The Future of Civil Rights: Affirmative Action Redivivus

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On November 5, 1996, the voters of California, after a bitterly contested campaign, endorsed an amendment to the California Constitution known as the California Civil Rights Initiative (Proposition 209). It was supported by a substantial majority, 54.3% to 45.7%. The Initiative was the first time that the people of a state had the opportunity to express a direct opinion on the issues of racial preferences and racial quotas. Similar initiatives will undoubtedly be tested in other states; and Proposition 209 may serve as the inspiration for federal legislation as well. In the meantime, however, there will be a protracted legal battle over the constitutionality of the California Initiative. That battle began with the issuance of a preliminary injunction by Judge Thelton Henderson, Chief Judge of the Federal District Court for Northern California. Judge Henderson found that there was a significant likelihood that women and minorities would suffer irreparable harm from the implementation of Proposition 209.1

Some unsettling racial divisions were evident in the results of the election. African-Americans voted against Proposition 209, 73% to 27%; Hispanics similarly voted against it by 70% to 30%; and Asians by 56% to 44%. Whites voted overwhelmingly in favor of the Proposition: white males, 66% to 34%; and white females 58% to 44%.2 The racial character of the vote was evident as groups reacted to perceived threats to their racial class interests. Yet, it is not entirely surprising that a measure that

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1. Coalition for Economic Equity v. Wilson, 946 F. Supp. 1480 (N.D. Cal. 1996). This ruling is discussed at greater length in Sec. IX infra.
would seek to innovate upon racial class entitlements by forbidding discrimination and preferences should produce such a division. As the current debate over Social Security and Medicare indicates, entitlements once accorded are not easily withdrawn or modified. This is particularly true of racial class entitlements; opponents of Proposition 209 portrayed non-discrimination as a rampant form of discrimination and the attempt to end racial categorizations in the law and public policy as racism. Those who invented racial class entitlements as remedies for "historic discrimination" perhaps bear some responsibility for the racial division occasioned by Proposition 209. However well intentioned they might have been in the beginning, remedies based on racial class considerations can never be productive of racial harmony. Perhaps the Proposition 209 results should not be surprising.

The California debate forces us once again to re-examine the constitutional status of race- and sex-based preferences. It is the contention of this article that such preferences cannot find a principled constitutional basis—indeed that race- and sex-based preferences are destructive of the principle of equal protection understood as the equal protection of equal rights. Part I discusses the politics of the passage of the California Civil Rights Initiative. Parts II-IV trace the origin and transformation of affirmative action, from a precept of equal opportunity to one of disparate impact. Parts V-VI examine the status of civil rights as individual or group rights. Part VII discusses the rise, fall and rise of strict scrutiny. Part VIII chronicles the rise of the new "separate but equal" doctrine, now said to serve the cause of civil rights. Part IX discusses the legal challenges to the California Civil Rights Initiative and the role of the judiciary in relation to majority will.

I. THE CALIFORNIA CIVIL RIGHTS INITIATIVE

The language of the California Civil Rights Initiative is modeled on the Civil Rights Act of 1964: it prohibits all discrimination and forbids all remedies that are predicated on racial, ethnic or sex factors. Its authors also attempted to insulate the

3. The California Civil Rights Initiative adds the following language to Article I, section 31 of the California Constitution:

(a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(b) This section shall apply only to action taken after the section's effective date.
constitutional amendment from federal attack by exempting all actions necessary to qualify for federal programs and federal funds and leaving unaffected all court orders and consent decrees. Section (a) is the heart of the Initiative: it prohibits the state from engaging in discrimination and preferential treatment for all individuals and groups in education, public contracting and employment. The Initiative forbids “preferential treatment,” thus eschewing the use of the term “affirmative action.” The Attorney General’s ballot summary of the Initiative similarly avoided the use of the term and merely paraphrased the language of the Initiative. Opponents, however, charged that the Attorney General had been partisan in drafting the summary statement and filed suit, ultimately persuading a superior court judge in Sacramento to order the Attorney General to revise the ballot summary to “reflect that the chief purpose of the measure is to prohibit affirmative action programs by public entities.” The superior court order, however, was overturned on appeal. “We cannot fault the Attorney General,” the court of appeals ruled, “for refraining from the use of such an amorphous, value-

(c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.

(d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

(e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.

(f) For purposes of this section, “state” shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or government instrumentality of or within the state.

(g) The remedies available for violations of this section shall be the same, regardless of the injured party’s race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law.

(h) This section is self-executing. If any part of parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

4. Id.

laden term from the ballot title and ballot label." Indeed, the court concluded, the Attorney General had discharged his legal duty under the California election code "[b]y essentially repeating the operative language of Proposition 209."

The stakes in this legal battle were high. Both sides knew the polls indicated that, while public opinion is adamantly opposed to racial preferences, goals, and quotas, there seems to be less opposition when racial preferences and goals are described as "affirmative action." Public opposition to racial preferences and quotas has been constant since the inception of affirmative action. A recent poll commissioned by the Washington Post, the Henry J. Kaiser Family Foundation and Harvard University, found that a vast majority of whites (86%), and substantial majorities among blacks (68%), Hispanics (78%) and Asians (74%) believe that "hiring, promotion and college admissions should be based strictly on merit and qualifications rather than race or ethnicity." However, polls asking about affirmative action without reference to racial preferences usually score 20-30 points lower. The polls in California showed the same differences. When asked whether "affirmative action has simply gone on too long" only 41% of the respondents answered in the affirmative; when asked whether "we need to continue affirmative action because discrimination is still common," 37% responded in the affirmative. These statistics indicate that the public does not strongly identify affirmative action with racial preferences and quotas. It was this ambivalence in the public mind that the opponents of the California Civil Rights Initiative were eager to exploit when they brought suit to change the ballot title and summary to include the phrase "affirmative action." The proponents of the Initiative, however, argued that all affirmative action programs that do not rely on racial, ethnic or sex preferences will remain unaffected by the passage of Proposition 209. By and large the opponents of the Proposition succeeded with racial and ethnic minorities but failed to convince white women. White women, although arguably the primary benefi-

6. Id. at 694.
7. Id.
10. Steeh & Krysan, supra note 8, at 129.
ciaries of affirmative action programs, were far less inclined to vote according to their sex-class interests.

The provision that provoked the most acerb debate in the campaign was section (c): “Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.” This language tracks that of the Civil Rights Act of 1964. Title VII provides that: “It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual’s . . . sex . . . .” Title VII also provides for exceptions based on bona fide occupational qualifications: “It shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.” The exception in the California Civil Rights Initiative is considerably narrower than the Civil Rights Act of 1964 because the latter restricts employers generally whereas the former only restricts state government. The Initiative, however, unlike the Civil Rights Act, extends the exception to education and contracting.

In a widely cited and circulated article, two prominent southern California law professors, Erwin Chemerinsky of the University of Southern California Law School and Laurie Levenson of Loyola Law School, argued that this “most insidious provision” of the California Civil Rights Initiative “allows government discrimination based on gender in public employment, education or letting contracts so long as there is reasonable justification.” The putative reason for their complaint is the fact that the California Supreme Court in *Sail'er Inn v. Kirby* appeared to assert an independent state ground interpretation of the California Constitution’s Equal Protection Clause, requiring sex classifications to be tested by “strict scrutiny” standards. The United

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12. Id. at A3.
15. *Sail'er Inn v. Kirby*, 5 Cal. 3d 1, 16 (1971). There is some ambiguity, however, as to how much the court wished to rely on independent state grounds. Although the court remarked that “[w]e conclude that the sexual classifications are properly treated as suspect,” the actual holding was that the statute in question was “unconstitutional under the equal protection clauses of the state and federal Constitutions.” Id. at 20, 22. At one point the court noted that “[t]he California and federal tests for equal protection are substantially the same,” and appeared to base its decision on a prediction that federal courts
States Supreme Court, of course, applies the less rigorous "important governmental objectives" test for sex classifications.\textsuperscript{16} According to Chemerinsky and Levenson, the Civil Rights Initiative "would amend the California Constitution to say that gender discrimination would be allowed if it was 'reasonably necessary,' a far less rigorous standard. Traditionally under constitutional law, a 'reasonableness test' means that any reason is sufficient and it doesn't even have to be a good one."\textsuperscript{17} Chemerinsky and Levenson thus understand the phrase "reasonably nec-
necessary" in section (c) as a term of art requiring the "reasonableness test" for sex classifications. To say the least, this interpretation is not compelling. The "bona fide qualifications" language is a very narrow exception to the extensive ban on sex classifications that already exists in the California Constitution and California law. The Fair Employment and Housing Act provides that a discriminatory employment practice is not unlawful if it is based upon a "bona fide occupational qualification." And while generally disallowing sex discrimination in housing, the Act allows educational institutions to provide separate facilities for male and female students. Similarly, the Education Code which forbids sex discrimination in education, allows sex-designated scholarships established under a will or trust, and allows sex-segregated athletic programs. And a narrow range of sex classifications do survive strict scrutiny analysis under the bona fide occupational qualification exception. Thus, it is not an exaggeration to say that under the California Constitution those sex classifications that are "reasonably necessary" provide a narrow ground of exception that survives strict scrutiny analysis. In the California courts strict scrutiny seems to be "strict in theory," but not always "fatal in fact" when sex classifications are involved.

The "[n]othing in this section" language permits "reasonably necessary" exceptions, but it does not limit other provisions of the California Constitution that forbid sex discrimination. Thus, even though Proposition 209 is a constitutional amendment initiative, its self-imposed limit leaves the broad protections already contained in other provisions of the California Constitution unaffected. As we have seen, the Equal Protection Clause of Article I, section 7 requires strict scrutiny for sex classifications between strict scrutiny and rational basis review, the CCRI would eviscerate the California Constitution's current protection against gender discrimination.

and Article I, section 8 stipulates that "[a] person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin." 22 Article IX, section 9(f) stipulates that "no person shall be debarred admission to any department of the [University of California] on account of race, religion, ethnic heritage, or sex." 24 Thus, the "[n]othing in this section" language of Proposition 209 explicitly leaves intact these nondiscrimination provisions of the California Constitution. 25 This plain language makes it impossible to impute to section (c) the interpretation of Chemerinsky and Levenson. In any case, as Chemerinsky and Levenson should know, any attempt to establish a "reasonableness test" for sex classifications in the California Constitution would violate the Equal Protection Clause of the Fourteenth Amendment. Assuming, arguendo, that Chemerinsky and Levenson are correct in their interpretation of section (c), it would not survive in federal courts, since the independent state grounds rationale only allows states to require standards that are more stringent than the federal minimum. The adoption of the "reasonableness test" for sex classifications in the California Constitution would fall below the federal minimum and therefore would not survive challenge.

