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I. INTRODUCTION

Our search to find ways to move quickly to equal opportunity led to the development of what we now call affirmative action. The purpose of affirmative action is to give our nation a way to finally address the systemic exclusion of individuals of talent, on the basis of their gender or race, from opportunities to develop, perform, achieve and contribute. Affirmative action is an effort to develop a systematic approach to open the doors of education, employment, and business development opportunities to qualified individuals who happen to be members of groups that have experienced long-standing and persistent discrimination . . . .[1]

What would the country look like without affirmative action? According to its opponents, a gentle notching downward would take place in [B]lack America: [B]lack students who now go to Harvard Law School would go to Michigan instead and do very well; [B]lack students at Michigan would go to Louisiana State, and so on. The net impact would be small . . . . The other possibility is that there would be an enormous decrease in [B]lack representation everywhere in white-collar (and also blue-collar) America, with a big, noticeable depressive effect on [B]lack income, employment, home-ownership and education levels.[2]

The most disturbing thing about [Justice] Thomas is not his conclusions, but his twisted reasoning and bilious rage. In his written opinions, he begins with premises that no self-respecting [B]lack would disagree with, then veers off into a neverland of color-blind philosophizing in which all race-based policies, from Jim Crow laws designed to oppress minorities to affirmative-action measures seeking to assist them, are conflated into one morally and legally pernicious whole.[3]

Still, as much as I loathe affirmative action—for the indignity and Faustian bargain it presents to minorities, for the hypocrisy and shameless self-congratulation it brings out in its white supporters—I must admit that it troubles me to see its demise so glibly urged from

1. *Excerpts From Clinton Talk on Affirmative Action*, N.Y. TIMES, July 20, 1995, at A10.

2. Nicolas Lemann, *Taking Affirmative Action Apart*, NEW YORK TIMES MAGAZINE, June 11, 1995, at 35.

3. Jack E. White, *Uncle Tom Justice*, TIME, June 26, 1995, at 36.

the political right . . . . Discrimination does not justify preferential treatment, but I want to know that the person who stands with me against preferences understands the problem that inspired them.[4]

"We are at the end of a second Reconstruction," said Janette Wilson, a black lawyer and former executive director of Operation PUSH, a Chicago-based civil rights organization. "The recent decisions say that the Supreme Court has joined together with the Newt Gingrich faction of Congress, and war is being declared on African-Americans and poor people economically, academically and now politically."[5]

"When I was an undergraduate at Yale, there were all these looks that said, 'Why are you here?'" said Kristin Weber, a [B]lack first-year Berkeley law student. "When I made it through and graduated with honors, I had people come up and say they didn't know I was so smart. Well, I knew I was smart. There's a lot of hostility that's playing out in this whole debate over affirmative action."[6]

Given that history, it is absurd to argue, as many critics do, that affirmative action has placed African-Americans under suspicion of incompetence, by propelling them into positions they do not rightly deserve. Bred into this country's bones, the presumption that [B]lacks are inherently less "qualified" would be a driving force in any case. An alternative view of affirmative action is that it breaks down occupational apartheid, the notion that elite jobs are for white folks only. The process is wrenching, but how could it be otherwise?[7]

While that state's Republican Governor, Pete Wilson, hailed as a "historic achievement" the elimination of affirmative action at the nine-campus University of California, academicians expressed concern . . . that minority enrollment at the system's elite Berkeley and Los Angeles campuses would decline significantly.[8]

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4. Shelby Steele, *Affirmative Action Must Go*, N.Y. TIMES, March 1, 1995, at A15. Glenn Loury echoes this theme:

> Giving out government contracts on the basis of sex or skin color of the (often wealthy) owners of businesses is discrimination. Turning away better qualified whites from a state law school in favor of [B]lacks from richer families who are not state residents is discrimination. Presuming that immigrants from Latin America are more entitled to preferential treatment than those from Eastern Europe is also discrimination. Exactly which of these practices is the President now committed to rooting out?

Glenn C. Loury, *Let's Get On With Dr. King's Idea*, N.Y. TIMES, July 26, 1995, at A9.

5. Steven A. Holmes, *As Affirmative Action Ebbs, A Sense of Uncertainty Rises*, N.Y. TIMES, July 6, 1995, at A1.

6. Peter Applebome, *The Debate on Diversity in California Shifts*, N.Y. TIMES, June 4, 1995, at 2.

7. Brent Staples, *The Presumption of Stupidity: Affirmative Action, Occupational Apartheid*, N.Y. TIMES, March 5, 1995, at 14.

8. William H. Honan, *Admissions Change Will Alter Elite Campuses, Experts Say*, N.Y. TIMES, July 22, 1995, at 7.

> Q. You've seen the evolution from Negro to [B]lack to African-American? What is the best thing for [B]lacks to call themselves?
>
> A. *White.*[9]

All of the preceding quotations from newspaper and magazine articles focus on one unifying theme—race in America. We do not live, nor have we ever lived, in a colorblind nation. We live in a nation blinded by color. America is in the midst of the Second Deconstruction,[10] a period of stagnation and retrenchment following thirty years of significant gains ushered in by affirmative action. Adopting a judicial posture eerily reminiscent of its post-Civil War decisions,[11] the United States Supreme Court held, in *Adarand Constructors Inc. v. Pena*,[12] that congressionally enacted benign remedies are subject to strict scrutiny.[13] Just as state and local governmental initiatives are held to the strict scrutiny standard under *City of Richmond v. J.A. Croson Co.*,[14] so are federally enacted programs; white subcontractors must not be discriminated against when race-conscious remedies are employed. Underlying this doctrinal shift is the illusory paradigm of colorblindness.

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9. Sam Roberts, *Conversations/Kenneth B. Clark: An Integrationist to This Day, Believing All Else Has Failed*, N.Y. TIMES, May 7, 1995, at 7 (emphasis added).

10. "Sometimes referred to as the First and Second Reconstruction, the periods between 1865-1875 and 1957-1968, respectively, mark the zenith of civil rights reform." Bryan K. Fair, *The Acontextual Illusion of a Color-Blind Constitution*, 28 U.S.F. L. REV. 343, 346 n.17 (1994) (reviewing ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1994)). Here, "Second Deconstruction" refers to the twilight period of civil rights reform from 1968 to the present. Indeed, the Second Deconstruction is quite similar to the white counterrevolution that followed the First Reconstruction. *See generally* W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA (Atheneum 1992); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1988).

11. See, e.g., Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding the constitutionality of state laws mandating racial separation); The Civil Rights Cases, 109 U.S. 3 (1883) (invalidating the first two sections of the Civil Rights Act of 1875, which prescribed discrimination in public accommodations; the Court concluded that private discrimination was beyond the reach of the Fourteenth Amendment); *United States v. Cruikshank*, 92 U.S. 542 (1876) (applying the *Slaughter-House Cases* and concluding that the right to assemble was not one of the Privileges and Immunities of national citizenship; this opinion severely diluted the Civil Rights Act of 1870, which reenacted the Civil Rights Act of 1866 and provided for voting rights and criminal penalties for depriving or conspiring to deprive anyone of their civil rights); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) (undermining congressional efforts to nationalize protection of the basic civil rights of former slaves by declaring that the Privileges and Immunities Clause of the Fourteenth Amendment applied only to a set of narrowly defined rights of national citizenship). *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-12, at 330 & nn.3,4 (2nd ed. 1988) ("The Supreme Court restrictively construed or simply invalidated much of this legislation, acting to preserve in law the autonomy that the states had largely lost politically in the wake of the Civil War."); Bryan K. Fair, *Foreword: Rethinking the Colorblindness Model*, 13 NAT'L. BLACK L.J. 1, 30 n.170 (1994).

12. 115 S. Ct. 2097 (1995).

13. *Id.* at 2113 ("[W]e hold . . . that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.").

14. 488 U.S. 469 (1989).

In this mythological vision of America, racism and sexism either no longer exist (or if they do, their manifestations are purely aberrational); African-Americans and women simply need to work hard and their efforts will be rewarded by the unerring "fairness" of the meritocracy; and perhaps most importantly, individual liberty, not group "interests," is the hallmark of the American polity. This article takes the view that nothing could be further from the truth.[15]

Part II addresses the inverted reasoning of colorblindness where the oppressed become the oppressor. *Adarand* is the first Supreme Court decision to completely embrace the New Equal Protection. Eschewing any acknowledgement of the history of race and racism in America, the Court has created a new suspect class—innocent whites who are injured by race-conscious remedies. Through an unrealistically acontextual assessment of racism in America, the principle of colorblindness perpetuates racial subordination.[16]

Notwithstanding the obvious implications of the *Adarand* decision on race-conscious remedial efforts, the most alarming aspect of the decision is its structural realignment of judicial and legislative decisionmaking. *Adarand* is particularly disturbing; not only is the Court acting as a superlegislature,[17] it is also redistributing the boundaries of power. This is antithetical to a positive view of federalism. Part II advances the theory that the Court has misinterpreted the meaning of *Bolling v. Sharpe*,[18] and in so doing, has eviscerated the traditional institutional boundaries between Congress, the states, and the Court itself. Consequently, Congress is, in relation to race-conscious remedial efforts to eradicate dis-

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15. *See, e.g.*, Andrew Hacker, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992).

16. *See, e.g.*, T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1062 (1991); Jerome McCristal Culp, Jr., Frank Cooper, & Lovita Tandy, *Foreword: A New Journal of Color in a "Colorblind" World: Race and Community*, 1 AFR.-AM. L. & POL'Y REP. 1, 2 (1994) ("We . . . need journals of color because 'colorblindness' is currently being defined in a way that reinforces the social stratification of society."); Fair, *supra* note 10 at 5; Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 8 (1991); Luke Charles Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 HARV. BLACKLETTER J. 1, 35 (1994); John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 324 (1994); Herbert O. Reid, Sr., *Assault on Affirmative Action: The Delusion of a Color-Blind America*, 23 HOW. L.J. 381, 427-28 (1980).

17. Obviously, there are discrete occasions when the Court has to perform this function. *See, e.g.*, Swann v. Charlotte-Mecklenburg Board of Educ., 402 U.S. 1 (1971); Brown v. Board of Educ., 349 U.S. 294 (1955) (*Brown* II); Brown v. Board of Educ. 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954). *But see* JOHN HART ELY, DEMOCRACY AND DISTRUST 74-77 (1980) (advocating a process-oriented theory of judicial review where the Court intervenes only on those rare occasions where "discrete and insular minorities," are injured).

