directly with a Jim Crow system in which it was fully invested. *But see* United States v. Shipp, 214 U.S. 386, 420-23, 483 (1909) (imprisoning a sheriff for contempt of the United States Supreme Court for complicity in the lynching of a prisoner after the Supreme Court had stayed his execution).

\(^{342}\) See 347 U.S. 483, 495 (1954).

\(^{343}\) For a brief discussion of United States Supreme Court employment discrimination cases during this era, see Selmi, *supra* note 25, at 283.
These models all relied on basic evidentiary principles that could be adapted to address discrimination that is subtle or overt, conscious or unconscious, intentional or unintentional, and brought as both constitutional and statutory claims.\textsuperscript{344}

This approach is clearly reflected in the two most prominent proofs of discrimination, disparate impact and disparate treatments.

In disparate impact cases the departure from the rational decisional grounds approach is express. Disparate impact plaintiffs prove discrimination when they show that the employer uses an employment device that disproportionately excludes members of a protected class.\textsuperscript{345} The employer can avoid liability if he can show the device is job related.\textsuperscript{346} Similarly, the three part proof of disparate treatment allows an individual plaintiff to show that she applied and met minimum qualifications for a job, but was not selected.\textsuperscript{347} This minimal proof excludes the most likely reasons for her adverse employment outcome.\textsuperscript{348} The employer is allowed to rebut this preliminary showing with any nondiscriminatory reason,\textsuperscript{349} but the employee may show that the employer’s claimed reason is pretextual or provide sufficient evidence of discrimination that a jury can find discrimination despite the employer’s explanation.\textsuperscript{350} This focus on use of the protected category is deceiving, because it is not so clear what the protected categories are and when they are used.\textsuperscript{351} Thus, the employer’s “use of the category” tends to turn on evidence that he departed from “normal” hiring criteria, as does the proof of pretext where the rebuttal consists of an accepted job criterion.

The indirect proof is also reflected in the special case of mixed motives litigation. In those cases, the employer or other defendant has used a rational job criterion in making the decision, but he has also used the protected category.\textsuperscript{352} These cases present substantial

\textsuperscript{344.} \textit{Id.} (footnotes omitted).


\textsuperscript{346.} \textit{Id.}

\textsuperscript{347.} \textit{See} McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).


\textsuperscript{350.} Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000) (citing \textit{Burdine}).

\textsuperscript{351.} \textit{See} White, supra note 333, at 761-68.

problems for antidiscrimination law: on the one hand, the focus on rational decision making would be undercut if the decision were invalidated; on the other, the antidiscrimination ethic would be abandoned if it were not. This dilemma has been navigated by the Court, and Congress confronted it by invalidating the decision but limiting recovery.

C. Easy and Hard Cases in Antidiscrimination Law

The rational decisional grounds approach to identifying discrimination distinguishes easy cases from hard cases. Easy cases involve decisions in areas where there are determinative, objective decisional grounds. Hard cases exist where there are either no objective criteria upon which to select candidates or the objective criteria cannot reduce the pool of candidates to an appropriately small number. Often hard cases involve objective criteria for one usage—determining minimal qualification—that turn out not to be objective in another usage—ranking candidates for selection.

1. Easy Cases

The existence of real, determinative, rational decisional grounds means that departures from these grounds are suspect and, if accompanied by any additional evidence of use of the category, can be read as discriminatory. This is consistent with what Professor Calloway calls the “basic assumption” of employment discrimination law. It is a judgment that, in a racially obsessed and stratified society, decisions not made on rational grounds are likely to be reflective of actual discrimination.

This proof of discrimination satisfies all the expected legal criteria. Intent, the most difficult to prove factor in many cases, is established here by the departure from the rational decisional ground. This requires the faith that discrimination is the real reason for such departures, and the basic assumption supplies that faith. This is an important way to show intent because intent is difficult to identify under any circumstances. Harm is usually assumed or taken from the

353. See Price Waterhouse, 490 U.S. at 258.
355. See Calloway, supra note 337, at 997-98.
356. See id.
plaintiff's allegation. Courts could delve into these questions deeper, but it is not clear that it would be profitable. The harm of discrimination, as the Court's affirmative action standing cases show, is easily identified and probably accepted as such by the general public. Causation is the key issue. It is here that the rational decisional grounds construction plays the most important role. Where a decision is not based on genuine rational grounds, the harm suffered must be caused by the irrational, discriminatory ground. Clearly, the role of the basic assumption is in supplying links to both intent and causation.