In interpreting constitutional initiatives, the California Supreme Court assumes that the drafters of initiatives are aware of the court's constructions of the various provisions of the California Constitution. In other words, it is presumed that initiative drafters understand constitutional terms of art. 26 Thus, if the framers of the California Civil Rights Initiative had intended to repeal "strict scrutiny" as the standard for sex classifications it must be presumed that they would have done so in explicit lan-

25. The United States Supreme Court reads "nothing in this section" language in precisely the same way. See International Paper Co. v. Ouellette, 479 U.S. 481, 493-94 (1987). Professor Chemerinsky, in a surprising display of tergiversation, denies that section (c) can be self-limiting since it is well established that more recent and more specific constitutional and statutory provisions control over earlier ones . . . . [A]ny court dealing with an issue of discrimination or preference in the area of contracting, education, or employment will be required to apply its provisions and not the prior California Constitution which it modifies. This interpretation would, of course, require a court to ignore the plain language of CCRI which limits its constitutional reach. See Chemerinsky, supra note 17, at 1016.
Absent such language, there is virtually no chance that the California Supreme Court will read the language of section (c) as an attempt to modify constitutional standards for testing sex classifications. This would be a wholly unnatural reading of familiar language. Chemerinsky and Levenson suggest that the attempt at constitutional revision in Proposition 209 is underhanded and surreptitious because it seeks to accomplish its purposes by indirection. If this is true, then the drafters of the initiative have selected language that will certainly fail to achieve their "surreptitious" ends—in fact, worse language could not have been chosen. It seems more likely that Chemerinsky and Levenson were themselves surreptitiously skewing their analysis to take advantage of polls that showed women disfavoring Proposition 209 in greater numbers than men.

The lines of the debate over Proposition 209 were sharply drawn and the contest agitated the issue of affirmative action—and its attendant racial preferences and racial quotas—in the starkest possible terms. It is difficult to know what more can be said on the general issue of affirmative action, but the exceedingly acerb—indeed frantic—character of the California debate perhaps obliges us to undertake something of a reexamination of the fundamental issues, even though it may take us, at least part way, down a well-trodden path.

II. AFFIRMATIVE ACTION REDIVIVUS

At its inception, the proponents of affirmative action assured a skeptical world that it was only a temporary measure to be employed in the service of genuine equality of opportunity. One generation, it was said, would suffice to overcome the lingering effects of past discrimination. These were indeed the heady days of affirmative action when almost everyone looked forward

27. Compare the language of Proposition 209 with that of Proposition 1 passed in 1979 and designed to repeal the California Supreme Court's independent state ground interpretation of the California Constitution's Equal Protection Clause:

[N]othing contained herein [in art. I, § 7] or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation.

See Erler, supra note 15, at 64-66.

28. See Morain, supra note 11, at A18. Polls showed that 67% of men supported the initiative as opposed to 54% of women.
to its success, and to its demise because of its success. Today, however, its proponents offer no illusions: affirmative action is advocated unabashedly as a means of securing racial class entitlements. It should have been easy to predict that once racial class entitlements became a part of the law it would be extremely difficult to end them. Not only those specially protected classes who benefit from race-conscious programs, but those bureaucrats (both in and out of government) who devise the programs and dispense the benefits, have developed entrenched—and powerful—class interests. Those who still adhere to the original purpose of affirmative action are today routinely branded as racists; and those who wish to perpetuate race-based entitlements are looked upon as progressives or perhaps realists because they know that race will always matter. The original optimism that

29. Justice William Brennan, in his majority opinion in Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 596 (1990), argued that the Federal Communication Commission's affirmative action program for broadcast licenses "carries its own natural limit, for there will be no need for further minority preferences once sufficient diversity has been achieved." It seems obvious, however, that "sufficient diversity" will never be achieved because the diversity contemplated by such programs is alien to free society. See infra text accompanying notes 179-183.

30. An interesting debate has arisen recently in regard to the uses of racial and ethnic categories by the Census Bureau. One very hopeful sign for the future of race relations in this country is the fact that the number of interracial and interethnic marriages has been steadily increasing. This, of course, provokes the question of how the children of mixed-race marriages are to be categorized. Are children who are half black and half white to be counted as black or white? Proponents of racial class entitlements do not want to allow the Census Bureau to create "mixed-race" categories because racial classes—and hence the racial demands based on those classes—will be "diluted." The "one drop" rule—that any black heritage makes a person "black"—must therefore be continued as the means of racial separateness. It is ironic that the "one drop rule," created by slave owners and segregationists as the principle of racial demarcation and separation, is now used as the "principle" of black and ethnic unity. A recent article in the New York Times indicated that the creation of multi-racial categories was opposed by the National Urban League, the NAACP, the National Council of La Raza and the Lawyers Committee for Civil Rights Under Law. As reported by Linda Mathews, the objection of these groups is that the availability of a multiracial category would reduce the number of Americans claiming to belong to long-recognized racial minority groups, dilute the electoral power of these groups and make it more difficult to enforce the nation's civil rights laws. Dozens of federal programs depend on racial data from the census. Linda Mathews, More Than Identity Rides on a New Racial Category, N.Y. Times, July 6, 1996, at A1. A marvelous commentary on the arbitrariness—indeed, the inhumanity—of the "one drop rule" can be found in Mark Twain, Pudd'nhead Wilson (1894).
seemed to have accompanied affirmative action at its inception has given way to a thorough-going cynicism.31

But even that initial optimism was probably misplaced. Early proponents of affirmative action described it as a way of enlarging the pool of applicants for jobs, university admissions and contracts. Affirmative action, understood as merely a device for insuring equal opportunity, seemed not to present any question of racial or ethnic quotas or "goals." But it quickly became apparent that affirmative action was inseparable from racial goals and quotas—indeed that racial preferences, goals and quotas were the engine driving affirmative action. If the putative argument is that an affirmative action program merely seeks to enlarge the pool of applicants, the inevitable question that arises is: how do we know when the pool is large enough? If the results are not racially proportional or do not reflect "population parity," the inference is inescapable: the pool is still not large enough. Only racially or ethnically proportional results are evidence that "genuine" equal opportunity has been achieved.

When the Civil Rights Act of 196432 was passed, almost everyone seemed optimistic that the final vestiges of race consciousness had been removed from the laws of the nation. The Civil Rights Act seemed to be the culmination of a long campaign to banish race, color, and ethnicity from the law. Its purpose was noble and its reach was extensive. The focus was on the rights of individuals; its promise was the equal protection of equal rights. It seemed that the dream of a color-blind Constitution had at long last been recognized, if not yet fully realized. As one prominent commentator has remarked, the civil rights movement "celebrated the formal achievement of its historic objectives: a legal regime from which racial classifications had been largely expunged, and under which the most salient forms of private discrimination (in public accommodations and employment) were

31. The hysteria provoked by Proposition 209 was remarkable: Willie Brown, former Speaker of the Assembly and one of the most powerful men in California, unabashedly said that the initiative represented nothing "except pure, unadulterated exploitation of racism." Jeff Jacoby, Unable to Refute CCRI on the Merits, Foes Play Dirty, L.A. DAILY J., Aug. 29, 1996, at 6. Los Angeles City Council Member Richard Alarcon compared the proposition to Hitler's "Mein Kampf." Id. San Diego City council Member George Stevens called Proposition 209 "the most racist initiative that has ever been put on the ballot." Id. State Senator Diane Watson said of Ward Connerly, an African-American businessman who chaired the Proposition 209 campaign: "He's married to a white woman. He wants to be white. He wants a colorless society. He has no ethnic pride. He doesn't want to be black." Id.

finally prohibited."33 Indeed, it can be fairly said that "[l]iberals believed in 1964 that the Constitution imposed a rule of color-blindness on government; and a color-blind standard, for most civil rights advocates, was the obvious choice to govern those areas of private conduct addressed by the new legislation."34

The congressional debate over the Civil Rights Act was the longest in our history. Many opponents expressed the fear that Title VII would eventually be interpreted to require racial quotas to achieve racial balance in employment. Its proponents vehemently denied this charge. Senator Hubert Humphrey, the floor leader in the Senate, repeatedly assured some of his more incredulous colleagues. Nothing in the Civil Rights Act, Humphrey said, would "require hiring, firing, or promotion of employees in order to meet a racial 'quota' or to achieve a certain racial balance." Any fear on this score was "non-existent," indeed a mere "bugaboo."35 In fact, Senator Joseph Clark, the floor manager for Title VII, was even more explicit when he remarked:

[A]ny deliberate attempt to maintain a given balance would almost certainly run afoul of Title VII because it would involve a failure or refusal to hire some individual because of his race, color, religion, sex, or national origin. What Title VII seeks to accomplish, what the civil rights bill seeks to accomplish is equal treatment for all.36

And as Professor Belz cogently notes, there were also repeated assertions that the provisions of the Act were intended to be prospective only; its various provisions could not be construed as providing remedies to compensate for past discrimination.37

III. FROM EQUAL OPPORTUNITY TO EQUALITY OF RESULT: THE NEW CYNICISM

The optimism that inspired the passage of the Civil Rights Act quickly dissipated. Lyndon Johnson's oft-quoted speech at Howard University on June 4, 1965 set the tone for the new cynicism:

[F]reedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please.

34. Id.
36. Id. at 7202, 7207 (remarks of Sen. Clark).
You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you're free to compete with the others," and still justly believe that you have been completely fair.

Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.

This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result...

To this end equal opportunity is essential, but not enough, not enough. The sweep of Johnson's pronouncement was breathtaking: "Freedom is not enough." Freedom is not enough because, although it protects equality of rights, it may not produce "equality as a result." Equal opportunity was the principle of distributive justice in the Civil Rights Act. If equal opportunity is not enough, then some form of unequal opportunity will be necessary to achieve equality of result. Thus restrictions on the freedom of some would be the necessary condition for the advancement of others—those who came to be known in affirmative action parlance as "specially protected classes" or "preferred classes." And it is precisely in this sense that the Supreme Court ruled in Fullilove v. Klutznick that in federal affirmative action programs using racial set aside quotas "as a remedy to cure the effects of prior discrimination . . . a 'sharing of the burden' by innocent parties is not impermissible" when the "burden" is "relatively light." Innocent parties must be burdened in order to remedy the lingering effects of prior discrimination. Those who did not contribute to the injury must be made to pay the price of the remedy.

This was the rationale of the new affirmative action that used equality of result—understood now as racial proportionality or population parity—as the measure of its success. In less cynical days, however, the Court always maintained that "[t]he degree of

the discrimination is irrelevant."41 In other words, the Court once believed that any violation of constitutional rights, however "slight" or "bearable," offended the Constitution. Indeed, it is difficult to imagine how there can ever be "slight" violations of constitutional rights, or how "relatively light" invasions of rights can be so easily justified by the mere invocation of a "benign" purpose. A slight acquaintance with American history demonstrates that the invocation of a good cause or a "benign" result has many times been the prelude to an invasion of rights. Indeed, there was once a way of thinking known as the "positive good" school of slavery that justified chattel slavery in terms of the benefits it conferred on slaves.42 And its adherents were quite sincere in believing that slavery afforded a modicum of civi-

41. Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 668 (1966) (holding a state-imposed poll tax as a prerequisite to voting was a violation of individual rights under the Equal Protection Clause of the Fourteenth Amendment).