18. 347 U.S. 497 (1954).

crimination, little more than a city council.[19] This is the problem of reverse incorporation.[20] Specifically, this Article argues that the *Bolling* decision was never meant to *limit* Congress' section 5 power under the Fourteenth Amendment as section 1 limits state power.[21]

Properly understood, *Bolling* stands for the proposition that Congress—like the states—cannot discriminate. If Congress does discriminate, then this Fifth Amendment[22] due process violation implicates the equal protection guarantee of the Fourteenth Amendment. Section 1 of the Fourteenth Amendment is a limitation on state power; conversely, section 5 is a *positive grant* of legislative power to Congress.[23] The two sections should be interpreted so as not to undermine Congress' power in eradicating discrimination. Section 5 acknowledges Congress' primacy as the nation's legislature. Thus, the implicit equal protection component of the Fifth Amendment is not a limitation on congressional power. Moreover, the varying interpretations of the equality embodied in the Fourteenth Amendment support this view—the only limitation in the Fourteenth Amendment is a prohibition against discriminatory enactments by the states; there is no limitation on legislative efforts to eradicate subjugation or caste. Thus, *Adarand* was wrongly decided. The overarching theme embodied in this discussion is that the Court lacks the institutional competence to intervene in this area, particularly where there is scant, if any, evidence of "invidious discrimination" against white majority interests.

Finally, Part II closes with a discussion and analysis of the Thirteenth Amendment.[24] "Under a colorblind framework, the [F]ourteenth [A]mendment serves as the font of antidiscrimination law, while the

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19. By placing Congress on the same plane as the Richmond City Council in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Court has drastically altered the parameters of institutional power. Indeed, the Court has redefined well-settled notions of federalism and institutional competence.

20. "'Reverse incorporation,' as the doctrine is sometimes called, purports to subject federal and state action to identical levels of equal protection scrutiny and therefore would treat Congress and states as possessing coterminous authority to enact laws implicating equal protection concerns." Bradford Russell Clark, Note, *Judicial Review of Congressional Section Five Action: The Fallacy of Reverse Incorporation*, 84 COLUM. L. REV. 1969 (1984). This is a gross misreading of the Fourteenth Amendment.

21. Section 1. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

Section 5. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

22. "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

23. *See* Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).

24. Section 1. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States . . . ." U.S. CONST. amend. XIII, § 1.

[T]hirteenth [A]mendment is reduced to simply prohibiting the reinstitution of slavery."[25] But the Thirteenth Amendment certainly means more than this—the Court itself has stated:

> At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.[26]

The Thirteenth Amendment focuses explicitly on the elimination of caste, and it moves away from the artificial barriers of state action and colorblindness. "It helps redefine the issue as one not simply of preventing racial discrimination, but of achieving racial justice."[27]

In Part III, *Fullilove v. Klutznick*,[28] *City of Richmond v. J.A. Croson Co.*,[29] and *Metro Broadcasting v. FCC*,[30] are analyzed with a particular emphasis on the Court's conception of institutional power. Specifically, this conception inevitably determines the standard of review that the Court adopts when construing a constitutional challenge to a race-conscious remedy. The Court moves from an unarticulated standard of review rooted in deference to Congress in *Fullilove*[31] to strict scrutiny for state or local race-conscious remedial efforts in *Croson*[32] to an intermediate level of scrutiny for an FCC program in *Metro Broadcasting*.[33] *Wygant v. Jackson Board of Education* is also analyzed to illustrate both Justice Stevens' forward-looking approach and the Court's arbitrary treatment of the requirement of discriminatory purpose in equal protection cases.

Obviously, this jurisprudential terrain is decidedly uneven. How-

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Section 2. "Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIII, § 2.

25. Aleinikoff, *supra* note 16, at 1119.

26. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968).

27. Aleinikoff, *supra* note 16, at 1120.

28. 448 U.S. 448 (1980).

29. 488 U.S. 469 (1989).

30. 497 U.S. 547 (1990). *Metro Broadcasting* is also analyzed as a First Amendment case. Specifically, this Article explores the relationship between diversity and the marketplace of ideas. Just as regulation of hate speech is not at odds with First Amendment principles when the overriding concern is the elimination of caste, *see* Cedric Merlin Powell, *The Mythological Marketplace of Ideas: R.A.V., Mitchell, and Beyond*, 12 HARV. BLACKLETTER J. 1 (1995), so too must be congressional attempts at inclusion of diverse viewpoints in the ideological marketplace. Congress or the FCC should be free to open up the marketplace to views and groups which have been historically excluded. Indeed, this approach may prove appealing to First Amendment absolutists.

31. 448 U.S. at 492, 497-16 (Burger, C.J.).

32. 488 U.S. at 504-10 (O'Connor, J.).

33. 497 U.S. at 564-65 (Brennan, J.).

ever, these decisions can be unified under an intermediate standard of review. Simply put, if legislative decisions are not motivated by racial animus, then such decisions should be subject to a less demanding standard of review than strict scrutiny.[34]

In the discussion of this constitutional triad, Justice Stevens' opinions are highlighted. His decisions have varied from requiring an exact fit between congressionally-enacted race-based remedies and injuries to minorities,[35] to requiring strict scrutiny analysis for states and local governmental efforts to remedy past discrimination,[36] to a deferential approach where Congress is concerned with diversity in broadcasting.[37] Today, Justice Stevens is the only remaining member of the *Metro Broadcasting* majority and his decisions dramatically illustrate the Court's power to establish and alter institutional boundaries. More importantly, his decisions illustrate the impact such determinations have on the ability of governmental entities to address issues of discrimination. His approach, however, has its shortcomings as well.[38] Finally, in *Adarand*, Justice Stevens comes full circle analytically and attempts to address a question the majority glosses over—the scope of congressional power under the Fifth Amendment.[39] More specifically, whether congruence between the Fifth and Fourteenth Amendments necessarily means that congressional power (under section 5 of the Fourteenth Amendment) should be limited in the same way as state power is under section 1 of the Fourteenth Amendment.

Finally, Part III offers a critique of the *Adarand* decision. Justice Stevens' invocation of "skeptical scrutiny," in dissent,[40] is used to analyze Justice O'Connor's majority opinion. Moreover, the preceding parts are employed to illustrate the unprincipled constitutional foundation upon which *Adarand* rests. Although affirmative action is not extinct under the reasoning in *Adarand*, there will nevertheless be a period of affirmative inaction: Clinging to the hollow notion of color-

34. *See* Fair, *supra* note 10, at 73-81; *infra* notes 408-18 and accompanying text.

35. *See Fullilove*, 448 U.S. at 540-53 (Stevens, J., dissenting).

36. *See Croson*, 488 U.S. at 512-16 (Stevens, J., concurring).

37. *See Metro Broadcasting*, 497 U.S. at 601 (Stevens, J., concurring).

38. Justice Stevens favors "forward-looking" approaches to eradicate racism, *see* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2120 (1995) (Stevens, J., dissenting), but disfavors any attempt to analyze past discriminatory practices which impact current conditions of caste. *See also Croson*, 488 U.S. at 511-12, nn.1-2. However, racism does not occur in a time capsule—it is systemic. Thus, Justice Stevens' approach is only marginally contextual and severely ahistorical. However, his approach does preserve some level of institutional power for Congress.

39. *See* Adarand Constructors Inc. v. Pena, 115 S. Ct. 2097, 2123-26 (1995) (Stevens, J., dissenting).

40. *See id.* at 2120.

blindness, governments will simply ignore the continuing effects of past discrimination.

II. CONCEPTIONS OF EQUALITY

The Court has substantially altered its conception of equality. Equality no longer means that systems of subordination will not be tolerated, it now means that the systemic manifestations of racism will be ignored in the name of colorblindness. Thus, individualized notions of liberty displace the moral claims of oppressed groups; Fourteenth Amendment analysis is doctrinally paralyzed by a futile effort to disconnect it from its historical moorings; and contextual analysis is abandoned in favor of a fairy-tale depiction of American society. In this inverted reality play, everyone is *already* equal—we must avoid considering race lest we all return to our horrible "past" of racial discrimination.

A. *The Colorblind Myth: The Oppressed Become the Oppressor*

Since Justice Blackmun's admonition in *Regents of the University of California v. Bakke*[41] that "[i]n order to get beyond racism, we must first take account of race,"[42] the Court has steadily moved away from this fundamental notion to the myth of colorblindness. At bottom, this doctrinal shift is indicative of the Court's conception of equality. "What separates most of the participants in the debate is not so much the goal of colorblindness, but rather differing views about the cause of current inequality and the efficacy of race-blind or race-conscious remedies in reaching a colorblind future."[43] In this context, the jurisprudence of colorblindness[44] obscures the systemic effects of racism characterizing caste and other abhorrent byproducts of subordination as "remnants" of

41. 438 U.S. 265 (1978).

42. *Id.* at 407 (Blackmun, J., dissenting).

43. Aleinikoff, *supra* note 16, at 1064.

44. *See, e.g.*, *Adarand*, 115 S.Ct. at 2118 (Scalia, J., dissenting) ("[G]overnment can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (citation omitted) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as *individuals*, not as simply components of a racial, religious, sexual or national class.'") (quoting Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073, 1083 (1983)); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J., concurring) ("The benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can no more be pursued by illegitimate means of racial discrimination than can other assertedly benign purposes we have repeatedly rejected."); Fullilove v. Klutznick, 448 U.S. 448, 524 (1980) (Stewart, J., dissenting) ("And our cases have made clear that the Constitution is wholly neutral in forbidding such racial discrimination, whatever the race may be of those who are its victims.").

a distant past. A past that no one wants to remember, but a past whose current effects continue to deprive both African-Americans and women of significant societal opportunities.[45] Thus, an aspirational goal—colorblindness—has supplanted any attempt to realistically assess the question of race in America.

The jurisprudence of colorblindness functions on three levels: (i) as a historical myth advancing the counterintuitive notion that the Civil War Amendments, the accompanying civil rights enforcement statutes, and the legislative history of these enactments are devoid of any conception of race; (ii) as a definitional myth advancing the fallacy that racism is not systemic, but merely a series of unconnected individual responses beyond the reach of the ameliorative powers of the courts and legislatures; and (iii) as a rhetorical myth focusing the affirmative action debate not on the victims of systemic racism and caste, but on a generalized class of "innocents"[46] who are arbitrarily punished.

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45. The recent Glass Ceiling Commission report provides startling statistics:

> A survey of senior-level male managers in Fortune 1000 industrial and Fortune 500 service industries shows that almost 97 percent are white, 0.6 are African American, 0.3 percent are Asian, and 0.4 percent are Hispanic.
>
> African American men and women comprise less than 2.5 percent of total employment in the top jobs in the private sector. African American men with professional degrees earn only 79 percent of the amount of their white male counterparts; African American women with professional degrees earn only 60 percent of what white males earn. African Americans represent a $257 billion consumer market.