This formula is undercut in two ways. In mixed motive cases the presence of both rational and illegal decisional grounds implies that the illegal ground was not the causal factor. The complexity of the mixed-motives case also emerges in "after acquired evidence cases" as well as in pattern and practice class actions or disparate impact cases where the employer seeks to exclude a particular class member from recovery because he would have been rejected in any case. Courts have dealt differently with each of these situations, but have not generally questioned the basic structure. These all remain easy cases, even if complicated.

Recent scholarship has challenged the basic assumption and therefore the existence of easy cases. Following this scholarship, the Court in St. Mary's Honor Center v. Hicks also departed from the rational decisional grounds construction. Commentators and the courts have imputed that departures from rational decisional grounds

358. See McKennon, 513 U.S. at 356-61.
359. "When the Government seeks individual relief [in a pattern or practice case] for the victims of the discriminatory practice, a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief." Teamsters v. United States, 431 U.S. 324, 361 (1977); see also id. at 359 & n.45 (discussing the rebuttable presumption employed in pattern and practices cases); Franks v. Bowman Transp. Co., 424 U.S. 747, 772 (1976) (concluding that petitioners successfully demonstrated the defendant's discriminatory hiring pattern and practice).
360. See the sources discussed in Deborah C. Malamud, The Last Minuet: Disparate Treatment after Hicks, 93 Mich. L. Rev. 2229, 2255-57 (1995). "These data are far from perfect, but they serve to demonstrate the instability of the empirical foundation underlying the 'basic assumption' that employment decisions are correct and defensible absent discrimination." Id. at 2257; see also Calloway, supra note 337, at 1009-23 (discussing commentators' skepticism and judicial skepticism).
362. See Malamud, supra note 360, at 2254-62; Calloway, supra note 337, at 999-1009.
do not necessarily evidence discrimination. Rather these departures might evidence nepotism, efficient choices, or other motives. Consequently, courts have come to emphasize the proof of discriminatory intent as such.

The Court’s models never clearly identified which acts would be classified as discriminatory, but rather offered guidelines concerning what types of evidence provided indicia of discrimination. In essence, these models suggested that deviations from race-neutral expectations, when the deviations were in the form of significant statistical disparities or procedural irregularities, could be seen as the product of discrimination because our history suggested that discrimination was the most likely explanation when the deviations were otherwise unexplained. Consequently, these models functioned properly only when the courts applying them were willing to see discrimination as a viable explanation for social and political conditions. Combined with recent Supreme Court decisions in the affirmative action and voting rights contexts, the Hicks case signals a judicial presumption that discrimination no longer offers an explanation for otherwise unexplained racial disparities.

This transformation represents less of a destruction of the easy case/hard case distinction than a repudiation of the modern definition of discriminatory behavior in favor of an earlier approach rooted in identifying outrages.

2. Hard Cases

The rational decisional grounds model requires that opportunities and jobs be subject to distribution on the basis of necessary and sufficient criteria. While it is possible to analyze cases that lack necessary and sufficient criteria against which to judge employment decisions under the earlier, outrages approach, for most of the history of modern antidiscrimination law such cases have simply produced hard cases. Perhaps surprisingly, these hard cases constitute most of the contentious cases in the jurisprudence. Generally, there are three types of hard cases: cases where it is difficult to identify truly rational selection criteria or where such criteria do not exist, cases where the validation of practices like cronyism or nepotism render otherwise

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363. See Foster v. Dalton, 71 F.3d 52, 54-57 (1st Cir. 1995) (holding that cronyism favoring a less qualified man for a promotion does not necessarily evidence discrimination).

364. See generally McGinley, supra note 16, at 1003-59 (reviewing the use of cronyism).

365. Selmi, supra note 25, at 283 (footnote omitted).

366. See White, supra note 333, at 754-58.
valid criteria unimportant, and cases where the valid criteria cannot select for the opportunity (they are underdeterminative).

Classically, hard cases arise when there are numerous qualified applicants for a given, limited opportunity. Under such circumstances there is generally no ground for distinguishing between the qualified applicants unless the basic qualifications are also rank-order qualifiers. This circumstance is particularly acute in areas like government employment, where a desire to avoid corruption or cronyism makes the identification of apparently objective selection criteria more urgent.