42. John C. Calhoun, in his Speech on the Reception of Abolition Petitions on Feb. 6, 1837, remarked, "I hold that in the present state of civilization, where two races of different origin, and distinguished by color, and other physical differences, as well as intellectual, are brought together, the relation now existing in the slaveholding States between the two, is, instead of an evil, a good—a positive good." UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN 474 (Ross M. Lence ed., 1992). A remarkable series of lectures was published in 1856 by William A. Smith, President of Randolph-Macon College and Professor of Moral and Intellectual Philosophy. In these essays, Smith explicated in considerable detail the tenets of the "positive good" school that Calhoun alluded to on the floor of the House of Representatives. "But it may be said," Smith wrote,

that the barbarous character of the race has greatly improved since their first introduction into this country. This is true—eminently so. And standing, as this fact evidently does, connected with the civilization and redemption of a whole continent of barbarians, upon whom the crushing sceptre of Pagan ignorance has lain for unnumbered ages, it fully vindicates both the wisdom and benevolence of the providence of God, which permitted their introduction in such vast numbers into civilized life, as affording the only means of accomplishing his humane design.

William A. Smith, LECTURES ON THE PHILOSOPHY AND PRACTICE OF SLAVERY, AS EXHIBITED IN THE INSTITUTION OF DOMESTIC SLAVERY IN THE UNITED STATES: WITH DUTIES OF MASTERS TO SLAVES 185 (1856; reprinted 1969). See also GEORGE FITZHUGH, CANNIBALS ALLI (1857; reprinted 1960). Fitzhugh's is the most infamous tract produced by the positive good school of slavery: "The negro slaves of the South are the happiest, and, in some sense, the freest people in the world. The children and the aged and infirm work not at all, and yet have all the comforts and necessaries of life provided for them. They enjoy liberty, because they are oppressed neither by care nor labor . . . ." Id. at 19. Indeed, Fitzhugh concluded that "[t]he best thing a philanthropist can do is to buy slaves, because then his power of control is greatest—his ability to do practical good most perfect" Id. at 188.
lization to the slaves and even introduced them to the tenets of enlightened religion. The same impulse, of course, supported the "separate but equal" doctrine that succeeded the "positive good" school of slavery.

While the vile institution of slavery has been extinguished from our national life, the "separate but equal" doctrine has received a new—and frightening—impetus in recent years. Justice O'Connor, in her dissenting opinion in Metro Broadcasting, Inc. v. F.C.C., has rightly noted that the nation's history of racial classifications should counsel extreme reluctance in the advocacy of their renewal: "The Court's emphasis on 'benign racial classifications' suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. History should teach greater humility." The invocation of "benign" purposes ultimately "reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable." Justice O'Connor's dissent in Metro Broadcasting was, of course, subsequently vindicated by the majority in Adarand Constructors, Inc. v. Pena. The mere invocation of "benign" purposes does not change the character of racial discrimination, no matter how sincere the invocation.

IV. DISPARATE IMPACT AND RACIAL QUOTAS: THE FORMALIZATION OF CYNICISM

Primary enforcement of Title VII of the Civil Rights Act was lodged in the Equal Employment Opportunity Commission (EEOC). The EEOC began assiduously to write guidelines designed, not indeed to achieve equality of opportunity, but equality of result. And equality of result was to be tested, not by the standard of individual rights, but by the disparate impact on racial and ethnic groups. In employment, individual rights were to give way to racial class rights, even though, as Herman Belz has rightly noted, "[t]he Civil Rights Act recognized that individuals are morally prior to rather than dependent upon groups." In September, 1965, President Johnson signed Executive Order 11,246 creating the Office of Federal Contract Compliance (OFCC) in the Department of Labor. The OFCC was charged

43. See discussion in Sec. VIII infra.
45. Id. at 610.
47. Belz, supra note 37, at 235.
with overseeing federal contracts and enforcing the Executive Order's requirement that contractors "take affirmative action to ensure that applicants are employed, and the employees are treated during employment, without regard to their race, creed, color, or national origin."\textsuperscript{48} The plain language of EO 11,246 required non-discrimination in public works contracting. Hiring was to take place "without regard to . . . race, creed, color, or national origin." But the OFCC also adopted a group rights approach to affirmative action. As Belz remarks, "[a]ffirmative action in contract compliance was directed at collective social and institutional discrimination, rather than individual discriminatory acts defined as denial of equal treatment in a procedural sense."\textsuperscript{49} In the hands of OFCC bureaucrats "affirmative action" became a thinly disguised code for racial quotas and "goals."

The policies of both EEOC and OFCC were predicated on the idea of "disparate impact," the theory that races should be represented in proportion to their numbers in employment and contracting. Where "disparate impact" was evident, the assumption was that it could be caused only by racial discrimination. Thus racial proportionality became the test of non-discrimination. Belz summarizes the situation accurately when he remarks that:

\begin{quote}
[the] transformation of employment discrimination law under Title VII and the federal contract program, and its parallels in other areas of civil rights policy, was effected by administrative regulations and court decisions based on the disparate impact theory of discrimination. Although rejected by Congress in the Civil Rights Act, this theory was asserted by EEOC as soon as Title VII went into effect and was adopted by the Supreme Court as the authoritative interpretation of the law in \textit{Griggs v. Duke Power} in 1971.\textsuperscript{50}
\end{quote}

A vast administrative apparatus was created to administer affirmative action programs and these programs became one of the convenient ways that the administrative state sought to magnify and enlarge its powers. Its favored instrument in the administration of affirmative action was the "coercive remedy" designed to correct disparate impact violations. Eventually, the courts, the Congress and both Democratic and Republican presidents became
complicit in this enterprise to restructure society based on racial class principles.\textsuperscript{51}

The theory of disparate impact, of course, assumes that, absent discrimination, the races will freely arrange themselves in the various aspects of political and private life in exact racial proportion to their numbers in society at large. When this does not happen, the cause is presumed to be racial discrimination. But, of course, when people are free they will never sort themselves out in exact racial proportionality in their choice of jobs or university attendance. This was Justice O'Connor's precise point when she argued in \textit{Richmond v. J.A. Croson Co.} that it was "completely unrealistic" to assume "that minorities will choose a particular trade in lockstep proportion to their representation in the local population."\textsuperscript{52} It is highly improbable that a free people will choose occupations in a way that satisfies the requirements of racial proportionality. Thus it clear that the disparate impact theory of racial discrimination must limit freedom of choice in the name of racial proportionality. Coercive remedies, whether imposed by administrative bureaucracies or courts, have the purpose of forcing racial quotas upon society at large. And since the "disparate impact" theory of discrimination is based on such unrealistic assumptions there will always be need for coercive remedies to achieve racial parity.

One enthusiastic supporter of coercive remedies notes that "the corrective conception [of remedies] means that freedom of choice may be impermissible during the period necessary to remedy unlawful discrimination; corrective norms may require interference with choice even though end-state norms would respect

\textsuperscript{51} The Nixon Administration greatly expanded the powers of the OFCC and strongly supported the 1972 amendments to Title VII that strengthened the enforcement power of the EEOC. As Belz notes, these changes were advocated as "a politically motivated policy of racial preference." Belz, supra note 37, at 89. Competition between the parties to control the levers of the vast racial spoils system that was developing was fierce—and altogether cynical. Nixon apparently believed that he could use civil rights issues to drive a wedge between labor unions and civil rights organizations, thus provoking antagonisms between two large constituencies in the Democratic party. See id. at 38; \textsc{Hugh Davis Graham}, \textsc{The Civil Rights Era: Origins and Development of National Policy} 325 (1990).

\textsuperscript{52} \textit{Richmond v. J.A. Croson Co.}, 488 U.S. 469, 507 (1989). Justice O'Connor refers to her previous opinion in \textit{Sheet Metal Workers v. E.E.O.C.}, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part) ("[I]t is completely unrealistic to assume that individuals of one race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination.").
This commentator reveals "the deepest insufficiency of choice" stems from:

a collective responsibility for purging our country of the continuing effects of our racial past . . . . To say 'the choice is yours' is to deny our own duties. It is to turn away, when we should be turning toward. It misunderstands what must be done to counteract the terrible effects of long exclusion: not simply choice, but inclusion—integration in its best meaning."

President Johnson in the speech quoted above said that "freedom is not enough." Now "freedom . . . may be impermissible" if it doesn't lead to "integration" understood in terms of racial and ethnic proportionality. But if population parity is the goal, "freedom of choice" will have to be rendered permanently impermissible since "freedom of choice" has demonstrated itself to be stubbornly intractable to the "lockstep proportion" required by the disparate impact theory of affirmative action. But this policy, rather than seeking out actual discrimination and working to redress it, instead presumes discrimination on the part of all who are not members of "discrete and insular minorities," and fashions remedies based on this presumption. This situation presents the alarming possibility of a nation that may one day consider all civil rights to be nothing more than racial class entitlements.

Any nation with the slightest regard for the lessons of history would never self-consciously allow itself to regard the rights of individuals as nothing more than the by-product of racial class interests. Despite assurances by proponents that the ultimate


54. Id. at 798.

55. Even the most enthusiastic supporters of the "corrective conception" display a curious lack of imagination when it comes to coercive remedies. A simple measure requiring every marriage to be a mixed-race marriage would suffice to end the "race problem" within one or two generations. Since freedom of choice must be subordinated to "integration in its best meaning," this would seem the most logical place to restrict choice in the name of integration. Racism is never so evident as in the choice of marriage partners.

56. This famous phrase is from United States v. Carolene Products Co., where the Court ruled that laws directed at "discrete and insular minorities" who were permanently isolated from the majoritarian political process would be subjected to "more searching judicial inquiry." 304 U.S. 144, 152 n.4 (1937). See Erler, supra note 22; Edward J. Erler, Discrete and Insular Minorities, in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 566 (Leonard Levy et al. eds., 1986); Edward J. Erler, Race-Consciousness, in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 411 (Leonard Levy et al. eds., Supp. I 1992).
purpose of racial preferences is to get beyond racial classifications, it is clear than no system that requires racial classifications for its operation can result in a decline in racialist thinking—indeed, racial consciousness is exacerbated by racial preferences and quotas because it promotes the dangerous idea that an individual's interest is properly determined by his race. Those who advocate policies based on racial consciousness simply have not thought out the consequences, believing, no doubt, that a means can never become the end itself. But that is exactly what has happened in the case of affirmative action.

V. EQUAL PROTECTION AND INDIVIDUAL RIGHTS

In Regents of the University of California v. Bakke, four members of the Court, in a joint separate opinion authored by Justice Brennan, argued that strict scrutiny was not the appropriate test for racial classifications that were designed to benefit rather than harm "discrete and insular" minorities. The University of California had failed to persuade the California Supreme Court that the racial classifications in its special admissions program served a compelling state interest under traditional strict scrutiny analysis. The University's strategy on appeal was to induce the U.S. Supreme Court to apply a less exacting test in light of the "benign" purpose of the classifications, and the fact that the injury induced by the classifications was not an injury to a member of a "discrete and insular" minority, but rather to a member of the white majority. Here the University relied on the analysis of footnote four of the Caro/ene Products case, arguing that the "strict scrutiny" test was reserved exclusively for "discrete and insular minorities." Justices Brennan, White, Marshall, and Blackmun agreed with the University, arguing that members of the majority needed no protection from the majoritarian political process that ultimately authorized the actions of the University. Indeed, they maintained, since "whites as a class" have none of the "traditional indicia of suspectness" they need no protection from the majoritarian political process. In short, Bakke did not suffer an injury at the hands of another racial class; he therefore could not invoke protection under the Equal Protection Clause.