THE FEDERAL GLASS CEILING COMMISSION, THE ENVIRONMENTAL SCAN, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL 9 (1995).

46. Significantly, a recent study, focusing on the validity of "reverse discrimination" claims, states:

> 1. "Reverse discrimination" cases constitute between 1 and 3 per cent of all discrimination opinions reported during the 1990-1994 period. Of the 3,000 plus reported opinions, fewer than 100 involved such claims. This finding casts doubt on the claim that "reverse discrimination" is widespread.
>
> 2. A high proportion of the "reverse discrimination" claims are without merit. Several were brought by whites or males who were less qualified than the females or minorities who obtained the position.
>
> 3. In the six individualized cases where "reverse discrimination" was established, the court gave appropriate relief.
>
> 4. In 12 cases where affirmative action programs, mainly under consent decrees, were challenged, the programs were upheld or modified. In six cases, the programs were either invalidated or reexamined.
>
> 5. In one case, a decree which was expected to take 5 years to and [sic] discrimination, actually took 19 years. This and one other case suggest that the task of ending discrimination may take us longer than we had hoped.

Alfred W. Blumrosen, *Draft Report on Reverse Discrimination Commissioned By Labor Department: How the Courts are Handling Reverse Discrimination Claims*, DAILY LAB. REP. (BNA) No. 56, at D-22 (March 23, 1995), *available in* 1995 D.L.R. 56 D-22 WL BNA-LB. This report challenges yet another myth—the myth of entitlement. Specifically, that white males have been displaced by a stream of incompetents. This is what underlies the argument that "innocents" will

Relying on the analyses of Professors Fair,[47] Gotanda,[48] and Morrison,[49] this section explores the colorblind myth, and its upside-down, underlying reasoning that transforms the historically oppressed into the oppressor.

1. THE HISTORICAL MYTH

Historically, colorblind jurisprudence begins with the elder Justice Harlan's famous and ironic dissent in *Plessy v. Ferguson*.[50] Justice Harlan articulated the central premise of the American polity and constitutional government: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."[51] Justice Harlan properly recognized that the Supreme Court has a moral obligation to interpret the Constitution in a principled manner;[52] however, the sentences preceding the oft-quoted proclamation give the colorblindness principle a disconcerting resonance:

> 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 that 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. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind.[53]

In analyzing this passage, Professor Tribe notes the underlying tension in Justice Harlan's dissent:

> Perhaps it is anachronistic and even unfair to stress too heavily the manifest racism in Justice Harlan's full statement. But even for this late nineteenth-century proponent of white dominance, the color-blind ideal, it turns out, was only shorthand for the concept that the Fourteenth Amendment prevents our law from enshrining and perpetuating white supremacy. To say that this particular vice is shared, automatically or presumptively, by race-specific minority set-asides strikes many as far-fetched.[54]

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be hurt by affirmative action programs. As these figures suggest, the "reverse discrimination" argument is largely an appeal to emotion rather than a practical reality. *See supra* note 44 and accompanying text.

47. *See* Fair, *supra* notes 10 & 11.

48. *See* Gotanda, *supra* note 16.

49. *See* Morrison, *supra* note 16.

50. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

51. *Id.* at 559.

52. *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

53. *Plessy,* 163 U.S. at 559 (Harlan, J., dissenting) (emphasis added).

54. Laurence H. Tribe, *"In What Vision of the Constitution Must the Law Be Color-Blind?,"* 20 J. MARSHALL L. REV. 201, 203 (1986). Professor Fair views this language as illustrative of Justice Harlan's understanding that "60 million Whites were in no danger of domination by 8

In essence, Justice Harlan's conception of colorblindness did not mean that the Constitution turns a blind eye on race; but rather, that the Constitution embraces the notion that there can never be caste based on one's status as *nonwhite*. Race is, indeed, a factor in this analysis. Significantly, *Plessy* embraces two theories—racial subjugation in the majority opinion[55] and the elimination of caste based on Black skin in Justice Harlan's dissent.[56] Both theories are color conscious, not colorblind. The striking difference between the two theories is how color is used to fashion a theory of equality.[57]

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million Blacks. Similarly, 200 million Whites are in no danger of domination from 30 million Blacks today." Fair, *supra* note 10, at 2 n.3. I do not think that it is unfair to stress too heavily the inherently racist undertones in Justice Harlan's dissent, nor do I think as Professor Fair suggests, that Justice Harlan was merely discussing the numerical disparities between white and Black populations in 1896. Justice Harlan articulated a theory of white dominance: The white race is the dominant race and shall "continue to be for all time." While "there is no caste here," there is certainly the widely held view that Blacks are subordinate to the dominant race. This tension continues to this day. *See, e.g.*, Morrison, *supra* note 16, at 316 ("Justice Harlan did not allow colorblindness to prevent him from taking judicial notice of, and some pride in, the enormous disparities between the Euro-American and African-American communities.").

55. Writing for the majority, Justice Brown concluded:

> The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality or a commingling of the two races upon terms unsatisfactory to either.

Plessy, 163 U.S. at 544.

56. Analyzing the language of the Fourteenth Amendment, Justice Harlan wrote:

> These [the Thirteenth and Fourteenth Amendments] notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems. They had, as this [C]ourt has said, a common purpose, namely, *to secure "to a race recently emancipated, a race that through many generations have been held in slavery, all the civil rights that the superior race enjoy." They declared, in legal effect, this [C]ourt has further said, "that the law in the states shall be the same for the black as for the white; shall stand equal before the laws of the states, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color."*

Id. at 555-56 (Harlan, J., dissenting) (emphasis added). Here, colorblindness means that the color of a Black person's skin is of no constitutional relevance—the Thirteenth and Fourteenth Amendments were enacted to *include* Blacks in the national citizenry and to obliterate the vestiges of slavery. Colorblindness means that the color, "Black," is not the mark of inferiority. The point is that even Justice Harlan's constitutional metaphor of colorblindness has a distinct recognition of color. The only way that colorblindness works in reverse—that the Constitution must totally ignore race—is if the entire historical context of Justice Harlan's dissent is not considered. When the constitutional proclamation, "Our Constitution is color-blind," is considered in light of Justice Harlan's complete dissent in *Plessy*, it is obvious that Justice Harlan was aware that race (color) should not be used to subjugate; however, he embraced the concept of race being used to eradicate discrimination. That is, he recognized that the Thirteenth and Fourteenth Amendments were designed primarily for the benefit of the oppressed class—Blacks.

57. For the majority, per Justice Brown, color is used to justify the "separate but equal" doctrine of *Plessy:*

The theoretical allure of colorblindness begins with an acontextual examination of Justice Harlan's dissent in *Plessy*: no mention is made of Justice Harlan's concern with racial subordination,[58] no reference is made to how the concept of race shaped his vision of constitutional equality,[59] and finally, the statement, "Our Constitution is colorblind" is transformed into a "restatement of the doctrine of separate but equal."[60] Thus, modern colorblindness is at odds with Justice Harlan's conception of colorblindness.

Conceptually, Justice Harlan's dissent in *Plessy* is an odd place to trace the historical origins of the jurisprudence of colorblindness. It is as if one sentence has been pulled from its context, and amplified several times to produce a contorted and hypertechnical reading of equality. Professor Fair pinpoints the inside-out reasoning that is inherent in the colorblindness model:

> [T]he colorblindness model preserves "White" rule in the United States . . . . Whites have never had to compete equally with Blacks for access to economic and political power. The Nation's Founding Fathers gave themselves an original advantage which subsequent generations of Whites have inherited. Many Whites ignore this subtle socio-economic history and believe that they have "earned" their economic and political position. They also believe that White racial hegemony is normative. Application of the transformed colorblind-

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> It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different states, some holding that any visible admixture of black blood stamps the person as belonging to the colored race; others that it depends upon the preponderance of blood; and still others that the predominance of white blood must only be in the proportion of three fourths.

Id. at 552 (citations omitted). Under this perverted reasoning, Blacks and whites are separated by the color-line, and one's blood determines whether they are truly included in American society or separated from it. *See* Fair, *supra* note 11, at 33 n.179 ("Plessy was apparently seven-eighths Caucasian blood and one-eighth African blood. He claimed that his mixture of African blood was not discernible. He therefore took a vacant seat in the coach for Whites. After he refused an order to move, Plessy was forcibly ejected and arrested.").

By contrast, Justice Harlan argued against this freakish notion of equality by blood—Blacks were protected by the mandate of the Fourteenth Amendment. Professor Fair notes:

> Justice Harlan argued that while the language of the Fourteenth Amendment was prohibitory, it also contained: a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively *as colored*—exemptions from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race.

Fair, *supra* note 12, at 34 & n.186.

58. *See supra* note 56 and accompanying text.

59. *See supra* notes 55-56 and accompanying text.

60. Fair, *supra* note 11, at 70. Professor Fair posits that both the colorblindness model and the "separate but equal" doctrine ignore the reality of caste. *Id.*

> ness model enshrines the very racial hegemony that Justice Harlan contended was unconstitutional.[61]

Clearly, Justice Harlan's notion of colorblindness was dramatically different from that espoused by today's Court—Justice Harlan acknowledged that the Civil War Amendments were designed to dismantle a system of caste based on race.[62] Indeed, Justice Harlan's acknowledgement was unavoidable because the Constitution is a pro-slavery document.[63] Thus, it is not surprising that a series of post-Civil War amendments were necessary to eradicate Black subjugation.[64] Underlying Justice Harlan's colorblindness model was a historical analysis. Unfortunately, this analysis is glaringly absent from the colorblindness

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61. *Id.* at 68.

62. *See supra* notes 55-60 and accompanying text.