The typical approach of employers and others in this context is to take what qualifiers exist and transform them into rank-order-qualifying devices, even if little or no distinction can be drawn between candidates on a rank-order list. This means that the selection device employed is rational only to the degree that it produces an efficient selection process—not that it selects the appropriate or best qualified applicants. So in selecting firefighters, municipalities typically employ criterion related tests and then rank the applicants by results. While the test itself is sometimes validated, it is rarely the case that the use of rank ordering is. Nevertheless, courts have been sympathetic to the dilemma faced by the municipal employers trying to allocate scarce resources.

The qualifiers and the rank-order listings are open to challenge as discriminatory under this model. It is often easy to make a case of disparate impact in such cases, and disparate treatment can be evidenced by the often severe consequences of use of the rank ordering. But the "safety" version of the Bona Fide Occupational Qualification (BFOQ) defense has often been invoked, especially in cases involving government defendants, to grant deference to the employer's desire to employ weeding devices to make apparently rational selections, even when these have disparate impacts or were adopted with general understanding of the effects they would have. In disparate impact cases the same rationale has been used to identify a business necessity in the use of the tests.

Such was the case in Zamen v. City of Cleveland, where the fire department adopted and administered a written and physical test.367 Because the department had never hired a woman firefighter, the City sought to develop a test that was professionally designed to meet the EEOC standards for test validation.368 It turns out that the test

367. 906 F.2d 209 (6th Cir. 1990).
368. Id. at 212-13, 218-19; see 29 C.F.R. § 1607.1 (2003).
emphasized strength over endurance, a choice reflecting in what subjects interviewed by the test designer thought important, but not independently validated.\textsuperscript{369} Moreover, the use of rank ordering of the results was not validated.\textsuperscript{370} Despite the disparate impact the test had on women applicants, the courts upheld their use.\textsuperscript{371} Whether being a fireman is about being football-player strong, or long-distance-swimmer steady, is unclear. Consequently, the Court in \textit{Zamlen} deferred to the department in its development and use of the tests.\textsuperscript{372} The court treats as legitimate and rational a test that is not because the court focuses on the emergency nature of firefighter service. The emergency nature both supported the test’s focus on strength and the court’s deference to the department on what was important.

Does the holding in \textit{Zamlen} mean that the selection criteria was rational? No. It only means that the court was prepared to sacrifice increased opportunity for women in this case to the need of the city for a selection criteria and the emergency nature of the job. Other courts have been willing to allow job criteria that restrict opportunity in the name of public safety.\textsuperscript{373} Whether as a finding of business necessity in disparate impact cases, such as in \textit{Zamlen}, or as a finding of a BFOQ in disparate treatment cases,\textsuperscript{374} the fundamental problem in these cases is the lack of clear criteria for making the decision. In that context, causation of discrimination cannot so easily be shown. While the test in \textit{Zamlen} caused the harm to the plaintiffs, it is not unlike \textit{Feeney} where the test was adopted in spite of the effect. Though the plaintiff in \textit{Zamlen} benefitted from the availability of a disparate impact cause of action unavailable to the \textit{Feeney} plaintiff, that proved to be less important than the fact that there was not a definitive answer to what a fireman does, causing the Court to defer to the department.

A similar circumstance is created when courts validate cronyism or nepotism as legitimate hiring criteria. The normally straightforward

\begin{itemize}
\item \textsuperscript{369} See \textit{Zamlen}, 906 F.2d at 212-13.
\item \textsuperscript{370} See \textit{id.} at 214.
\item \textsuperscript{371} See \textit{id.} at 215-19. The trial court ruled that the tests were validated and the United States Court of Appeals for the Sixth Circuit affirmed. In a similar decision out of the United States Court of Appeals for the Second Circuit, cited in \textit{Zamlen}, the court came to the same result after recognizing that the test there did not adequately incorporate endurance abilities on which women might perform better. See Berkman \textit{v.} City of New York, 812 F.2d 52, 57-60 (2d Cir. 1987).
\item \textsuperscript{372} See \textit{Zamlen}, 906 F.2d at 217-79.
\item \textsuperscript{373} See, \textit{e.g.}, Fitzpatrick \textit{v.} Atlanta, 2 F.3d 1112, 1113 (11th Cir. 1993) (upholding the fire departments ‘no beard’ rule despite disparate impact on African Americans).
\item \textsuperscript{374} See Dothard \textit{v.} Rawlinson, 433 U.S. 321, 332-37 (1977) (upholding height and weight requirements for prison guards).
\end{itemize}
analysis of departures from normal job criteria is complicated by the addition of non-quality-based factors that are said to be rational. Use of cronyism and nepotism is effective at limiting the pool of applicants but doesn’t convincingly exclude discriminatory motive nor project that the person selected was best qualified for the job. In other words, these criteria, while distinct from discriminatory motive, are not exclusive of it.