58. Bakke v. Regents of the Univ. of California, 18 Cal. 3d 54 (1976).
60. Id. at 357.
61. Justice Stevens expressed this idea in his dissenting opinion in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2122 (1995) ("As a matter
Justice Powell, writing for a majority on this issue, rejected the University's strategy, remarking that:

The guarantees of the Fourteenth Amendment extend to all persons . . . . It is settled beyond question that the "rights created by the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights . . . ." The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color . . . .

Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious. Justice Powell further argued that discreteness and insularity might be "characteristics" relevant to a consideration of whether or not to add new classes to "the list of 'suspect' categories or whether a particular classification survives close examination," but neither has ever been held to be the exclusive pre-condition for strict scrutiny. Race, on the other hand, is a classification which automatically triggers strict scrutiny, and no action based on a racial classification has survived "strict scrutiny" since Korematsu v. United States, the Japanese exclusion case decided in 1944. Korematsu, of course, upheld the constitutionality of the racial classification as "a pressing public necessity" dictated by the "conditions of modern warfare." Yet as Justice Murphy rightly noted in his dissenting opinion, to judge an individual based on an inference from racial class characteristics—"however well intentioned"—is "to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against of constitutional and democratic principle, a decision by representatives of the majority to discriminate against the members of a minority race is fundamentally different from those same representatives' decision to impose incidental costs on the majority of their constituents in order to provide a benefit to a disadvantaged minority.")]. Justice Stevens' candor in describing a violation of equal protection rights as implicating merely "incidental costs" is somewhat surprising—not to say shocking!


63. Id. at 290.


65. Korematsu, 323 U.S. at 216.
other minority groups in the passions of tomorrow." Korematsu was a decision the Court almost certainly regretted until it was used in Justice Brennan's joint separate opinion in Bakke as authority for the proposition that the Court is not required to interpret the Constitution in a "color-blind" manner!

Justice Powell, paraphrasing Brown v. Board of Education, sardonically noted: "The clock of our liberties . . . cannot be turned back to 1868 . . . . It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others." Such a dilution of the strict dictates of equal protection, Justice Powell argued, would make "constitutional principles" depend upon "transitory considerations," creating a situation where "judicial scrutiny of classifications touching on racial and ethnic background may vary with the ebb and flow of political forces." In the current universe of multiculturalism and political correctness, one can only imagine how often the list of "favored" classes might change. Rights that have no other foundation than the political passions of the day certainly have no constitutional anchor or ground.

VI. Class Rights and Remedies

Justice Brennan's joint separate opinion in Bakke sought to reinterpret the Equal Protection Clause so as to convert it into an instrument of class remedies for what are deemed to be essentially class injuries. As Justice Marshall remarked in his separate opinion: "It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact." But this racial class analysis ignores the rights of individuals that constitute the principal core of the Equal Protection Clause. "No State shall . . . deny to any person . . . the equal protection of the laws." The exclusive focus is the persona, not the group or the racial class. It is undoubtedly true that the major impetus for passing the Fourteenth Amendment was to settle the question of the citizenship of the newly freed slaves, and to extend to them the whole panoply of civil rights

66. Id. at 240 (Murphy, J., dissenting).
70. Id. at 298.
71. Id. at 400 (Marshall, J.).
that are the necessary incidents of federal citizenship. But these rights were extended to them as individual citizens, not entities subsumed within a racial class. The framers of the Fourteenth Amendment could have used the language of class or groups, but they chose not to do so, rather specifying that the natural rights of individuals was the focus of the Amendment. In fact, the most characteristic statement about the Equal Protection Clause was that it intended to secure "natural and personal rights."72 The Framers of the Fourteenth Amendment believed that they were completing the principles of the Declaration of Independence, particularly its central moral injunction that, since "all men are created equal," it is the primary responsibility of government to provide for the equal protection of equal rights. Thaddeus Stevens, the leading Radical Republican, made this exact point in a speech before the House of Representatives on May 8, 1866, urging adoption of the Fourteenth Amendment:

It cannot be denied that this terrible struggle sprang from the vicious principles incorporated into the institutions of our country. Our fathers had been compelled to postpone the principles of their great Declaration, and wait for their full establishment till a more propitious time. That time ought to be present now.73

This, in fact, was the principal sentiment guiding the deliberations of the Thirty-Ninth Congress.

What is important for our present purposes is that the conception of rights as the possession of individuals is the only one consistent with the principle that "all men are created equal." It is no accident that the most enthusiastic supporters of racial preferences and affirmative action argue that equality is an "empty idea" that "should be banished from moral and legal discourse as an explanatory norm."74 Rights, we are told, are merely claims "made by or on behalf of an individual or group of individuals to some condition or power. . . ."75 Rights are positive claims to entitlements or positions of power, and there seem to be no limits to what can be claimed as a right or what might be the source of rights. There is thus no interest that cannot be disguised in terms of rights. Indeed, it is even fashionable to refer to "the

73. Id. at 2459.
75. Id.
rights of race and sex." What the proponents of class rights do not seem to realize, however, is that once all rights are deemed to be positive rights—merely claims of power and privilege—there is no guarantee that class rights will remain in the service of benign purposes.

One recent commentator has remarked, "even affirmative action that remedies 'identified' discrimination characteristically provides benefits to a large, undifferentiated group of minority citizens, without requiring any showing that those particular beneficiaries were injured by discrimination." But this intrusion of class brings into question the very idea of liberal jurisprudence. The great principle of liberal jurisprudence holds that whenever the law has created an injury, the law must also afford a remedy. But a necessary concomitant of this principle would seem to be that no one can be made a part of the remedy who has not been a part of the injury. Both of these precepts derive from the assumption that rights belong to individuals, not to classes. As Justice Powell explained, "there is a measure of inequity in forcing innocent persons in [Alan Bakke's] position to bear the burdens of redressing grievances not of their making."

Using class considerations as a means of fashioning equitable remedies for such injuries as "historic" discrimination or "the present effects of past discrimination" will inevitably destroy the possibility of a jurisprudence based on constitutional principles. It is only by viewing the Equal Protection Clause as the guarantor of individual rights, Justice Powell argued, that the Constitution can ultimately be applied in a non-arbitrary manner:

If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic

76. Id.
78. See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137, 168 (1803):
    The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. . . .
    The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.
79. See, e.g., Milliken v. Bradley, 418 U.S. 717, 748-49 (1974); Missouri v. Jenkins, 115 S. Ct. 2038, 2050-52 (1995); id. at 2073 (Thomas, J., concurring). Both cases disallowed inter-district remedies for purposes of integrating schools where school districts included in the remedies have not contributed to patterns and practices of segregation.
background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently. 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. The Constitution guarantees that right to every person regardless of his background.\textsuperscript{81}

As Justice Powell rightly points out, an adherence to a conception of equal protection that disallows class considerations is the only one that is consistent with the dictates of principled constitutional government. Anything else simply makes protection of constitutional rights “vary with the ebb and flow of political forces.”\textsuperscript{82} And as Justice Thomas perceptively noted in his concurring opinion in Missouri v. Jenkins, “[i]t goes without saying that only individuals can suffer from discrimination, and only individuals can receive the remedy.”\textsuperscript{83}

Class remedies afford benefits to those who have not been injured, and trammel the rights of those who have not perpetrated injuries. In the case of racial class remedies, the assumption is that all members of the monolithic white majority are guilty of racial class injuries and all members of “discrete and insular minorities” have been the victims of racial class injuries. This is a pure fiction that assaults the notion of the rule of law itself. Whatever else the rule of law is, it cannot tolerate arbitrariness, in this instance the lack of correspondence between injury and remedy. The sons and daughters of wealthy African-Americans who have attended private prep schools are treated the same as inner city ghetto residents who have attended public schools; the sons and daughters of wealthy Hispanics who only recently arrived in the United States are given the same admissions preferences, contract set-asides, and employment preferences as all other Hispanics who occupy the same racial class. Yet the recently arrived Hispanic has not suffered “historic” injuries,

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\textsuperscript{81} Id. at 299 (citations omitted).
\textsuperscript{82} Id. at 298.
\textsuperscript{83} Missouri v. Jenkins, 115 S. Ct. 2038, 2073 (Thomas, J., concurring).
\end{flushleft}
nor the lingering effects of past discrimination. In any case, the "historic" injuries of these two classes are not comparable. The first African-Americans were brought to the United States against their will and were held as chattel slaves. Hispanics came to the United States voluntarily and were never subjected to chattel slavery. This "remedy" also ignores the fact that many free blacks were themselves slave owners in pre-Civil War America. A class remedy that seeks to benefit the descendants of slaves and the descendants of slave owners equally makes a mockery of the principles governing equity. Historical evidence tends to support the proposition that slavery is a human problem and only accidentally a racial class problem, since it can be argued that probably every racial and ethnic group has been at one time or another complicit in the crime of slavery. The only possible remedy now is to end not only slavery, but discrimination based on race as a prospective, not a retrospective, measure. In other words, we should strive to do what the framers of the Civil Rights Act of 1964 sought to accomplish—remove race consciousness from the law. Classification by race and ethnicity—like race and ethnicity itself—is simply arbitrary; it is not an essential part of human nature and therefore it cannot be an essential part of the rule of law.

The model that is used in fashioning remedies for "historic" discrimination is, of course, the "make-whole" remedy, which seeks "to make persons whole for injuries suffered on account of unlawful . . . discrimination." The objective is "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." In the case of individuals, it is not difficult to fashion such remedies. The remedy might entail an award of seniority beginning from the time of the employment discrimination, an award of advanced rank or back pay. But how is a racial class restored to its original position? Those who advocate racial class remedies have not thought through their position with sufficient clarity. The case of African-Americans is especially poignant. They were brought to America against their will and subjected to the most appalling conditions


of chattel slavery. But the first act of discrimination did not occur in America; it occurred when rival tribes in Africa captured and sold them into slavery.\textsuperscript{87} To restore this class to its original position—to fashion a “make-whole” remedy for the class—leads to bizarre results. Those who advocate racial class remedies do not think of themselves as modern day followers of the American Colonization Society, but they, no less than the advocates of colonization, adopt the same racial class remedies.\textsuperscript{88} Anyone who adheres to the principles of equal protection will refuse to advocate this long discredited idea.

\textbf{VII. Strict Scrutiny Redivivus}

\textit{Metro Broadcasting, Inc. v. F.C.C.} was the first case in which a majority of the Court held that racial classifications did not have to be subjected to strict scrutiny if they served a “benign” purpose. \textit{Fullilove} had implied that “close examination” was required in evaluating a congressional act that employed “racial or ethnic criteria,” but the Chief Justice’s opinion was equivocal because of his insistence that the Court must give “appropriate deference to the Congress.”\textsuperscript{89} Even though both decisions were extremely solicitous in deferring to Congress,\textsuperscript{90} the principal difference was that the racial set-asides in \textit{Fullilove} were given a remedial justification by Congress whereas in \textit{Metro Broadcasting} they were not. In any case, the decision not to apply strict scrutiny was supported by only a plurality in \textit{Fullilove}.\textsuperscript{91}

\textsuperscript{87} See \textit{David Brion Davis, The Problem of Slavery in Western Culture} 183 (1988).