63. *See* Fair, *supra* note 11, at 20. Professor Fair argues that this conclusion is well-supported by the works of Professor Derrick Bell and the historian William Wiecek. Bell cites the historian William Wiecek for compiling the following list of direct and indirect accommodations to slavery contained in the Constitution:

> 1. Article I, Section 2: representatives in the House were apportioned among the states on the basis of population, computed by counting all free persons and three-fifths of the slaves (the "federal number,"; or "three-fifths" clause);
>
> 2. Article I, Section 2, and Article I, Section 9: two clauses requiring, redundantly, that direct taxes . . . be apportioned among the states on the foregoing basis, the purpose being to prevent Congress from laying a head tax on slaves to encourage their emancipation;
>
> 3. Article I, Section 9: Congress was prohibited from abolishing the international slave trade to the United States before 1808;
>
> 4. Article IV, Section 2: the states were prohibited from emancipating fugitive slaves, who were to be returned on demand of the master;
>
> 5. Article I, Section 8: Congress was empowered to provide for calling up the states' militias to suppress insurrections, including slave uprisings;
>
> 6. Article IV, Section 4: the federal government was obliged to protect the states against domestic violence, including slave insurrections;
>
> 7. Article V: the provisions of Article I, Section 9, clauses 1 and 4 (pertaining to the slave trade and direct taxes) were made unamendable;
>
> 8. Article I, Section 9, and Article I, Section 10: these two clauses prohibited the federal government and the states from taxing exports, one purpose being to prevent them from taxing slavery indirectly by taxing the exported product of slave labor.

Id. at 19 n.108 (quoting DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987)).

64. *See* Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution,* 101 HARV. L. REV. 1, 5 (1987).

model articulated by various Justices in *Fullilove*,[65] *Croson*,[66] *Metro Broadcasting*,[67] and *Adarand*.[68]

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65. 448 U.S. 448 (1980). In *Fullilove*, the plurality rejected the colorblindness approach. 448 U.S. at 482 ("As a threshold matter, we reject the contention that in the remedial context the Congress must act in a wholly 'color-blind' fashion."). The advocates of colorblindness in *Fullilove*, Justices Stewart and Rehnquist, conveniently ignored both the context and history underlying Justice Harlan's colorblindness paradigm. Citing the language in Justice Harlan's colorblindness proclamation, Justice Stewart strained to place the federal minority set-aside program in *Fullilove* on the same constitutional plane as the segregated railroad cars in *Plessy*. *Id.* at 522-27. This approach obscures the constitutional validity of governmental action to eliminate discrimination under the Thirteenth and Fourteenth Amendments. Of course, Justice Stewart never mentioned the *purpose* of these amendments; he simply took one sentence in Justice Harlan's *Plessy* dissent and transformed it into a constitutional principle.

66. 488 U.S. 469 (1989). Moving closer to the adoption of colorblindness, Justice O'Connor in *Croson* concluded: "While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they use race-conscious relief." 488 U.S. at 504. Justice O'Connor's concern with "racial politics," *see id.* at 495, forced her to embrace a modified notion of colorblindness. That is, benign remedial measures designed to ameliorate the status of Blacks are inherently suspect, and must be buttressed by particularized findings of past discrimination. Since "innocent whites" can be harmed by such measures, a high threshold of constitutional validity must be met. Thus the suspect classes are inverted—Blacks are now the oppressors and whites are the oppressed. Again, colorblindness distorts the purpose of the Civil War Amendments, dulling the brightline between invidious and benign discrimination.

The approach of Justice Scalia is purely colorblind, and even more radical than Justice O'Connor's modified conception. For Justice Scalia, not only are Blacks practicing racial politics, *id.* at 524, but he turns the meaning and import of the Civil War Amendments on their head: "The Civil War Amendments were designed to 'take away all possibility of oppression by law because of race or color . . . .'" *Id.* at 522. Justice Scalia is blind to one important aspect of doctrinal history—the Civil War Amendments were enacted to fully liberate Blacks. Whites did not need the Civil War Amendments—they already had political power at the time the amendments were enacted.

67. 497 U.S. 547 (1990). Justice O'Connor, in her *Metro Broadcasting* dissent, adopted a colorblind approach that was closer to Justice Scalia's concurrence in *Croson*: "The FCC has used race as a proxy for whatever views it believes to be underrepresented in the broadcasting spectrum. This reflexive or unthinking use of a suspect classification is the hallmark of an unconstitutional policy." 497 U.S. at 621. Again, race is inherently suspect regardless of how it is used—race should be ignored in the absence of particularized findings of discrimination.

Justices Kennedy and Scalia attempted to rewrite history placing *Plessy* on the same level as *Metro Broadcasting*. In a cynical and unprincipled exercise of constitutional decisionmaking, Justice Kennedy equated the programs at issue in *Metro Broadcasting* with how the Third Reich or the South African government had previously defined racial groups. *Id.* at 633 n.1. Once again, in this warped view of history, context is completely ignored. Justice Kennedy totally ignored the brutal history of these infamous regimes, and attempted to equate this savage history with an FCC program that promoted diversity in broadcasting.

68. 115 S. Ct. 2097 (1995). In *Adarand*, reiterating her dissent in *Metro Broadcasting* Justice O'Connor returned to the theme that all racial classifications—benign or malign—are inherently suspect. 115 S. Ct. at 2112-18. Thus, benign remedial measures are no different, for the purposes of constitutional analysis, than invidious discrimination.

In his concurrence, Justice Scalia states that "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction." *Id.* at 2118 (Scalia, J., concurring) (citation omitted). To Justice Scalia, "we are just one race here. It is American." *Id.* at 2119. Again, no mention was made of the

The historical underpinnings of Justice Harlan's colorblindness notion further reinforced the proposition that the Constitution embraced the notion of race, and that government was not free to ignore it.[69] Professor Fair traces this historical development:[70] "In the decade of reconstruction, between 1865 and 1875, the federal government enacted legislation and constitutional amendments to end slavery, grant citizenship to former slaves, enfranchise them, and accord former slaves all the rights and liberties enjoyed by Whites."[71] Analyzing the Thirteenth Amendment, Professor Fair highlights the purpose of the amendment and Congress' enforcement power under it. Not only did the Thirteenth Amendment abolish slavery and involuntary servitude,[72] it prompted Congress to enact, under its enforcement power,[73] the Freedmen Bureau Act of 1865.[74] Professor Fair characterizes the Act as "an early form of affirmative action remedy for former slaves."[75] Thus, the Thirteenth Amendment and the concomitant enforcement power of Congress unquestionably recognize race[76]—the Constitution is not colorblind.

Professor Fair further notes that when states continued to perpetuate slavery "in all but its constitutional sense, Congress enacted the Civil

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purpose of the Civil War Amendments; centuries of oppression with current effects were glossed over, and the distinct history of African-Americans was subverted. African-Americans are simply "Americans" with a shared history with whites. Slavery and all of its present day manifestations never existed for "Americans," "Americans" need no preferential treatment. Justice Scalia's facile manipulation of history confused race-type and nation-type, and offered an unsupportable view of the Constitution.

69. Professor Fair writes: "I do not believe we will attain racial equality until we interpret our Constitution as proscribing racial caste and placing on government an affirmative duty to eradicate it." Fair, *supra* note 10, at 348.

70. For a thorough examination of the history of antidiscrimination law with an emphasis on the colorblindness principle, see Fair, *supra* note 11, at 11-44. This Article focuses only on the Civil War Amendments and their underlying enforcement legislation.

71. *Id.* at 25 & n.144.

72. *See supra* note 24.

73. *Id.*

74. 13 Stat. 507 (1865). Section 2 provided: "That the Secretary of War may direct such issues of provisions, clothing, and fuel, as he may deem needful for the immediate and temporary shelter and supply of the destitute and suffering refugees and freedmen and their wives and children, under such rules and regulations as he may direct."

75. Fair, *supra* note 11, at 25.

76. But the need for legislative appendages to the Thirteenth Amendment became almost immediately apparent. Something more than the idealistic words of the amendment was essential. Widespread atrocities against the free Negroes and their white friends continued in the South. Most southern legislatures enacted Black Codes, the many restrictions of which resulted in forcing Negroes to work for their former masters or other white men. The Negro in effect remained a slave in all but the constitutional sense. By virtue of these codes, he was "socially an outcast, industrially a serf, legally a separate and oppressed class."

Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1325 (1952) (quoting JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 163 (1951)).

Rights Act of 1866 and amended the Freedmen's Bureau Act to strengthen the power of the national government over civil rights within each state and territory."[77] The Civil Rights Act of 1866 essentially provided that former slaves—who were Black—would enjoy the same rights as whites.[78] Thus, the Thirteenth Amendment, the Freedmen's Bills, and the Civil Rights Act of 1866 all represent attempts to eradicate caste based on race. More importantly, these legislative initiatives clearly embraced the constitutional philosophy that race must be taken into account *positively* to ameliorate the condition of Blacks.[79]

The history of the Fourteenth Amendment is equally compelling in its rejection of colorblindness.[80] As Professor Fair writes, "Congress enacted the Fourteenth Amendment because of lingering doubts about the adequacy of the Thirteenth Amendment and the 1866 Civil Rights Act to secure former slaves their full civil rights."[81] "Congressman [Thadeus] Stevens, introducing the [F]ourteenth [A]mendment in the House, characterized its basic purpose as the 'amelioration of the condition of the freedmen.'"[82] The Fourteenth Amendment was not intended to be a clarion call to individual rights, it sought to bring an oppressed

77. Fair, *supra* note 11, at 25-26 & n.148 (citing 14 Stat. 27 (1866)).

78. These rights included: "[t]he right to make and enforce contracts; [t]he right to buy, sell, and own realty and personalty; [t]he right to sue, be parties, and give evidence; and [t]he right to full and equal benefit of all laws and proceedings for the security of persons and property." Fair, *supra*, note 11, at 26-27. Both the Civil Rights Act of 1866 and the 1866 Freedmen's Bureau Act contained these enumerated rights. *Id.*

79. Professor Schnapper states that "[s]upporters of the 1866 Freedmen's Bureau bill . . . stressed the special needs of blacks." Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 767 (1985). The statements of Senators and Congressmen, who legislated during the 39th Congress on the 1866 Freedmen's Bureau bill, vividly illustrate that the history of the Civil War Amendments is distinctly race-conscious. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 365 (1866) (statement of Sen. Fessenden) (noting the economic, social, and political plight of freed slaves); *id.* at 588 (statement of Rep. Donnelly) ("We have liberated four million slaves in the South. It is proposed by some that we stop right here and do nothing more. Such a course would be cruel mockery. These men are without education, and morally and intellectually degraded by centuries of bondage."); *id.* at 632 (statement of Rep. Moulton) ("The very object of the bill is to break down the discrimination between whites and blacks. . . . Therefore I repeat that the true object of the bill is the amelioration of the condition of the colored people."); *id.* app. at 75 (statement of Rep. Phelps) (Congressman Phelps specifically noted the disparities between white and Black political power: "The very discrimination it makes between 'destitute and suffering' negroes and destitute and suffering white paupers, proceeds upon the distinction that, in the omitted case, civil rights and immunities are *already sufficiently protected* by the possession of political power, the absence of which in the case provided for necessitates governmental protection.") (emphasis added); *see also* Gressman, *supra* note 76, at 1327 (noting that the Thirteenth Amendment and Freedmen's Bureau debates of 1866 specifically focused on the status of recently freed slaves).