Finally, hard cases most prominently arise when the qualifier, though rational, is underdeterminative. Unlike cronyism, which is effective at narrowing the pool, but is not merit based, the qualifiers in these cases are merit based, but are ineffective at reducing the pool of applicants. In tenure, faculty appointments, or elite school admissions cases, plaintiffs are virtually precluded from proving discrimination by the fact that the underdeterminative criteria are related to genuine institutional needs. Though the underdeterminative nature of the qualifiers make them susceptible to manipulation, plaintiffs would have to discover direct evidence that such manipulation occurred to have a chance of proving that manipulation was discriminatory. Like the firefighter cases, where the identification of hiring criteria is difficult, the rank-order use of the available criteria in higher education decisions is controversial. But the underlying criteria are widely accepted as valid. It is just that they only exclude a small part of the population, tempting the institutions to rely on unvalidated rank ordering. In the end, this choice and others remain largely insulated from challenge as discriminatory, absent strong evidence of prejudicial motive. They become, even under disparate impact proofs, like Feeney.

These hard cases have vexed the courts. They have also proved troublesome impediments to the desegregation of the American workforce and higher education systems. If employers and others are driven to using underdeterminative or otherwise insufficiently rational decision-making devices, and courts committed to allowing their use, these devices would become entitlements granted to those who possess them and would operate in the interest of preserving the status quo. In this context, affirmative action becomes more than an arbitrary tool to advance social equality, it becomes a necessary corrective to a flaw in the antidiscrimination machinery.

3. **Affirmative Action Defined**

   Hard cases make bad law. And, if these hard cases have led courts to legitimate underdeterminative or irrational decisional
grounds in certain selection processes, they have also generated much pressure for employers to soften the effects of these apparently rational qualifiers. Affirmative action typically emerges in response to the court-approved use of these devices and in an effort to compensate for their strict irrationality and harsh effects on minority groups and women. Affirmative action cases are challenges to these departures. In each of the major affirmative action cases an apparently rational decision-making device is at the root of the dispute. But if a device is irrational as a hiring device, departures from it can scarcely be said to be discriminatory. To the extent the Court fails to apply discrimination tests to affirmative action cases, it validates these apparently rational decision-making devices.

In *Weber* the Court avoided the difficult question of whether the employer’s requirement of existing craft experience constituted perpetuation of past discrimination, given that craft training was discriminatorily allocated in the past. In creating a training program, the employer suddenly opened opportunities for valuable manufacturing jobs to the whole working population of the region. Given the minimal skills needed to qualify to enter the training program, the employer’s goal of addressing its reliance on a discriminatory criterion would have been severely frustrated.

In *Fullilove*, the Court found Congress was spending money to stimulate the economy. To this end it created a public works program to infuse the economy with new spending. Congress’s previous experience with such a program showed that the revenues were not well distributed. Although Congress’s goal was to spend money, it is unclear what truly determinative criterion could be identified for doing so. Congress’s choice of public works projects was arbitrary; so was its choice to correct the previous program by adding an affirmative action program.

In the higher education cases, this effect is most clear. Although there is some implication in *DeFunis* and *Bakke* that there were minority students admitted who were not minimally qualified to succeed in the schools in question, these cases, along with *Gruetter* and *Gratz*, involved selective institutions choosing from an overwhelmingly large group of qualified applicants. The dispute comes from the transformation of qualifiers from predictors of success to rank-order qualifiers. This transformation is unwarranted.375