\textsuperscript{88} The American Colonization Society was founded in 1816; its principal goal was the gradual abolition of slavery and the colonization of the freed slaves to Africa. Liberia was established as such a colony, and the capital was named Monrovia after one of its early supporters, James Monroe. See P.J. \textit{Staudenraus, The African Colonization Movement 1816-1865} 59-66 (1961).

\textsuperscript{89} \textit{Fullilove v. Klutznick}, 448 U.S. 448, 472 (1980).

\textsuperscript{90} \textit{Metro Broadcasting, Inc. v. F.C.C.}, 497 U.S. 547, 563 (1990) (“It is of overriding significance in these cases that the FCC’s minority ownership programs have been specifically approved—indeed mandated—by Congress”); \textit{Fullilove}, 448 U.S. at 472 (“[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 . . . . In Columbia Broadcasting System, Inc. v. Democratic National Committee, we accorded ‘great weight to the decisions of Congress’ even though the legislation implicated fundamental constitutional rights guaranteed by the First Amendment. The rule is not different when a congressional program raises equal protection concerns.”).

\textsuperscript{91} \textit{But see Metro Broadcasting}, 497 U.S. at 608 (O’Connor, J., dissenting) (“Although the Court correctly observes that a majority did not apply strict
Metro Broadcasting upheld the Federal Communication Commission's (FCC) policy of giving racial and ethnic group preferences in the issuance of broadcast licenses. Writing for the majority in a 5-4 decision, Justice Brennan ruled:

[B]enign race-conscious measures mandated by Congress—even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.92

The "important governmental objective" to be served by the congressionally-mandated FCC policy was "broadcast diversity."93 The real novelty of Metro Broadcasting, however, was the manner in which it treated the "nexus" between minority ownership and broadcast diversity. In determining this nexus, it was, of course, impermissible to "stigmatize" racial and ethnic groups by imputing to them a particular opinion or point of view. If it is assumed that minorities will promote a minority viewpoint, then the FCC policy must be disallowed because it promotes an impermissible stereotype. But if minorities do not promote a "minority viewpoint," then what will be the source of the diversity that the FCC seeks to promote?

Justice Brennan was forced to engage in a variety of turgid sations in order to maintain the illusion that the "nexus" between minority ownership and broadcast diversity was an "empirical" one.94 But under the new "important governmental interest" dispensation, the Court was undeterred. Justice Brennan wrote:

While we are under no illusion that members of a particular minority group share some cohesive, collective viewpoint, we believe it a legitimate inference for Congress and the Commission to draw that as more minorities gain ownership and policymaking roles in the media, varying perspectives will be more fairly represented on the airwaves.95

This was indeed a tenuous conclusion in light of the fact, noted by Justice Brennan, that Congress had actually prevented the FCC from undertaking in-depth studies to determine whether the

scrutiny [in Fulfillove], six Members of the Court rejected intermediate scrutiny in favor of some more stringent form of review."].

92. Id. at 564-65.
93. Id. at 567.
94. Id. at 570.
95. Id. at 582 (emphasis added).
nexus existed or was a substantial one. Under these circumstances, Justice Brennan's assurances that the burdens imposed on non-minorities by the operation of the racial and ethnic classifications in the policy were "slight" seem wholly unwarranted, if not disingenuous.

Justice O'Connor expressed this point in her dissent. Noting that there was no pretense whatsoever of a remedial purpose, Justice O'Connor stated that the FCC policy was "simply too amorphous, and too insubstantial" to permit the trammeling of the rights of innocent parties. The government's attempt to promote "diversity" apart from the remedial context, Justice O'Connor argued, will simply mean that the FCC will pick and choose among favored minority viewpoints that they deem to be "underrepresented." And the list of the favored will be subject to change according to the political mood of congressional majorities. No one seems to be overly concerned that the majority might one day come to represent a majority faction and that the Court will have no argument, save that of deference, to resist that faction. It is, of course, easy to forget how vulnerable political institutions are and how much "slight" or "bearable" innovations on the rights of individuals reverberate throughout the political system. Proposition 209 may be an indication of how volatile the "politics of rights" can become.

Unbeknownst to Justice Brennan, however, was the fact that the reversal of the Metro Broadcasting decision had already begun the previous year, and would be completed five years later. In Richmond v. J.A. Croson Co., the Court overturned a city Minority Business Utilization Plan that required prime contractors awarded city contracts to subcontract at least thirty percent of the dollar amount of the contract to Minority Business Enterprises (MBE). The plan was modeled on the MBE provisions of the Public Works Act of 1977 upheld in Fullilove. The majority in Croson was fragmented, although five members of the Court clearly agreed that "benign" racial classifications must be tested by strict scrutiny standards. There was some disagreement, however, as to what would be necessary to show a "compelling state interest" under the test. Justice O'Connor, speaking for a

96. Id. at 560, 578, and 628.
97. Id. at 600.
98. Id. at 612 (O'Connor, J., dissenting).
100. Id. at 480.
majority, argued that the city of Richmond could not adopt a "race-conscious" program whose remedial purpose was premised on societal discrimination; there must be more particularized findings:

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. ... A governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists. ... The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis.\textsuperscript{102}

Justice O'Connor was at pains, however, to distinguish \textit{Fullilove}. She noted that Chief Justice Burger's plurality decision did not rely on strict scrutiny analysis, preferring instead to defer to Congress' power to act under § 5 of the Fourteenth Amendment.\textsuperscript{103} Chief Justice Berger did, however, come close in \textit{Fullilove} to saying that the MBE provisions should not be subjected to strict scrutiny when he stated that, "[a]s a threshold matter, we reject the contention that in the remedial context the Congress must act in a wholly 'color-blind' fashion."\textsuperscript{104}

In any case, Justice O'Connor found the decisive difference in the fact that \textit{Fullilove} upheld the power of the federal government to act under the Fourteenth Amendment, a power that is denied to States and other political subdivisions.\textsuperscript{105} Indeed, Justice O'Connor rightly notes that the framers of the Fourteenth Amendment intended its provisions to be restrictions on States and an increase in the power of Congress. Only Congress, therefore, "may identify and redress the effects of society-wide discrimination."\textsuperscript{106} Remedial measures based on

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

\textsuperscript{102} \textit{Croson}, 488 U.S. at 500-501 (citations omitted).
\textsuperscript{103} \textit{Id.} at 487-88, 490.
\textsuperscript{104} \textit{Fullilove v. Klutznick}, 448 U.S. 448, 482 (1980).
\textsuperscript{105} \textit{Croson}, 488 U.S. at 490.
\textsuperscript{106} \textit{Id.}
criterion for legislative action, and to have the federal courts enforce those limitations.\textsuperscript{107}

The clear implication of Croson was that states and cities could engage in race-conscious remedial programs only if they were based on particularized findings of discrimination; the states could not imitate the federal government in promoting racial policies to remedy "society-wide" discrimination.

Five years after Metro Broadcasting, the Court once again entered the fray in Adarand Constructors, Inc. v. Pena.\textsuperscript{108} Once again, Justice O'Connor wrote the opinion of the Court while presiding over a fragmented majority. There was agreement by five members of the Court that all racial classifications must meet strict scrutiny and serve a compelling interest. There was disagreement about what strict scrutiny meant, however. Justices Thomas and Scalia seemed to indicate that no racial classification could ever meet strict scrutiny standards,\textsuperscript{109} whereas Justice O'Connor "wish[ed] to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact'.\textsuperscript{110} Justice O'Connor would allow some racial classification to survive because "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in the country is an unfortunate reality, and government is not disqualified from acting in response to it."\textsuperscript{111} Despite this persistence, when government engages in race-based action it must be necessary to further a compelling interest and "is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases."\textsuperscript{112} By thus setting the parameters of strict scrutiny analysis, Justice O'Connor believes that she has found something of a middle ground between those who, like Justices Thomas and Scalia, would forbid race conscious government action, and those who, like the four dissenters in Adarand, would require a lesser standard of review. It is doubtful whether Justice O'Connor has succeeded in articulating this middle ground and, in any case, she is unlikely ever to persuade a majority of the current court of her position. But at least for the moment, strict scrutiny has been restored as the threshold test for racial classifications, regardless of whether their purpose is invidious or benign.

\textsuperscript{107} Id. at 490-91
\textsuperscript{109} Id. at 2118-19; see also Missouri v. Jenkins, 115 S. Ct. 2038, 2065 (1995) (Thomas, J., concurring).
\textsuperscript{110} Adarand, 115 S. Ct. at 2117 (quoting Gunther, supra note 22, at 17).
\textsuperscript{111} Id.
\textsuperscript{112} Id.
Adarand explicitly overruled both Fullilove and Metro Broadcasting. Justice O'Connor declared that "the Court took a surprising turn" in Metro Broadcasting.\textsuperscript{113} The "surprising turn" was the fact that the Court required a lesser standard for the federal government than it did for the States. In effect, Metro Broadcasting overruled Bolling v. Sharpe\textsuperscript{114} sub silento. Bolling v. Sharpe had imposed the same obligations on the federal government under the Due Process Clause of the Fifth Amendment as would be required of the States under the Equal Protection Clause of the Fourteenth Amendment. According to Justice O'Connor, since the Court in Croson had required the strict scrutiny test for state action, it should have required no less of the federal government.

The race-based set-asides at issue in Adarand were egregious examples of the arbitrariness that racial classifications introduce into the law. Under a Department of Transportation program, prime contractors on federal highway projects received additional compensation if they hired subcontractors who were certified by the Small Business Administration (SBA) as "socially and economically disadvantaged individuals."\textsuperscript{115} But for purposes of certification, the SBA presumed all "Black Americans, Hispanic Americans, Native Americans, [and] Asian Pacific Americans," as well as other groups that the SBA could from time to time designate, to be both socially and economically disadvantaged.\textsuperscript{116} Although the presumption of disadvantage is rebuttable, in truth a significant number of those who succeed in securing subcontracts are wealthy minority contractors who have become adept at manipulating the system of racial set-asides.\textsuperscript{117}

Justice O'Connor repeated her long-standing argument that equal protection rights belong to individuals and not to racial or ethnic classes. She understands this as the key to a principled application of equal protection. Remedies based on "society-wide" discrimination, Justice O'Connor argues, unnecessarily trammel the rights of individuals who are not members of the protected classes. All "government action based on race" should therefore "be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed."\textsuperscript{118} And there is a presumptive conclusion that "the

\textsuperscript{113} Adarand, 115 S. Ct. at 2111.
\textsuperscript{115} Adarand, 115 S. Ct. at 2102 (emphasis added).
\textsuperscript{116} Id.
\textsuperscript{117} TERRY EASTLAND, ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE 139, 178, 180 (1996).
\textsuperscript{118} Adarand, 115 S. Ct. at 2113.
Constitution imposes upon federal, state, and local governmental actors the same obligation to respect the personal right to equal protection of the laws."