80. Professor Schnapper notes that the Fourteenth Amendment was enacted in an era of race-conscious federal programs. *See* Schnapper, *supra* note 80, at 754-84.

81. Fair, *supra* note 11, at 27; *see also* Gressman, *supra* note 76, at 1329.

82. Schnapper, *supra* note 80, at 785 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Stevens)). Similar language was employed by Congressman Moulton in

group into the national citizenry.[83]

Similarly, the Fifteenth Amendment[84] extended the most vital right of citizenship—the right to vote—to the previously disenfranchised masses of slaves.[85] Again, this amendment was not colorblind—it specifically referenced race and color.[86]

Finally, Professor Fair chronicles a series of legislative enactments that emanated from Congress' enforcement powers. Congress enacted the Civil Rights Act of 1870,[87] which reenacted the Civil Rights Act of

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introducing the Freedmen's Bureau Bill. *See* Schnapper, *supra* note 80, at 765 (*citing* CONG. GLOBE, 39th Cong., 1st Sess. 632 (1866) (statement of Rep. Moulton).

83. Representative Stevens stated:

> Whatever law protects the white man shall afford "equal" protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same. These are great advantages over their present codes. Now different degrees of punishment are inflicted, not on account of the magnitude of the crime, but according to the color of the skin. Now color disqualifies a man from testifying in courts, or being tried in the same way as white men. . . . Unless the Constitution should restrain them those States will all, I fear, keep up this discrimination, and crush to death the hated freedmen.

CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Stevens); *see also* Fair, *supra* note 11, at 27-28.

84. Section 1. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend XV, § 1.

Section 2. "The Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XV, § 2. It would be ninety-five years before the right to vote became a practical reality for African-Americans. *See* Voting Rights Act of 1965, 42 U.S.C. § 1973 (1965).

85. Arguing in support of the adoption of the Fifteenth Amendment, Senator Ross stated:

> No class, no race is truly free until it is clothed with political power sufficient to make it the peer of its kindred class or race and enable it to resist the contingencies of popular commotion. No nation can be truly republican which denies to any portion of its citizens equal law and equal rights. By perpetuating this discrimination between whites and blacks we should remember that we are sustaining a discrimination established by the enemies of the Union and of popular government in the interest and for the perpetuation of slavery. [Slavery] will never die until the negro is placed in a position of political equality from which he can successfully bid defiance to all future machinations for his enslavement.

CONG. GLOBE, 40th Cong., 3d Sess. 983 (1869) (statement of Sen. Ross).

86. The broad language of the Fifteenth Amendment should not be misconstrued. Certainly, the language is applicable to all "citizens of the United States," but whites already had the right to vote. *See supra* note 85 and accompanying text.

Senator Yates described the essence of national citizenship, and argued in support of the Fifteenth Amendment: "I then asserted the broad and bold proposition that being a citizen, although he was black, he was entitled to vote just as much as though he were white. The white citizen was entitled to vote. Nobody denies that. Then, was not the black citizen entitled to vote?" CONG. GLOBE, 40th Cong., 3d Sess. 1004 (1869) (statement of Sen. Yates).

87. Fair, *supra* note 12, at 28 n.159 (citing 16 Stat. 140 (1870), *as amended by* 16 Stat. 433 (1871)). In legislative debate, Representative Townsend stated:

> The [F]ifteenth [A]mendment gave to the colored race the right to vote and to hold office; but as constitutions are but declarations of rights and duties, and point out the

1866 and provided for voting rights and criminal sanctions for the deprivation of rights under either the 1866 or 1870 Acts.[88] Responding to acts of terrorism against its newly emancipated citizens, Congress enacted the Civil Rights Act of 1871.[89] "The Core of the Act was section 2, which made it illegal to 'conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose . . . of depriving any person or class of person of the equal protection of the laws. . . .'"[90]

The last Reconstruction Act was the Civil Rights Act of 1875[91] which stated, in its Preamble that

> it is essential to a just government that . . . we recognize the equality of all men before the law, and hold that it is the duty of government in all its dealings with people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political . . . .[92]

The inescapeable conclusion is that Justice Harlan's conception of color-blindness did not ignore race. Rather, his conception is decidedly color-conscious because its foundation rests upon the Civil War Amendments and their underlying statutory framework of congressional enforcement. As Professor Fair concludes: "The first Reconstruction was not color-blind. Congress enacted a series of laws designed to ensure that Blacks would enjoy the same rights as Whites. The Reconstruction Laws defined national rights in terms of those enjoyed by Whites."[93]

Notwithstanding the overwhelming historical evidence against the

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> means whereby those rights and duties may be secured and enforced, it yet remains necessary that there should be appropriate legislation to effect the same. The situation of political affairs at the South since ratification of that amendment, as manifested in the obstruction to registration of colored voters who are entitled to the ballot, and the attempts to intimidate them from voting, show conclusively that some stringent law is necessary to neutralize the deep-rooted prejudice of the white race there against the negro, and that the only means of the latter to secure his dearest privileges are to be found in national legislation.

CONG. GLOBE, 41st Cong., 2d. Sess. app. 392 (1870) (statement of Rep. Townsend).

88. *See* Fair, *supra* note 11, at 29.

89. This Act is commonly referred to as the Ku Klux Klan Act. *See* Fair, *supra* note 11, at 29 & n.161 (citing 17 Stat. 13 (1871)).

90. Fair, *supra* note 11, at 29.

91. *Id.* at 30. During legislative debate on the Civil Rights Act of 1875, Representative White articulated the purpose of the Act:

> The evil proposed to be remedied by the bill is that people of color in many of the States are denied the privilege of admission into public schools, of traveling upon public conveyances, of obtaining food and lodging at public hotels when traveling, and of going to places of public amusement, theaters, &c.; and to secure to them equality of right in these respects is the object of this proposed legislation.

CONG. GLOBE, 43rd Cong., 2d Sess. app. 15 (1875) (statement of Rep. White).

92. Fair, *supra* note 11, at 30.

93. *Id.* at 31.

doctrine of colorblindness, proponents of this illusory jurisprudence attempt to advance two additional myths premised on contorted definitions and mechanistic rhetoric.

2. THE DEFINITIONAL MYTH

Professor Gotanda examines varying theoretical strains of race in the jurisprudence of colorblindness and concludes that the myth of colorblindness is an analytical instrument of subjugation. "A color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans."[94] Professor Gotanda critiques colorblind jurisprudence, and develops five themes that emerge from the Court's decisions: (i) the public-private distinction;[95] (ii) nonrecognition of race;[96] (iii) racial categories;[97] (iv) formal-race and unconnectedness;[98] and (v) racial social change.[99]

According to Professor Gotanda, race is distinctly defined in four ways,[100] and the Court employs this definitional approach to race to

94. Gotanda, *supra* note 16, at 2-3.

95. Here, Professor Gotanda refers to the designation of distinct spheres of permissible and impermissible conduct. "Race discrimination is unconstitutional only in the realm marked out by the doctrine of state action." *Id.* at 5. Racial discrimination is permissible in the private sphere; the state action doctrine establishes an illusory boundary of prohibited conduct.

96. Analyzing Justice Stewart's dissent in *Fullilove*, Professor Gotanda identifies the pure colorblind theme of nonrecognition. It is irrelevant whether the purpose of governmental action is benign or malign, government should not act on the basis of race. *Id.* Professor Gotanda suggests that this view is too simplistic: "Before a private person or a government agent can decide 'not to consider race,' he must first recognize it." *Id.* at 6. This glaring tension underlies the *Croson* decision. The Court is suspicious of race—it wants to ignore race as much as it can—but it must recognize the *racial composition* of the Richmond City Council in order to advance the hollow argument that "innocent" whites will be injured. *See infra* pp. 98-111.

97. While race is "objectively fixed," with immutable factors such as skin color and country of origin, it is also a product of history and social context. Gotanda, *supra* note 16, at 6. Professor Gotanda points to the "one drop of blood" stigma as an example of the social construct that determines status. *Id.*; *see supra* note 56.

98. "Under color-blind constitutionalism, references to 'race' mean formal-race. Formal-race implies that 'Black' and 'white' are mere classification labels, unconnected to social realities." Gotanda, *supra*, note 16, at 6. Professor Gotanda postulates that the colorblind model is acontextual: "[t]he color-blind mode of constitutional analysis often fails to recognize connections between the race of an individual and the real social conditions underlying a litigation or other constitutional dispute." *Id.* at 7.

99. Citing Justice O'Connor's dissent in *Metro Broadcasting*, Professor Gotanda concludes that, under this thematic model, government must never consider race because it leads to a Nation divided into racial groups. In order to avoid racial conflict and hostility, race must be ignored. *See* Gotanda, *supra* note 16, at 7. Yet as Professor Gotanda notes, "[I]t is far from clear that a race-blind society is necessarily a desirable goal." *Id.* Perhaps African-Americans would truly "disappear" under this theory of racial social change. *See, e.g.*, RALPH ELLISON, INVISIBLE MAN (1947).

100. Interpreting the Court's colorblind jurisprudence, Professor Gotanda places the definition of race into four distinct categories: (i) status-race; (ii) formal-race; (iii) historical-race; and (iv)

advance one of the five themes of racial domination. In short, "white racial domination is supported, protected, or disguised by the particular theme under discussion."[101]

Professor Gotanda's theory of formal-race and unconnectedness is directly applicable to *Croson* and *Adarand.* He argues that the Court's modern affirmative action jurisprudence is simply a return to the *Plessy* notion of formal-race.[102] That is, any consideration of history is suppressed by the Court—race is neutral and the concern shifts to the protection of "oppressed whites." This is accomplished by two doctrinal prongs which are cynically employed by the Court: formal-race unconnectedness and the strict scrutiny standard of judicial review.