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375. Even as the Law School Admissions Counsel advocates the use of its LSAT in law school admissions by noting its predictive power, it readily admits that on average a substantial number of students in the bottom quartile will end up in the top of their class if
The other prominent affirmative action cases also follow this pattern. *Firefighters Local Union No. 1784 v. Stotts* and *Local No. 93, International Association of Firefighters v. City of Cleveland* obviously involve firefighters, but they also involve layoffs and promotions, respectively.\(^{376}\) Accordingly each involves cases where everyone is qualified. In these circumstances, in fact, the municipal employers are not even pretending to make the decisions on rational, merit-based grounds, focusing instead on the bargained seniority systems to base their decisions.\(^{377}\) The Court’s recognition in *Stotts* that seniority rights are valid decisional grounds, protected by Title VII and elsewhere, is far short of deciding that violation of seniority rights constitutes discrimination, although that’s what the decision implies. Nor does the trumping of those seniority rights in *Sheet Metal Workers* suggest that the rights are unimportant. Quite apart from the Court’s recognition that a trial court must enforce its antidiscrimination orders, there exists ample reason to modify seniority rights that lock in the results of discrimination. The Court’s failure to analyze these affirmative action challenges as discrimination cases obscures these facets of the cases.

The broadcast licenses in question in *Metro Broadcasting* are classic governmental privileges to which no one can truly claim a right. One might seek to craft a rational allocation mechanism preferencing applications by parties with the better business plans, financing, and the sort. Possession of a license grants the holder a significant asset around which to build a business. This is not to deny that it is preferable for the government to expect applicants to have feasible business plans that would ensure that they could quickly make use of the privilege granted them. Rather, it is to note that there are not necessary and sufficient criteria for selecting licensees.\(^{378}\)


\(^{378}\) While government contractor cases present the strongest case for there being rational decisional grounds for awarding contracts, focused on the low bidder meeting the
Affirmative action challenges occur in the context of hard discrimination cases. The Court’s approach to affirmative action, assuming rather than finding discrimination against the opponents of such plans, conceals this fact. It has the additional problematic effect of casting questionable decisional grounds as legitimate, nondiscriminatory ones. Over time this approach has created two different antidiscrimination laws: one for minorities disfavored by employer decisions and another, less rigorous one for challengers to the affirmative action plans crafted in response to hard cases. In the end this perversion of employment discrimination law has played a part in refocusing the law away from the rational decisional grounds approach and back to an “outrageous cases” approach. Put another way, this is just another step in the degradation of antidiscrimination law, replacing much of it with an equity-like system that vests great discretion in trial judges to search for inequitable circumstances, “good for the goose, good for the gander”-type affirmative action plans, or just plain outrages.

V. CONCLUSION: INTEGRATING THE HISTORICAL AND ANALYTICAL DEFINITIONS OF AFFIRMATIVE ACTION

Over the years, courts that sought to respond to the discrimination and inequality of our Jim Crow system and its aftermath were presented with a challenge. Jim Crow was organized around notions of race that were being increasingly rejected at the very time that remedies to Jim Crow and its effects were being crafted. If race is really the social construct it was becoming understood to be—a construct without scientific basis and with only a fleeting support in reality—it was surely a poor ground for crafting neutral, universal, and rational remedies, even remedies to an overtly race-based system like Jim Crow. With the civil rights movement making it difficult for governments to ignore the need for legislative and judicial remedies to Jim Crow, this dilemma could not be ignored. In response, the courts adopted several strategies for overcoming the problems of crafting remedies to systemic inequality based on grounds which had been rejected as a legitimate decisional basis. Among these, two seem especially important. First, courts relied on an existing judicial response to discrimination and prejudice, one developed during the height of Jim Crow, to temper that system’s “excesses”; courts

listed specifications, the situation of contractors is not especially distinct from the award of broadcast licenses.
responded to and enjoined behavior which constituted extreme and outrageous denials of constitutional and other rights. These courts, almost exclusively in state action cases, recognized the inequality-producing or discriminatory character of such behavior. Second, in response to the proliferation of legislation outlawing segregation and discrimination, the courts crafted a more quotidian test of discrimination. Beginning in the 1970s, courts came to recognize discrimination when decision makers departed from what could be viewed as objective decisional grounds. Courts came to presume that these departures constituted discrimination.

These two methods of locating discrimination resolved the problem of responding to race discrimination when race was rejected as a legitimate decisional ground by locating discrimination indirectly. It was a system based on presuming race discrimination in the absence of direct proof, proof that would require that race be treated as an objective, legitimate grouping of human beings. This Article’s claim is that affirmative action disputes occur in and can be defined as being limited to situations where neither method for defining discrimination is applicable. Whether in the hiring of police and firemen, the training of craft workers, the selecting of classes at institutions of higher education, the letting of public contacts, or the drawing of voting district lines, the disputes we call affirmative action disputes are characterized by a situation where the decisional grounds can neither be viewed as a dramatic, outrageous event, nor a departure from objective decisional criteria. That is, no matter how troublesome it might be that many fire and police departments remain largely segregated, it is not equivalent to the widespread lynchings or other manipulations of judicial processes aimed at sending black men into a convict lease system which characterized Jim Crow. Also, all of the cases we call affirmative action are characterized by the lack of sufficiently determinative objective decisional grounds. Though performance tests, SAT’s, or voting districts have objective characteristics, in none of these cases are those objective criteria necessary nor sufficient to reduce the pool of applicants. All affirmative action disputes occur in these contexts and concern use of these criteria in ways that opponents (affirmative action advocates) argue is illegitimate and supporters (affirmative action opponents) argue is legitimate.