Justice O'Connor clearly argues that some affirmative action programs can survive strict scrutiny. But in the current state of affairs, it is unlikely that any programs will pass muster. They must be predicated on specifically identified discrimination; a mere invocation of "society-wide" discrimination or lack of "population parity" will no longer suffice. Furthermore, the remedy embodied in the affirmative action program must be narrowly tailored in the sense that it reaches actual victims of discrimination and does not trammel the rights of those who did not contribute to the injury. Justice O'Connor cites United States v. Paradise as the only example of an affirmative action program that would survive strict scrutiny. In Paradise, there was clear evidence that the Alabama Department of Public Safety had engaged in systematic racial discrimination. Although Justice O'Connor believed that the unconstitutional discrimination at issue in Paradise had been identified with the requisite specificity, she dissented in the case because in her judgment the remedy was not narrowly tailored. The remedy involved a "one for one" promotion quota for state troopers with a goal of "25% black representation in the upper ranks." According to Justice O'Connor, the scheme:

necessarily eviscerates any notion of 'narrowly tailored' because it has no stopping point .... If strict scrutiny is to have any meaning, therefore, a promotion goal must have a closer relationship to the percentage of blacks eligible for promotions. This is not to say that the percentage of minority individuals benefited by a racial goal may never exceed the percentage of minority group members in the relevant work force. But the protection of the rights of non-minority workers demands that a racial goal not substantially exceed the percentage of minority group members in the relevant population or work force absent compelling justification.

It is clear that, for Justice O'Connor, the strict scrutiny standard is less restrictive for affirmative action programs than it is for

119. Id. at 2115.
120. Id. at 2117.
122. Id. at 198-99.
123. Id. at 199.
measures that discriminate against minorities. In the latter instance, the invalidity is absolute, but in the former some measures may survive, although it is difficult to predict what the precise circumstances might be.\footnote{124}{See \textit{Witmer v. Peters}, 87 F.3d 916 (1996). At issue in this case was an affirmative action hiring program in an Illinois "boot camp" prison where the inmates are approximately 70\% black. A black correctional officer who was ranked forty-second on the advancement list was promoted to lieutenant over three white officers who were ranked third, sixth and eighth. Judge Posner, writing for the court, noted the array of opinions on strict scrutiny analysis expressed in \textit{Adarand}:}

Justice Scalia’s concurrence in \textit{Adarand} was short and to the point: racial class entitlements, "even for the most admirable and benign of purposes," preserves and reinforces "the way of thinking that produced race slavery, race privilege and race hatred."\footnote{125}{Justice Thomas, however, pushed the issue to a deeper level when he remarked in his concurring opinion:}

I believe that there is a ‘moral [and] constitutional equivalence,’ between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government
cannot make us equal; it can only recognize, respect, and protect us as equal before the law.\textsuperscript{126} This statement, of course, has provoked utter bewilderment among commentators.

Surely, few people really believe that affirmative action is morally or constitutionally equivalent to discrimination against minority groups. . . . Racial discrimination against African Americans, of the kind that the original 'strict scrutiny' standard was intended to uproot, inflicts harms that are qualitatively different from those inflicted on non-minorities by affirmative action. Discrimination against African Americans, not discrimination in their favor, was historically the central concern of the Civil War Amendments.\textsuperscript{127}

It is certainly true that the "historic" occasion for the passage of the Fourteenth Amendment was to provide federal protection for the rights of the newly freed slaves. But the framers of the Fourteenth Amendment surely knew that its principles would outlive the "historic" occasion that produced the Amendment. They understood that the most powerful protection for rights was not protection for groups or racial classes, but for individuals. Equal protection rights cannot depend upon a calculus of racial class interests. Justice Thomas shares that understanding: race introduces an arbitrariness into the law that dissolves not only the idea of rights as the necessary incidents of natural human equality, but the conditions of constitutional morality itself. If race is an arbitrary category, then all putative "benign" uses of race are the moral equivalent of invidious uses. Justice Thomas clearly indicated his natural right understanding of equal protection when he further noted in his \textit{Adarand} concur-rence that "[t]here can be no doubt that the paternalism that appears to be at the heart of [the Department of Transportation's set-aside program] is at war with the principle of inherent equality that underlies and infuses our Constitution."\textsuperscript{128} As reference, Thomas cites the Declaration of Independence as the authoritative source for "the principle of inherent equality." And, as Justice Thomas wrote in his concurring opinion in \textit{Missouri v. Jenkins}:

\begin{quote}
At the heart of . . . the Equal Protection Clause lies the principle that the Government must treat citizens as indi-
\end{quote}

\begin{flushright}
\textsuperscript{126} Id. at 2119 (Thomas, J., concurring in part and concurring in the judgment).
\textsuperscript{127} Strauss, \textit{supra} note 77, at 11-12.
\textsuperscript{128} \textit{Adarand}, 115 S. Ct. at 2119.
\end{flushright}
individuals, and not as members of racial, ethnic or religious
groups. It is for this reason that we must subject all racial
classifications to the strictest of scrutiny... 129

"It goes without saying," Justice Thomas concluded, "that only
individuals can suffer from discrimination, and only individuals
can receive the remedy." 130

Justice Thomas makes a salient point: the Constitution pro-
tects equality of rights, not equality of result. Insofar as affirma-
tive action seeks equality of condition, it cannot be a precept of
equal protection. Affirmative action, created by the white min-
ions of the administrative state to provide the terms and condi-
tions for the advancement of blacks is, in Justice Thomas' eyes,
inherently paternalistic. 131 It assumes that blacks are debilitated
and can succeed only under the tutelage of the administrative
state. Affirmative action does not seek to promote merit, but
result. It corrupts the idea of merit by implying that somehow
race is a part of the calculation of merit. But, as Justice Thomas
well knows, what offends equal protection is segregation by race;
it is not a question of whose racial class interests are served. It
may be that white racial class interests are ultimately served to a
greater extent by affirmative action than those of the so-called
"client races."

VIII. "Separate But Equal" Redivivus

It is fashionable today for leading liberal constitutionalists to
argue that adherence to the ideal of a color-blind Constitution
was a mistake. In fact, it has been recently discovered that "color-
blindness" was all along a "myth" or, at best, a "chimera." 132 The

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concurring).
130. Id. at 2073.
131. Id. at 2064, 2065-66; Adarand, 115 S. Ct. at 2119.
123. Prof. Strauss says:
By common agreement, few institutions in our history have been as
clearly wrong as the regime of racial discrimination against blacks.
But it remains annoyingly difficult to articulate why it was wrong. As a
result, it is sometimes difficult to identify with precision the objectives
that the law in this area should pursue. And when we attempt to
pursue those objectives, we will inevitably impose burdens on innocent
people.
Id. at 134. To say the least, this is an astonishing statement. The framers of the
Constitution and the framers of the Fourteenth Amendment had no doubts as
to why slavery and racial discrimination were morally wrong: racial discrimina-
tion treats the accidental feature of race as an essential feature of the human
persona. This is wrong because it violates the principles of human nature—
principal reason for the volte-face on the part of liberal activists is summarized by Professor Laurence Tribe, who writes that "judicial rejection of the 'separate but equal' talisman seems to have been accompanied by a potentially troublesome lack of sympathy for racial separateness as a possible expression of group solidarity." Another prominent scholar argues that "[w]hile the legal strategy of colorblindness achieved great victories in the past, it has now become an impediment in the struggle to end racial inequality." The reason, of course, is that the invocation of a "color-blind" Constitution will do nothing to challenge "white attitudes or recognize a role for black self-definition." Indeed, it seems to be true that the expression of racial or ethnic group solidarity, or black self-definition, does require something like the old—and once justly decried—"separate but equal" doctrine. Justice Blackmun, in his separate opinion in *Bakke*, stated the necessity of restoring the "separate but equal" doctrine in unequivocal terms:

I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it be successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.136

those principles in *The Declaration of Independence* that are said to stem from the proposition that "all men are created equal." If Professor Strauss cannot determine why racial discrimination is wrong, he cannot begin to approach the question of how discrimination should be solved, as his cavalier remark about "innocent people" indicates.

135. Id. Professor Aleinikoff accurately summarizes the position he opposes:

In the colorblind world, race is an arbitrary factor—one upon which it is doubly unfair to allocate benefits and impose burdens: one's race is neither voluntarily assumed nor capable of change. For nearly all purposes, it is maintained, the race of a person tells us nothing about an individual's capabilities and certainly nothing about her moral worth. Race-consciousness, from this perspective, is disfavored because it assigns a value to what should be a meaningless variable. To categorize on the basis of race is to miss the individual.

Id. at 1063. The individual, of course, easily disappears in the universe of "separate but equal."

Justice Blackmun could have used the word "separately" in place of "differently" without changing the meaning of the sentence in any respect. In order to treat people equally, they must be treated separately ("differently"): this is the explicit meaning of the racial preferences and quotas that form the core of result-oriented affirmative action. It is not entirely fashionable yet to speak openly about the desirability of returning to the "separate but equal" doctrine. Attacks on the idea of a color-blind Constitution, on the other hand, are legion.

In her dissenting opinion in Adarand, Justice Ginsburg implied that Justice Harlan's celebrated dissent in Plessy was somehow tainted or insincere. Justice Harlan's invocation of the "color-blind" Constitution is well known:

Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

Less well known is the passage that Justice Ginsburg quotes to discredit Justice Harlan:

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

Rather than discredit Justice Harlan, however, this passage gives even more credence to the idea of the "color-blind" principle. Justice Harlan here distinguishes between power and right. The white race is dominant and will probably dominate for the foreseeable future. This is a fact. What is remarkable, however, is that Justice Harlan maintains that this fact can never be expressed in the Constitution. The white race will prosper only if it adheres to the principle of color-blindness—only if it "holds fast to the principles of constitutional liberty." Even though society may be infused with racial distinctions—and who could deny this reality in 1896?—the Constitution cannot properly be the vehicle of racial class dominance because it is the individual, not

139. Id.
the racial class, that is comprehended in the Constitution. Justice Harlan would have been foolish to say that society is "color-blind;" but it was eminently proper for him to advocate color-blindness as the central principle of equal protection in the Constitution.

In subsequent years, Justice Harlan's dissent provided a kind of moral standard that steadily worked toward the eventual demise of the "separate but equal" doctrine. Indeed, Justice Harlan's opinion formed the basis for liberal constitutionalism. Professor Kull has rightly argued that it was Justice Harlan's dissent rather than the majority decision in Plessy that became authoritative:

It is nevertheless a striking and somewhat unexpected fact that—within the narrow but significant confines of Supreme Court adjudication—'separate but equal,' the supposed rule of Plessy v. Ferguson, ceased almost as soon as it was announced to be a doctrine by which segregation might [be] justified, becoming instead the doctrine in the name of which segregation would consistently be held illegal.140

It would be difficult to deny that the principle of a color-blindness was the source of tremendous progress in the years after Plessy; while that progress might have moved too slowly and irregularly, by the time of the Civil Rights Act of 1964 the Constitution had indeed become color-blind. But new proponents of the "separate but equal" doctrine arose, calling the old doctrine by a new name: result-oriented affirmative action. The supporters of the new "separate but equal" doctrine believed that the genie of race could be released once again, but this time as a force for good. At almost the eleventh hour—indeed almost contemporaneously with the passage of the 1964 Civil Rights Act—the civil rights movement abandoned the principles that had served it so well. It was believed that new principles would better serve the cause of human liberty and serve that cause more quickly. The racial genie, after having finally been confined by powerful constitutional restraints, was released once again. To say that this was a dangerous move is a vast understatement. In the past, the racial genie has always been a force for evil; there is no reason to believe that it has miraculously changed its ways. But today, its work is made easier by the apologists of the new "separate but equal" doctrine, because they portray the new racism—and the supposedly new genie—as the best that liberal, progressive and enlightened opinion can produce.