Professor Gotanda explains the effect of the formal-race unconnectedness mode of constitutional analysis: "Formal-race and the application of strict scrutiny lend themselves to superficial critiques of affirmative action programs, thus legitimizing the continued subordination of the Black community."[103] Under the formal-race unconnectedness model, racism is defined as an aberrational defect in what is otherwise a well-functioning process. Racism is entirely a function of individual prejudice; it is not systemic.[104] The historical and societal aspects of racism are de-emphasized, and race-conscious remedial approaches must be based on particularized findings of discrimination.[105] This segmentation of the systemic and structural underpinnings

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culture-race. "Status-race is the traditional notion of race as an indicator of social status." Gotunda, *supra* note 16 at 4. Here, the "distinct, inferior status of Blacks was implicit in the Constitution," and Congress was powerless to remedy this constitutional mandate of inferiority. *Id.* at 37; *see also* Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857). Formal-race is the embodiment of the Court's decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896)—"separate but equal" is premised on the notion that race is neutral. Thus, the fact that Blacks were enslaved in a separate, inferior caste is not cognizable under the Constitution. *See* Gotunda, *supra* note 16, at 38. While formal-race is driven by a blatant disregard of historical and societal factors, historical-race moves away from this blindness and adopts Justice Harlan's approach in his *Plessy* dissent. *See id.* at 39. Professor Gotanda describes this theme: "Justice Harlan was advocating a peculiar mix of historical-race and formal-race. Government acts were required to be genuinely neutral; therefore judicial review of race-based legislation should recognize the historical content of race." *Id.*; *see also supra* note 55 and accompanying text. Professor Gotanda identifies the historical-race paradigm in Justice Marshall's *Regents of Univ. of California v. Bakke* dissent. *Id.* at 40 (quoting Regents of University of California v. Bakke, 438 U.S. 265, 400 (1977) (Marshall, J., dissenting) ("It [the experience of Blacks in America] is not merely the history of slavery alone but also that a whole people were marked as inferior by law.")).

Finally, "[c]ulture-race is the basis for the developing concept of cultural diversity." Gotanda, *supra* note 16, at 4-5. This is precisely the approach articulated by Justice Brennan in *Metro Broadcasting v. FCC*, 497 U.S. 547, 585 (1990).

101. Gotanda, *supra* note 16, at 3.

102. *See supra* note 100.

103. Gotanda, *supra* note 16, at 43.

104. *See id.*

105. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492, 504-06 (1989).

of racism limits discussion to a set of "isolated incidents" and severely undermines race-conscious remedial approaches:

> Despite the fact that personal racial prejudices have social origins, racism is considered an individual and personal trait. Society's racism is then viewed as merely the collection, or extension, of personal prejudices. In the extreme, racism could come to be defined as a mental illness. These extremely individualized views of racism exclude an understanding that race has institutional or structural dimensions beyond the formal racial classification. Individual irrationality and mental illness simply do not adequately explain racism and subordination.
>
> Furthermore, the view that racism is merely an irrational prejudice suggests that the types of remedies available to address racial subordination and oppression are limited.[106]

Thus, by summarily discounting context and history, formal-race unconnectedness destroys a governmental entity's ability to address systemic racism,[107] and the Court invents a mythological world where racism no longer exists and "everyone" is entitled to an "equal starting point."[108]

Strict scrutiny analysis takes on a peculiar meaning when it is employed as a tool of colorblind jurisprudence. Invoking a theory of judicial review that "is generally fatal to race-based government action,"[109] the Court has turned equal protection law on its head. Strict scrutiny analysis applies not only to invidious discrimination, it now applies with equal force to race-based remedial approaches designed to eradicate racial subordination.[110]

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106. Gotanda, *supra* note 16, at 44.

107. For example, Professor Gotanda, points to Justice Scalia's concurrence, in *Croson*, where he "transforms the contractors into 'the dominant political group, which happens also to be the dominant racial group.'" *Id.* at 45 n.179 (quoting *Croson*, 488 U.S. at 524 (Scalia, J., concurring)). By ignoring history and context, the Court can characterize the minority contractors in Richmond as the dominant political power that has trammeled the rights of "innocent whites." Overruling *Metro Broadcasting* and implicitly *Fullilove*, the Court in *Adarand*, focused on *individual* rights and preserved the rights of "innocent whites" whose individual rights had been undercut by the federal government's race-conscious remedial approach. In *Adarand*, congressional power is undermined—the Court refuses to examine the history and context of racism in federal highway construction projects. *See infra notes* 155-78 and accompanying text.

108. The "equal starting point" metaphor "implies that if Blacks are underrepresented in a particular employment situation, it must be a result of market forces. Any statistical correlation is either coincidental or beyond the control of the employer, and in any case unrelated to the employer's past practices." Gotanda, *supra* note 16, at 46; *see also* Aleinikoff, *supra* note 16 at 1101 ("It seems likely that the Court is willing to accept, without being willing to state, that underrepresentation is a function of capability or 'culture.' But even if that were so, why is it an impermissible state objective to make equality of opportunity a reality by helping blacks to be more competitive?").

109. Gotanda, *supra* note 16, at 46.

110. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2110 (1995) ("With *Croson*, the

Professor Gotanda articulates two theories of strict scrutiny review: the *Brown v. Board of Education*[111] interpretation, which focuses on the subordination of Blacks and defines race in historical terms;[112] and the *Croson* interpretation which focuses on formal-race.[113] Professor Gotanda concludes that the historical-race interpretation of *Brown* is the correct analytical approach to strict scrutiny review. Since *Brown* is based on the Civil War Amendments and their constitutional mandate to eradicate discrimination against Blacks, strict scrutiny is correctly applied to governmental action that is intended to subordinate Blacks as an oppressed class. Today, the Court has moved away from the *Brown* analytical model.

In *Adarand*, the Court adopted the view that race is inherently suspect,[114] compelling the conclusion that, "the government's use of *any* racial classification triggers strict scrutiny."[115] This literal reading of the Constitution obscures the underlying premise of the Civil War Amendments: Caste based on race is constitutionally repugnant and government is empowered to make certain that Blacks are no longer subjugated by a social and legal system of oppression. Professor Gotanda writes:

> This version of racial strict scrutiny—that use of any racial classification is subject to strict scrutiny without reference to historical or social context—is best interpreted as a use of formal-race. Strict scrutiny is triggered whether the classification is designed to remedy the effects of past subordination or designed to further oppress a traditionally subordinated racial group.
>
> This shift from the use of strict scrutiny to review governmental oppression of Blacks to review of any use of race has never been explicitly addressed by the Court; the underlying justification for the change remains undiscussed.[116]

Court finally agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments.").

111. 347 U.S. 483 (1954).

112. *See supra* note 101.

113. *See supra* note 101.

114. *See Adarand*, 115 S. Ct. at 2117 ("Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.").

115. Gotanda, *supra* note 16, at 48; *see also Adarand*, 115 S. Ct. at 2113, 2116-17; *Croson*, 488 U.S. at 493-94.

116. Gotanda, *supra* note 16, at 48. The Court, in *Adarand*, attempted to explain this shift in Justice O'Connor's three-prong approach—skepticism, consistency, and congruence—to strict scrutiny analysis. But Justice O'Connor's approach never explains why whites are now considered an oppressed racial group deserving of the protection of the Fourteenth Amendment. Yet another myth emerges—the myth of white entitlement. *See* Aleinkoff, *supra* note 16, at 1098-99 ("It would clearly be wrong to argue that whites are not harmed by affirmative action programs. But it would be difficult to construct a plausible case for the proposition that the harms to whites adversely affected by affirmative action programs *outweigh* the harms imposed on *innocent* black beneficiaries by a history of racism."). Does it necessarily follow that race-

The definitional myth, with its varying strains of racial labels and interpretive doctrines, perpetuates caste. It builds upon a historical approach distorting the meaning of Justice Harlan's *Plessy* dissent, ignoring the underlying history of the Civil War Amendments, and diminishing the significance of the systemic nature of racism. The rhetorical myth completes this trilogy of jurisprudential distortion by framing the affirmative action debate in divisive terms. Affirmative action is given a "Black face" in the same way as crime was given a "Black face" by then Vice-President Bush's use of Willie Horton in the 1988 Presidential election.

3. THE RHETORICAL MYTH

Employing an Oedipal metaphor, Professor Morrison illustrates how blindness—or a conscious effort to ignore race—shapes the affirmative action debate: "There is an uncanny parallel between Oedipus blinding himself after discovering his guilt and Euro-Americans' colorblinding themselves after making a similar discovery . . . . Oedipus lacked the moral courage to face his guilt as reflected in the sight of his parents and his people."[117] The same lack of moral courage causes the affirmative action debate to be structured in a manner skewed towards the perpetuation of caste.

The choice of colorblindness and its underlying doctrinal tenets "reflects a desire to avoid the painful revelations that may be lurking in an examination of either racial history or the current racial disparities in society."[118] "[C]olorblindness advances a formal test that strikes down racial classifications without acknowledging what lead to the need for such strictures."[119] Thus, proponents of the colorblind model embrace a series of convenient distortions.[120] Professor Morrison lists the following doctrinal stereotypes:

> (1) Affirmative action is not colorblind, because it intentionally invokes racial classifications;[121]

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conscious remedial approaches will "discriminate"—in the constitutional sense—against whites? Absent a literal interpretation that ignores history, there is no explanation for this doctrinal shift. *See* TRIBE, *supra* note 11, § 16-22 at 1536-37 (stating that injured whites are not victims of racial discrimination, and concluding that a focus on the degree of sacrifice visited upon innocent whites "unnecessarily confounds . . . equal protection analysis."); *see also infra* notes 318-22 and accompanying text.

117. Morrison, *supra* note 16, at 324 (quoting SOPHOCLES, OEDIPUS THE KING OF SOPHOCLES I (David Grene et al. eds., David Grene trans., 1954)).

118. Morrison, *supra* note 16, at 324.

119. *Id.*

120. *See id.* at 314.

121. *Id.*; *see also* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2118-19 (1995) (Scalia, J., concurring). In *Adarand*, only Justices Scalia and Thomas advocated a pure colorblind

(2) Affirmative action is not based on individuals, but on groups;[122]
(3) Affirmative action is not based on merit;[123]
(4) Affirmative action leads to racial politics and backlash in the form of white extremists;[124]
(5) Affirmative action is exploited by middle-class African-Americans;[125]
(6) Affirmative action stigmatizes its intended "beneficiaries;"[126]
(7) Affirmative action is social engineering, demanding equal results rather than equal opportunity;[127] and
(8) Affirmative action victimizes innocent (white) workers.[128]

Morrison examines each of these distortions and shows how the fallacy of colorblindness is used to maintain a system premised on white privilege. In its affirmative action decisions, the Court has appropriated each of these illusory arguments in varying degrees.[129] All of these arguments are variations on the constitutional metaphor of colorblindness.