Affirmative action, then, is always about the use or abandonment of underdeterminative selection criteria. Attacks on affirmative action, then, are less about clear-cut discrimination against one group or
another than about validations of these criteria in contexts where they do little work. Because this aspect of the dispute is hidden, it conceals that the invalidation of affirmative action policies calls into question attacks on any underdeterminative decisional criteria. In this way the affirmative action debate constitutes a generalized attack on antidiscrimination principles. And it reveals the ongoing assault on those principles from other directions. As distance from Jim Crow lengthens, the appeal of the first class of discrimination claims wanes. This is unsurprising and perhaps appropriate. However, this makes the second category of discrimination claims more important to eliminating racialized decision making. Instead of an increased role for this method of identifying discrimination, however, there has been an attack on this approach which parallels and draws from the attack on affirmative action. Commentators and judges have argued strenuously that departures from objective criteria should not create a presumption of discrimination. Rather, allegations of discrimination should be proved directly by showing intent "based on race"—i.e., race should be treated as a real, legitimate distinction between people for the purposes of proving that race was the ground for decision. In this light, affirmative action comes to mean any use of race in decisions, and it is thus merged with a simple but impossible understanding of race.

The current system is unsustainable. By focusing on classification as discrimination, the Court's approach to affirmative action jurisprudence is predisposed to reject any distinction between "soft" and "hard" affirmative action. As Professor Adams has shown, some courts are already considering such challenges. We can expect that future attacks on outreach programs will continue, imposing the sort of blindness to racial inequality that Professor Hernandez has discussed as existing in Latin-American countries with substantial numbers of descendants of African slaves.\footnote{379} There the imposition of a colorblind refusal to discuss race has permitted racial inequality to be denied despite its widespread existence.\footnote{380}


380. Such a system produces some benefits for some of those who in the United States would be considered black, allowing those who are ambiguously ethnic to escape the denigration of the classification. However, it would also lock in the racial identification of dark people and deny them the explanatory basis for the racially stratified system in which they would be consigned to live. Race, I fear would be replaced with a perverse color-ism of the type only slightly hidden in the Caribbean and South America.
If the Court is truly committed to combating this kind of result in the name of colorblindness, the current approach must be jettisoned. As Professor Rubenfeld has ably demonstrated, the general damage done to strict scrutiny and the specific contributions of the colorblind basis for the current approach hamstring the Court’s efforts. Moreover the general distortion of strict scrutiny proves problematic on its own terms.

Ultimately, the current approach is a significant contributor to the poisoned nature of the current debate as it implies discrimination has occurred in contexts that raise palpable suspicion that a dual system of justice has developed—one for white challengers to affirmative action, another for minority discrimination plaintiffs. As this Article has revealed, the flippant designation of affirmative action as discrimination not only raises problems by moving the key causation analysis to strict scrutiny. It validates opportunity-limiting criteria in the absence of any evidence that such criteria validly select for the jobs or educational opportunities in question. In employment discrimination law the deference to employers is arguably valid to grant them power over their workplaces; but the cost is borne by rejected applicants who rightfully argue that the policies have a disparate impact on protected groups. By also treating departures from these grounds as discriminatory against plaintiffs who can show only minimal causal connection between their rejection and the departure from the hiring criteria, the Court grants more validity to those criteria than the criteria can bear.

The future of affirmative action is cloudy; the future of a vigorous antidiscrimination law is even more so.

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Latin American race relations are a poor model to emulate. The recognition of a separate class of mixed-race persons in Brazil has not led to a genuinely colorblind society, because the desire to avoid being categorized with a denigrated Black populace has resulted in a hyper-consciousness of color gradations and phenotypical traces of African ancestry. In fact, some Brazilians describe their race relations as “veiled apartheid.”