140. Kull, supra note 33, at 132-33.
Probably nothing in the last fifty years has more harmed racial relations, or done more to undermine the principle of equal protection of the laws, than racial preferences and racial quotas. Paul M. Sniderman, a political scientist at Stanford University, and Thomas Piazza, a sociologist at the University of California at Berkeley, have documented that “the new race-conscious agenda” represented by affirmative action programs “has provoked broad outrage and resentment. Racial preferences are so intensely disliked that they have led some whites to dislike blacks—an ironic example of a policy meant to put the divide of race behind us in fact further widening it.”

Sniderman and Piazza demonstrate, however, that racial animus is not the principal cause of the anger and resentment. They have discovered in their exhaustive analysis of racial attitudes that racial class preferences offend the “set of convictions about fairness and fair play that make up the American Creed.” As Sniderman and Piazza rightly note, the principles of “liberty and equality” form the basis of the American Creed. The tremendous gains of the civil rights movement were due to the fact that it sought equal treatment for blacks and whites. This was consistent with the American Creed. But on the heels of the movement’s greatest successes—the Civil Rights Act of 1964 and the Voting Rights Act of 1965—“the voices of separatism began to drown out those of integration.”

According to Sniderman and Piazza, opposition to racial quotas is driven by a desire to preserve the principles that animate the American Creed—those principles that protect the equal rights of every individual. The conclusion is evident:

Affirmative action—defined to mean preferential treatment—has become the chief item on the race-conscious agenda. It produces resentment and disaffection not because it assists blacks—substantial numbers of whites are prepared to support a range of policies to see blacks better off—but because it is judged to be unfair.

But it is simply wrong, Sniderman and Piazza caution, “to suppose that the primary factor driving the contemporary arguments over the politics of race is white racism.”

142. Id. at 176-77.
143. Id. at 177.
144. Id.
145. Id. at 5.
It has often been noted that, in articulating the "separate but equal" doctrine, the majority decision in Plessy "ratified American apartheid." If this is true of the old "separate but equal" doctrine, then it is no less true of the new "separate but equal" doctrine. It was wrong in 1896 and it is wrong today.

IX. PROPOSITION 209 REDIVIVUS

The court of public opinion had scarcely put its imprimatur on the California Civil Rights Initiative than action was brought in federal court to annul it. A coalition of advocacy groups led by the California Civil Liberties Union filed suit in federal district court in San Francisco seeking an injunction to block the implementation of Proposition 209. Judge Thelton Henderson agreed with the CCLU’s analysis and issued an order enjoining the implementation of the Proposition on December 23, 1996. In effect, Judge Henderson ruled that the prohibition against discrimination in the Proposition is itself discriminatory. By his irrefragable logic, the Fourteenth Amendment’s command that "No State shall... deny to any person... equal protection of the laws" is unconstitutional.

Judge Henderson properly began his analysis by noting that our system of democracy teaches that the will of the people, important as it is, does not reign absolute but must be kept in harmony with our Constitution. Thus, the issue is not whether one judge can thwart the will of the people; rather, the issue is whether the challenged enactment complies with our Constitution and Bill of Rights.

Indeed, the framers of the Constitution regarded majority faction as the primary threat to the existence of republican government. James Madison wrote a few months before the opening of the Constitutional Convention that "[t]here is no maxim in my opinion which is more liable to be misapplied, and which therefore more needs elucidation than the current one that the interest of the majority is the political standard of right and wrong." Nearly fifty years later Madison expressed this same point in terms of the social contract origins of the Constitution:

146. Aleinikoff, supra note 134, at 1076.
148. Id.
149. Id. at 1490.
Whatever be the hypothesis of the origin of the *lex majoris partis*, it is evident that it operates as a plenary substitute of the will of the majority of the society for the will of the whole society; and that the sovereignty of the society as vested in & exercisable by the majority, may do anything that could be rightfully done by the unanimous concurrence of the members; the reserved rights of individuals (of conscience for example) in becoming parties to the original compact being beyond the legitimate reach of sovereignty, wherever vested or however viewed.  

Madison thus characterizes the majority as a moral entity rather than a collection of discrete, value-positing individuals. The majority acts as a substitute for the will of the whole of society, not just the majority. When the majority acts in the interests of the whole, its acts “rightfully.” Thus the majority is subject to moral restraints no less than individuals who retain rights not submitted to majority rule. The majority is rightfully sovereign only when it obeys the moral law—or in Madison’s terms, the law of nature—which dictates not only that all legitimate government be based on the consent of the governed, but that the primary obligation of government is to protect the rights of those who consent.

Thomas Jefferson made the same point in his First Inaugural Address:

All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression.

Jefferson wrote in the same vein some years later when he remarked that “[i]ndependence can be trusted nowhere but with the people in mass. They are inherently independent of all but moral law.” Thus, the moral legitimacy of majority rule depends upon whether its decisions are consistent with the Constitution and the moral precepts which inform the Constitution. It is emphatically not true, as some commentators would have us believe, that, for Madison and the framers generally, “[t]he first
principle [of] self-government . . . means that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities.”154 This observation entirely misses the moral and constitutional dimension of constitutional government.

The framers were also clear about the role of the judiciary in constitutional government. The judiciary was to protect the organic will of the people against assaults from temporary or transient majorities. According to Alexander Hamilton in *The Federalist*, “the courts of justice are to be considered as the bulwarks of a limited Constitution.”155 The courts thus have the constitutional duty “to declare all acts contrary to the manifest tenor of the Constitution void.”156 Madison, in his famous June 8, 1789 speech introducing the Bill of Rights in the First Congress, argued that “[i]ndependent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights . . . expressly stipulated for in the constitution by the declaration of rights.” Indeed, courts will provide an “impenetrable bulwark” against the violations of individual rights by majorities.157

Chief Justice Marshall’s opinion in *Marbury v. Madison* is properly read as an extended commentary on Hamilton’s argument in *The Federalist* No. 78. Chief Justice Marshall described the Constitution as “the fundamental and paramount law of the nation” emanating from “the supreme will” of the people that is superior to the Constitution itself. The people in establishing the Constitution, Marshall argued, exercised an “original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness.” This “original right,” Marshall continued,

is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.158

It is this original will, Marshall noted, that “organizes the government, and assigns, to different departments, their respective pow-

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156. Id. at 466.
157. 1 ANNALS OF CONG. 457-58 (Gales & Seaton eds., 1834).
ers. It may either stop here or establish certain limits not to be transcended by those departments." It is of the latter character, Marshall emphasized, that the government of the United States partakes; indeed, "the Constitution is written" to ensure "that those limits not be mistaken or forgotten." 159

Any ordinary act of legislation that conflicts with the "paramount law" is, of course, void. This is a necessary conclusion from the fact of a written constitution. "Certainly all those who have framed written constitutions," Marshall argued, "contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void." 160 Marshall poses the question of the extent of the judicial power to interpret the Constitution: "In some cases then, the Constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?" 161 Marshall cites several restrictions upon judicial power contained in the Constitution, one of which is the clause in Article III, section 3 which reads that "no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." Marshall remarks that

here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. . . . From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature. 162

Thus, the exact same relationship that exists between the Constitution and legislative power also exists between the Constitution and judicial power. In both cases, the Constitution is supreme. In his remarkable peroration to the Marbury decision, Marshall noted that

[I]t is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

159. Id.
160. Id. at 177.
161. Id. at 179.
162. Id. at 179-80.
Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.\textsuperscript{163}

Thus, in the case of Proposition 209, it is a matter of properly determining, not indeed whether it simply expresses the will of the people of California, but whether that will is compatible with the superior will that created the Constitution. Even though the Initiative amended the California Constitution, under the Supremacy Clause of Article VI and the Fourteenth Amendment state constitutions must conform to federal constitutional standards. If the California Civil Rights Initiative is found to be incompatible with those standards, federal and state judges have a constitutional obligation to declare it unconstitutional, regardless of whether it expresses the will of the people or not. The only legitimate expression of the people's will is when it genuinely acts as the "plenary substitute" for the will of the whole, a will that is embodied in the organic and superior will that established the Constitution. By the same token, however, no judge can substitute his own will or confuse his own will with the Constitution. These are the standards by which Judge Henderson's opinion must be judged. And, in my considered estimation, Judge Henderson's opinion in \textit{Coalition for Economic Equity v. Wilson} demonstrates a woefully inadequate understanding of the Constitution and its principles.

Judge Henderson relied principally on two Supreme Court rulings, \textit{Washington v. Seattle School District, No. 1}\textsuperscript{164} and \textit{Romer v. Evans},\textsuperscript{165} in issuing the injunction. Both cases dealt with state constitutional initiatives. The \textit{Romer} decision was something of a departure from \textit{Adarand}. In \textit{Adarand} a solid majority had emphatically held that the Equal Protection Clause "protect[s] persons, not groups."\textsuperscript{166} Yet in \textit{Romer}, the Court held unconstitutional a Colorado constitutional amendment initiative that banned special status or privileges to gays and lesbians. As the Court noted, these groups "can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution."\textsuperscript{167} All other groups that wish to

\begin{itemize}
\item\textsuperscript{163} \textit{Id.} at 180.
\item\textsuperscript{164} 458 U.S. 457 (1982).
\item\textsuperscript{165} 116 S. Ct. 1620 (1996).
\item\textsuperscript{166} \textit{Adarand Constructors, Inc. v. Pena}, 115 S. Ct. 2097, 2100 (1995).
\item\textsuperscript{167} \textit{Romer}, 116 S. Ct. at 1627 (emphasis added).
\end{itemize}
press special class interests, whether based on race, ethnicity, color, national origin, or sex, have no such special hurdles to surmount. They can merely press for ordinary legislation to further their class claims.

The Court seemed to argue that the Colorado initiative was impermissible class legislation because it disabled an identifiable group from pressing its class claims. Legislation favoring a particular class, it seems, is not class legislation:

Central both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. . . . A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.  

The Court did not think, however, that gays and lesbians could obtain the same or even adequate protection “in laws of general application”—laws designed to protect individuals rather than groups or classes. Indeed the Court noted that “the amendment seems inexplicable by anything but animus toward the class that it affects.” Proposition 209, of course, is easily distinguished from the Colorado initiative because it does not single out a specific group or class, either implicitly or explicitly. Indeed, it applies to all individuals and to all groups and classes. It neither favors nor disfavors any groups but treats all individuals equally. Proposition 209 thus attempts to restore the individual as the focus of equal protection jurisprudence.

In the Seattle School District case, the Supreme Court noted that a Washington initiative that subjected school busing and integration decisions to majority vote was unconstitutional because singling out busing and integration issues for special treatment was a proxy for race. The initiative thus employed a prohibited racial classification in violation of the Fourteenth Amendment’s Equal Protection Clause. As the Court stated, the initiative “subtly distort[ed] governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.”