Unpacking the myths underlying these propositions, Professor Morrison offers a critique of the Supreme Court's affirmative action jurisprudence. The bedrock theme of Professor Morrison's critique is that constitutional interpretation should not function as an instrument of subordination, but as one of liberation. The rhetorical myth turns the constitutional principle of equality on its head, and twists the colorblindness metaphor into a perverse, modern-day mirror image of the infamous "separate but equal" doctrine of *Plessy*. That is, if women and

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approach where race is never a factor. *See also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520-22 (1989) (Scalia, J., concurring).

122. Morrison, *supra* note 16, at 314; *see also Adarand*, 115 S. Ct. at 2112 ("[T]he Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*.").

123. Morrison, *supra* note 16, at 314; *see also Croson*, 488 U.S. at 502 (emphasizing the lack of any factual finding of how many MBE's were *qualified* to do work on construction contracts).

124. Morrison, *supra* note 16 at 314; *see also* Metro Broadcasting v. FCC, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting); *Croson*, 488 U.S. at 495-96.

125. Morrison, *supra* note 16 at 314; *see also Metro Broadcasting*, 497 U.S. at 636 (Kennedy, J., dissenting) ("And, rightly or wrongly, special preference programs often are perceived as targets for exploitation by opportunists who seek to take advantage of monetary rewards without advancing the stated policy of inclusion.").

126. Morrison, *supra* note 16 at 314; *see also Adarand*, 115 S. Ct. at 2119 (Thomas, J., concurring) (stating that there is no "racial paternalism exception" to the Constitution); *Croson*, 488 U.S. at 493-94.

127. Morrison, *supra* note 16 at 314; *see also Adarand*, 115 S. Ct. at 2110; *Croson*, 488 U.S. at 497 ("[S]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.").

128. Morrison, *supra* note 16, at 314; *see also Adarand*, 115 S. Ct. at 2111 ("[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."); *Croson*, 488 U.S. at 493 ("The Richmond Plan denies certain [white] citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race.").

129. *See supra* notes 121-28.

people of color "perceive" themselves as outside of American society and its societal benefits, it is because they have chosen to adopt that view. This fairy tale view of American society is wholly without support.

Paradoxically, a benign remedial effort to eradicate the effects of discrimination by government is blamed for a deeply rooted system of racial subordination. Thus, it is affirmative action that is not "color-blind" because it invokes racial classifications. Yet the *purpose* of the governmental action is ignored because racial classifications in and of themselves are "evil." By placing the blame on affirmative action, it is then quite simple to consistently avoid the question of race. Thus, if we ignore race, racism will go away—we need only avert our eyes and embrace the rhetorical fairytale. Professor Morrison describes this as a manifestation of cultural guilt:

> The racial guilt implicit in colorblindness rhetoric is evident. The rhetoric is not quite a guilty plea, however. It is more a plea of confession and avoidance: we confess not the problem, racial subordination, but the cause, racial classifications . . . . This rhetoric fails to address the problem; it simply pronounces a diagnosis and easy cure. Victory over racism is an accomplished fact. This choice of color-blindness reflects a desire to avoid facing race in two different ways. First, it reflects a desire to avoid the painful revelations that may be lurking in an examination of either racial history or the current racial disparities in society. Second, colorblindness advances a formal test that strikes down racial classifications without acknowledging what lead to the need for such strictures. Euro-Americans thus choose to blind themselves rather than face their past.[130]

Another strand of doctrinal avoidance is the notion of individualism. Here, affirmative action is not viewed as a device to eradicate systemic oppression, but as antithetical to the notion of individualism; this leads to a segmented constitutional jurisprudence of individuals, not groups.[131] Thus, discrimination must be detected and proven in a piece-

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130. Morrison, *supra* note 16, at 323-24. Professor Morrison also points out that even Justice Scalia has acknowledged that "[B]lacks have suffered discrimination immeasurably greater than any directed at other racial groups," *see id.* at 323 (quoting *Croson*, 488 U.S. at 527-28) (Scalia, J., concurring). However, Justice Scalia then concluded that there is no constitutional right to "even the score," by using racial classifications. *See Croson*, 488 U.S. at 527-28. Justice Scalia carried this proposition one step further in *Adarand* where he stated that there is only one race—American. *See Adarand*, 115 S. Ct. at 2119 (Scalia, J., concurring in part and concurring in the judgment).

131. *See supra* notes 122-23; *see also* Metro Broadcasting v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as *individuals*, not as simply components of a racial, religious, sexual or national class.'") (quoting Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073, 1083

meal and particularized manner. Consequently, the analysis is shifted from principles of anti-subordination and anti-caste to a search for "individuals" who openly practice racism. By focusing on the protection of individual rights, race becomes meaningless—individuals are not components of racial categories.[132] Thus, it is not racism that accounts for systemic inequities, but some "misguided" individual:

> Essential individualism demands proof that a particular individual participated in the discriminatory culture by overtly discriminating. If evidence of affirmative participation is forthcoming, Euro-Americans will offer up the participant as proof of their own innocence because they were not similarly offered up. Individuality is thus self-congratulating. Essential individualism enables Euro-Americans to identify the responsible individual. This understanding of individuality allows the transfer of guilt to another without asking about the relationship between the "other" and "us." Individuality also allows Euro-Americans to acknowledge the racial polarization of society while ironically shifting the blame and guilt from a racist society to affirmative action programs.[133]

Individuality reduces what should be a complex analysis into simplistic notions of societal and cultural blameworthiness. However, the issue is not guilt—whether Euro-Americans can successfully cleanse themselves of some societal notion of original sin—it is the eradication of caste. Inevitably, some members of society, usually those with entrenched power, will have to carry the burden of sharing that power with other members of society. This is equality.[134]

In order to avoid accepting this burden, opponents of affirmative action articulate the illusory theory of merit:

(1983)); *Croson*; 488 U.S. at 493 (O'Connor, J., plurality opinion) ("Rights created by the first section of the 14th Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.") (quoting Shelly v. Kramer, 334 U.S. 1, 22 (1948)).

132. *See supra* note 131 and accompanying text.

133. Morrison, *supra* note 16, at 328-29.

134. Indeed, what gives the reverse discrimination argument much of its theoretical appeal is the notion that individual rights have been trammeled. But this argument totally ignores the *nature* of injustice premised on race. Professor Dworkin writes:

> We are all rightly suspicious of racial classifications. They have been used to deny, rather than to respect, the right of equality, and we are all conscious of the consequent injustice. But if we misunderstand the nature of that injustice because we do not make the simple distinctions that are necessary to understand it, then we are in danger of more injustice still. It may be that preferential admissions programs [or other affirmative action measures] will not, in fact, make a more equal society, because they may not have the effects their advocates believe they will. That strategic question should be at the center of debate about these programs. But we must not corrupt the debate by supposing that these programs are unfair even if they do work. We must take care not to use the Equal Protection Clause to cheat ourselves of equality.

RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 239 (1977).

> Perhaps a sense of racial guilt explains this choice of interpreting merit as an absolute standard . . . . Absolute standards for merit ease this guilt. They rhetorically shift the burden of proof in discussions of racial reparations. Those who want the benefits of society must prove their worth. Those who are already on top prove their merit merely by being there . . . . Furthermore, those who have made it can presume that those questioning the standards must do so because they, or someone they care about, is just not good enough.[135]

Since there is no substantive right to equality in results, merit explains why some people are inherently underqualified. Proponents of the colorblind theory view any attempt to remove societal barriers that perpetuate caste as "racial paternalism."[136] Moreover, they fear that such paternalism leads to racial politics with decisionmakers who make assumptions based on race culminating in a backlash of white extremism. Paradoxically, colorblindness is undercut by reference to race. That is, in order for proponents of colorblindness to ignore race, they must first recognize it. Thus, the Court has expressed concern that Blacks may "take over" the boundaries of legislative decisionmaking subjugating Whites, and that this will lead to racial strife:[137]

> In *City of Richmond v. J.A. Croson Co.*, Justice O'Connor hesitantly noted that African-Americans were on or just over the verge of majority status in Richmond, thereby raising the specter of racial politics. Simultaneously, she avoided holding that racial composition of the relevant political unit is a legitimate part of equal protection analysis. The reason for Justice O'Connor's tight-rope act is obvious. A racial analysis of the political units that adopt laws would have a dramatic impact on equal protection law. Less obvious is the troubling assumption behind such a vision of racial politics. The perception is that only minority racial groups engage in racial politics. Perhaps this belief stems from a sense that Euro-Americans are not a race. Therefore, Euro-Americans are incapable of racial politics by definition.[138]

Perhaps it is an exaggeration to characterize the Court's reasoning in *Croson*, and at least implicitly in *Adarand*, as judicial paranoia,[139] but the racial politics rationale is the modern day equivalent of the racist notions that surrounded the First Reconstruction: namely, that a gang of

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135. Morrison, *supra* note 16, at 333-34.

136. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2119 (1995) (Thomas, J., concurring in part and concurring in the judgment).

137. *See* Morrison, *supra* note 16, at 334-35 ("A pervasive argument against affirmative action is that it actually creates or exacerbates racial problems. A common version of this argument is the concern about racial politics.").

138. *Id.* at 339.

139. Here I refer to the underlying assumption that when people of color gain power they will inevitably move to subjugate innocent Whites.

incompetent, buffoonish Black legislators had "taken over" the American polity. In his seminal work, *Black Reconstruction in America 1860-1880*, W.E.B. Du Bois identifies three dominant themes:

> 1. *All Negroes were ignorant.*
>
> "All were ignorant of public business."
>
> "Although the Negroes were now free, they were also ignorant and unfit to govern themselves."
>
> "The Negroes got control of these states. They had been slaves all their lives, and were so ignorant they did not even know the letters of the alphabet. Yet they now sat in the state legislatures and made the laws."[140]
>
> 2. *All Negroes were lazy, dishonest and extravagant.*
>
> "Those men knew not only nothing about the government, but also cared for nothing except what they could gain for themselves."[141]
>
> 3. *Negroes were responsible for bad government during Reconstruction.*
>
> "In the exhausted states already amply 'punished' by the desolation of war, the rule of the Negro and his unscrupulous carpetbagger and scalawag patrons, was an orgy of extravagance, fraud and disgusting incompetence."[142]

It is striking that in order to avoid any consideration of race, it must first be recognized and then ignored. We are not concerned about race until "innocent whites" are injured, or if Blacks are shifting the established boundaries of the political arena. "The racial politics argument could violate colorblindness in the same way the term 'innocent whites' does. For example, the concern only about African-Americans taking over a specific polity [sic] . . . . For racial politics even to be possible, race must be something more than an arbitrary, meaningless grouping."[143] In essence, colorblindness is held together by a conglomeration of baseless contradictions which are illuminated with increasing intensity the more we try to ignore race. "[C]olor blindness draws just as much attention to race as does race-consciousness."[144]

For example, the myths that affirmative action is exploited by middle class African-Americans, that affirmative action has a "stigmatizing" effect on its intended beneficiaries, and that affirmative action victimizes innocent white workers, are all examples of how the principle of colorblindness gives way to a twisted analysis of race. Blacks either "get

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140. W.E.B. DuBois, Black Reconstruction in America 1860-1880 711 (1935) (citations omitted).