At the same time, however, the Court noted that

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168. Id. at 1628.
169. Id. at 1626.
170. Id. at 1627.
laws structuring political institutions or allocating political power according to 'neutral principles'—such as the executive veto, or the typically burdensome requirements for amending state constitutions—are not subject to equal protection attack, though they may 'make it more difficult for minorities to achieve favorable legislation.' . . . Because such laws make it more difficult for every group in the community to enact comparable laws, they 'provide[e] a just framework within which the diverse political groups in our society may fairly compete' . . . Thus, the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action.\footnote{172}{Id. at 470 (quoting Hunter v. Erickson, 393 U.S. 385, 394 (1969)) (citations omitted).}

Although many references were made to the Seattle School District case in Judge Henderson's order, this passage was curiously ignored even though it almost perfectly describes the context of Proposition 209. Proposition 209, unlike the Washington initiative, applies equally to all groups and individuals; all groups must first surmount the hurdle of a constitutional amendment before they can press class claims based on race, sex, ethnicity, color, national origin, or sex. This would seem to meet the requirement of neutrality.

The only way that the California Initiative can be put in the same category as the Washington initiative is to argue that a refusal to allow the use of race, sex and ethnicity is itself an impermissible use of race, ethnicity and sex. Even though such an unnatural reading of the plain language of the California Civil Rights Initiative cannot be supported by any known principles of logic, Judge Henderson used this precise ploy to say that the Initiative was specifically aimed at minorities and women:

\[^{172}\text{Prior to the enactment of Proposition 209, supporters of race-and gender-conscious affirmative action programs were able to petition their state and local officials directly for such programs. After the passage of Proposition 209, however, these same advocates face the considerably more daunting task of mounting a statewide campaign to amend the California Constitution. At the same time, those seeking preferences based on any ground other than race or gender, such as age, disability, or veteran status, continue}\]
to enjoy access to the political process of all levels of government.\textsuperscript{173}

But Judge Henderson misses the point: disabled minorities and disabled women will have the same access as all disabled people; minority veterans and women veterans will have the same access as all other veterans; the aged will be made up of all races and both sexes. But the Equal Protection Clause disallows access based exclusively on race, ethnicity, or sex. Judge Henderson is mistaken in thinking that the Constitution regards racial classes as no different than veterans, the disabled, or the aged.

The telling point for Judge Henderson, however, is the fact much of the campaign rhetoric surrounding the election "had a racial and gender focus" and that the "people of California viewed Proposition 209 as a referendum on affirmative action."\textsuperscript{174} This observation is sufficient grounds for Judge Henderson to determine that the neutral language of the Proposition was really a subterfuge for race and sex classifications. Thus, "Proposition 209 'was enacted "because of," not merely "in spite of," its adverse effects upon' affirmative action, and thus . . . the measure was effectively drawn for racial purposes."\textsuperscript{175} Premised on such race and sex classifications, the Initiative fails both strict scrutiny review and the important governmental interests standard.

Perhaps the most interesting—not to say bizarre—part of Judge Henderson's opinion involves the locus of decision making. It is true, Henderson concedes, that

\[\text{[t]he body that enacts an affirmative action measure is free . . . to repeal it . . . Those who support race- and gender-conscious affirmative action must compete within the neutral rules of the political process—the 14th Amendment expects that in the democratic struggle, the interests of minorities and women will sometimes prevail, and will sometimes be defeated.}^{176}\]

But if "race- and gender-conscious" preferences are to be repealed they must be repealed by the same level of government that enacted them in the first place. "Once those who support race- and gender-conscious affirmative action prevail at one level of government . . . the Equal Protection Clause will not tolerate an effort by the vanquished parties to alter the rules of the

\textsuperscript{174.} Id. at 1504.
\textsuperscript{175.} Id. at 1506 (citations omitted).
\textsuperscript{176.} Id. at 1510.
game—solely with respect to this single issue—so as to secure a reversal of fortunes.”

Thus we have the singular result that an act of the legislature cannot be repealed by a constitutional amendment, nor we presume, by a constitutional initiative. What cannot be accomplished by a constitutional amendment can be accomplished by an ordinary action of legislation! But if an ordinary act of legislation passed by the California legislature trumps the California Constitution then we are indeed in a quandary—especially when this is said to be a requirement of the Fourteenth Amendment. It hardly seems credible that the Fourteenth Amendment’s command that “No State shall . . . deny to any person . . . the equal protection of the laws” could be construed to mean that state constitutions must be subordinated to ordinary acts of legislation when minorities and women are involved. Indeed, we might invoke the old dictum of constitutional construction that no interpretation can render absurd any provision of the Constitution. But Judge Henderson’s reasoning surely comes close to violating that dictum.

Judge Henderson knows, of course, that special interest pleading is more likely to succeed in the legislature than in the public at large. But if the Fourteenth Amendment demands equal access to the levers of government for racial and gender classes, would it not also demand that the legislative process produce specified racial and sex results as well? Based on Judge Henderson’s reasoning one could argue that there is an equal protection requirement for proportional legislative results, simply because the only genuine proof of equal access is equal (proportional) results. In fact, this is precisely the argument that Professor Lani Guinier has made famous in recent years: “[i]n a system shaped by irrational, majority prejudice, remedial mechanisms that eliminate pure majority rule and enforce principles of interest proportionality may provide better proxies for political fairness.”

Both Professor Guinier and Judge Henderson seem to deny that, in Madison’s terms, the majority can ever act as a

177. Id.
178. See Joseph Story, 1 STORY’S COMMENTARIES 384 (1833).
179. Lani Guinier, The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success, 89 MICH. L. REV. 1077, 1137 (1991). As an example of how a requirement of racially proportional results might be combined with a minority veto to achieve “political fairness,” Guinier cites favorably the “concurrent majority” scheme of John C. Calhoun. Id. at 1140 n. 303. What Judge Henderson, Professor Guinier and John C. Calhoun have in common is their shared belief that rights belong to collectives rather than to individuals—in the case of Calhoun, rights belong to States, and in the case of Guinier and Henderson, rights belong to races.
"plenary substitute" for the interest of the whole of society.\textsuperscript{180} Indeed, Guinier and Henderson come perilously close to denying the very possibility of constitutional government.

It almost goes without saying that any idea of proportional representation, let alone one based on race or ethnicity, is utterly foreign to the Constitution and to any principled understanding of equal protection. There is no doubt that equal protection of the laws is intimately connected with constitutional government. Indeed, equal protection may be said to be the very foundation of the rule of law itself. All civil liberties, in one form or another, are traceable to this basic constitutional precept. And as a constitutional precept, equal protection derives its dignity from the fact that it is the conventional reflection of the principles that flow directly from natural human equality, the fact that, in the terms of the Declaration of Independence, "all men are created equal." But the racial class analysis that undergirds Judge Henderson's decision is at odds with the principles of equality that form the basis of the American regime. Class considerations explicitly deny this equality because they necessarily abstract from the individual and ascribe to him class characteristics that are different—and necessarily unequal—from those of individuals inhabiting other classes. If there were no inequalities implicit in class claims, such claims would be superfluous; claims of equality properly focus on the individual. Rights, including equal protection rights, are the necessary incidents of natural human equality and they belong to the individual, not the nation, the community, or any racial or ethnic group. Groups claims are claims of inequality; they are assertions of preference not equal protection. It matters little whether the claims of inequality are couched in terms of remedies for "historic" injuries or simply in terms of "diversity;" the reality is the same: they remain claims of inequality that cannot be derived from any principled notion of equal protection.

James Madison, in \textit{The Federalist} No. 51, described the problem of republican constitutionalism in this manner: "It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part."\textsuperscript{181} The first aspect of the problem is addressed by the separation of powers; the second, and more difficult problem, requires an extensive regime with a "multiplicity of interests" designed to mitigate against the

\textsuperscript{180} Sovereignty, \textit{supra} note 151, at 570-71.

\textsuperscript{181} \textit{The Federalist} No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).
formation of "majority faction." In a large, diverse republic, Madison reasoned, it will rarely be in the interest of the majority to invade the rights of the minority. Since, in all probability, there will be no permanent class interests in society, it is unlikely that there will be permanent majorities and permanent minorities; thus the majority will never develop a sense of its own identity and interest as a majority. In such a situation, there is less probability that "a majority of the whole will have a common motive to invade the rights of other citizens."\(^\text{182}\) The majorities that do form will be essentially composed of coalitions of minorities; as interest groups they remain largely unaffected by the fact that they have become a part of the majority. In the structure of the regime, the Framers expected the struggle between interests to replace the struggle between classes. And, by and large, the solution of the Framers has worked remarkably well.

In the history of America there have been no permanent majorities, and certainly none based exclusively on race. Yet, the constitutional doctrine that has contributed most to race-consciousness is that of the "discrete and insular minority."\(^\text{183}\) The underlying premise of this doctrine is that there are certain racial and ethnic minorities who are permanently isolated from the majoritarian political process and therefore cannot vindicate their racial class interests by merely exercising the vote. The concept of the "discrete and insular minority" assumes that American politics has always been dominated by a monolithic majority that seeks only to aggrandize its own racial class interests at the expense of the various discrete and insular minorities. Thus, the moral authority of the majority—indeed, of majoritarian politics itself—must be questioned, if not undermined. Some legal scholars even advocate that the Supreme Court should play the role of "virtual representative" for such minorities who would otherwise be unrepresented in the majoritarian political system.\(^\text{184}\) But, of course, virtual representation is an idea that is wholly incompatible with the moving principle of republican government—the consent of the governed.

Courts, of course, play a legitimate constitutional role when they provide checks on majorities that overstep constitutional limits. But, a long-standing opinion widely held cannot safely be ignored. And a widely held opinion that is consonant with the public good cannot be ignored without undermining republican

\(^{182}\) \text{THE FEDERALIST No. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961).}

\(^{183}\) \text{United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1937).}

\(^{184}\) \text{See JOHN H. ELY, DEMOCRACY AND DISTRUST 82-88 (1980).}
principles. The principal task of republican statesmanship—including judicial statesmanship—is to reconcile the requirements of wisdom and consent. Modern republics derive their legitimacy from the consent of the governed. Thus, the requirement of consent necessarily defines the limits of republican statesmanship; depending on the character and circumstances of the regime, those limits will be more or less pronounced. The goal of the republican statesman remains essentially constant: to reconcile theory and practice (wisdom and consent) in a manner that will maintain the principles of the republican regime. This means, above all, that the object of republican statesmanship is to secure the conditions necessary to the rule of law (i.e., to substitute reason for human will or will to power). But today majority opinion on questions of racial preferences and quotas are far more consonant with the principles of the Constitution than are those race-conscious decisions exemplified by Judge Henderson's opinion in *Coalition for Economic Equity v. Wilson*. Understanding American politics in terms of "monolithic" majorities and "discrete and insular" minorities precludes the possibility of ever creating a common interest or common ground that transcends racial class considerations. By transforming the Fourteenth Amendment into an instrument of class politics the judiciary runs the considerable risk either of making a majority faction more likely, as the majority inevitably becomes more aware if its class status as a majority, or of transforming the constitutional regime into one no longer based on majority rule.