141. *Id.* (citations omitted).

142. *Id.* at 712.

143. Morrison, *supra* note 16, at 337.

144. *Id.* at 338.

over" on the system,[145] or they are stigmatized as incompetents,[146] while whites are simply the victims of this societal spoils system.[147] All three myths, however, require an acknowledgement of race—Blacks are benefited and whites are victimized.

Several propositions emerge from the preceding discussion:

1) The Civil War Amendments are based primarily on a notion of race that sought to guarantee citizenship to African-Americans;[148]

2) Justice Harlan's *Plessy* dissent specifically acknowledged racial caste as a constitutional evil;[149]

3) Race is interpreted in strictly formulaic terms so that legislative initiatives—whether benign or malign—are placed on the same constitutional plane without reference to legislative intent or purpose;[150]

4) Colorblindness leads to a paradoxical and subterranean jurisprudence where the central question of race is passively acknowledged only to be submerged and ignored;[151]

5) Stereotypes, such as racial politics, and the stigmatization of intended beneficiaries, obscure any relevant analysis of race and perpetuate caste;[152] and

6) These propositions shape the Court's conception of institutional power; if race is irrelevant, then both state and federal legislatures must be circumspect in their efforts to eradicate societal inequities.[153]

Thus, it is not surprising that the Court, in *Adarand*, interpreted *Bolling v. Sharpe* so as to limit severely congressional power. Clearly, this reading does not comport with Fourteenth Amendment jurisprudence.

B. *The Fifth and Fourteenth Amendments*

Adarand is about much more than affirmative action. It is the first Supreme Court decision to espouse the New Equal protection. Because racism no longer exists, or at the very least is impossible to detect, legislatures must be restrained by the Court in their efforts to dismantle societal barriers. Underlying the New Equal Protection is the Court's

145. The recent Glass Ceiling Commission Report belies this proposition. *See supra* note 45 and accompanying text.

146. *See supra* note 7 and accompanying text.

147. *See supra* note 46 and accompanying text.

148. *See supra* notes 55-59, 61-93 and accompanying text.

149. *See supra* notes 49-68 and accompanying text.

150. Thus, race is inherently suspect and subject to strict scrutiny. *See supra* notes 94-116.

151. *See supra* note 130 and accompanying text.

152. *See supra* notes 136-47.

153. *See infra* notes 302-51 and accompanying text.

conception of institutional power. *Bolling v. Sharpe* is the doctrinal linchpin of Due Process and the New Equal Protection.

1. DUE PROCESS AND EQUAL PROTECTION: *BOLLING V. SHARPE*

Overruling *Metro Broadcasting*,[154] and by implication, *Fullilove v. Klutznick*[155] the Court, in *Adarand*, refashioned the parameters of institutional power and diluted the meaning of section 5 of the Fourteenth Amendment.[156] Federal and state power are thus compressed into a unitary standard of judicial review—strict scrutiny. Because the Fifth and Fourteenth Amendments are subject to the same equal protection analysis, section 1 of the Fourteenth Amendment[157] now limits federal as well as state power. This contorted reading of the Fourteenth Amendment began with the Court's reinterpretation of *Bolling v. Sharpe*. Ignoring the mandate of *Brown v. Board of Education* which prohibited governmental maintenance of caste-based systems of oppression, the Court instead substituted the illusory notion of colorblindness.

Correctly understood, *Bolling v. Sharpe*, the federal companion case to *Brown v. Board of Education*, stands for a simple proposition: If it is unconstitutional for states to maintain a caste system in violation of the Equal Protection Clause of the Fourteenth Amendment, then it is unconstitutional for the federal government to do the same in violation of the due process clause of the Fifth Amendment. Chief Justice Warren clearly articulated this constitutional principle:

> We have this day held that the Equal Protection Clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools. The legal problem in the District of

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154. 497 U.S. 547 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995).

155. 448 U.S. 448 (1980). *Fullilove* employed a broad, deferential standard to congressional power under section 5 of the Fourteenth Amendment. Relying on the notion that Congress was exercising an "amalgam" of its constitutionally authorized powers, the Court explicitly rejected the notion that remedial efforts must be colorblind. *Id.* at 482. This deferential approach has been criticized as unprincipled and open to an interpretation that would ultimately prove unfavorable to future remedial efforts. *See* Drew S. Days, III, *Fullilove*, 96 YALE L.J. 453, 456 (1987). Professor Days commented:

> I continue to be concerned both about the manner in which Congress enacted the Public Works Employment Act and about the arguments that the Supreme Court adduced to find the Act constitutional. Specifically, I find myself asking whether Congress and the Supreme Court, in enacting and approving the Public Works Employment Act, established standards for the formulation and judicial review of minority set-aside programs that, constitutionality aside, fall below those we ought to employ, given our justifiable national sensitivity to racial classifications.

Id. at 456. Professor Days clearly anticipated a decision like *Adarand* where the loose, deferential standard annunciated in *Fullilove* would be obliterated.

156. *See supra* note 21 and accompanying text.

157. *See id.*

> Columbia is somewhat different, however. The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.[158]

If states cannot maintain a caste system of public schools because such an invidious scheme is condemned by the Equal Protection Clause of the Fourteenth Amendment, then certainly the Fifth Amendment due process clause would require the same of the federal government. While "equal protection of the laws" and "due process of law" both embrace bedrock notions of *fairness*, the Court does not view them as doctrinally interchangeable.[159] *Bolling* says nothing about limiting federal power to eradicate racial discrimination. Instead, *Bolling* mandates a uniform constitutional duty for the federal government, under the Fifth Amendment, as *Brown* did for the states under the Fourteenth Amendment: "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."[160]

Despite the language of *Bolling*, the Court erected a new model of interpretation in *Adarand*. Thus, the Fifth Amendment due process clause is read to incorporate the equal protection clause of the Fourteenth Amendment subjecting federal and state action "to identical levels of equal protection scrutiny"[161] and ultimately diminishing Congress' enforcement power under section 5 of the Fourteenth Amendment. In so doing, the Court ignored deeply rooted notions of institutional competence in the name of doctrinal congruity. Noting that *Bolling* relied on the well-settled proposition that distinctions based on ancestry and race were odious and inherently suspect,[162] the Court concluded that *Bolling* articulated the principle that *General Government* could not discriminate on the basis of race.[163] Thus, the *same* constitutional duty was imposed on the Federal Government via the Fifth

158. Bolling v. Sharpe, 347 U.S. 497, 498-99 (1954).
159. *See id.* at 498.
160. *Id.* at 500.
161. Clark, *supra* note 20, at 1969.
162. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2107 (1995).
163. *See id.*

Amendment that was imposed on the state via the Fourteenth Amendment.[164] The Court then cited several decisions for the proposition that "the equal protection obligations imposed by the Fifth and the Fourteenth Amendments [are] indistinguishable . . . ."[165]

What is glaringly absent from the Court's analysis is how the "identical" equal protection components of the Fourteenth and Fifth Amendments compel a result that drastically alters the configuration of state and federal power. The Court has never answered two central questions: (1) What does the "same" analytical approach to the Fourteenth and Fifth Amendments mean? and, (2) Has such an analysis ever contemplated a *limitation* on congressional power?

The Court's ambivalence is the product of years of doctrinal disarray. Rather than embarking on the arduous task of articulating the scope of Congress' section 5 powers, the Court has instead settled for the simplistic incantation that the Fifth and Fourteenth Amendments are the same. One commentator has noted prophetically:

> By directing courts to the due process clause of the fifth amendment, modern reverse incorporation deemphasizes Congress' power to enforce the fourteenth amendment. In so doing, the doctrine obscures the fourteenth amendment's allocation of authority. The Reconstruction Congress thought that states were likely to deny blacks the equal protection of the laws and viewed the nation's legislature as the most effective guardian against such denials. Through the adoption of the fourteenth amendment, the Constitution codified a presumption of congressional competence and state incompetence to treat the races evenhandedly. By subjecting state and congressional action to identical standards of review, reverse incorporation contradicts this presumption. And by emphasizing the penumbras of the fifth amendment rather than the text of the fourteenth, the doctrine creates a substantial likelihood that courts will subordinate Congress' express constitutional powers to a judicially implied restriction . . . . The result has been the melding of standards of review for state and federal action, with states granted those powers accorded to Congress,

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164. *See id.*

165. *Id.* The Court's reliance on these decisions is particularly telling. None of the cited decisions embrace the Court's conclusion that federal governmental initiatives are subject to heightened scrutiny when race is employed as a factor. Indeed, the decisions merely stand for the proposition that the Fifth and the Fourteenth Amendments are the *same* without any mention of *why* this is so. *See, e.g.*, United States v. Paradise, 480 U.S. 149, 166 n.16 (1987) ("[T]he reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth. . . ."); Buckley v. Valeo, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975). None of these decisions reach the ultimate conclusion of the Court in *Adarand* that section 1 of the Fourteenth Amendment limits federal power under section 5 of the Fourteenth Amendment. *Bolling* was not a case arising under section 5 of the Fourteenth Amendment.

> and Congress potentially limited by the same restrictions applicable to the states. Although reverse incorporation thus brings symmetry to equal protection review of state and congressional action, the doctrine does so in contravention of the text, history, and structure of the Constitution.[166]

Underlying this doctrinal melding is the notion of colorblindness. Because race is inherently suspect, the same standard that is applied to states must be applied to Congress; since race is constitutionally irrelevant, all remedial efforts—state and federal—must be subject to strict scrutiny.[167] This approach obscures the plain language of the Constitution,[168] ignores the legislative intent of the Fourteenth Amendment,[169] and realigns the boundaries of institutional power.[170]

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166. Clark, *supra* note 20, at 1974-75.

167. *See Adarand*, 115 S. Ct. at 2113.

168. Simply put, it is the Fourteenth Amendment, not the Fifth, that contains the Equal Protection Clause:

> Advocates of reverse incorporation view equal protection restrictions on Congress as emanating from the due process clause of the fifth amendment. Such a penumbral restriction cannot, as the Supreme Court has suggested, be "precisely the same" as the equal protection clause that binds the states since although both the fifth and fourteenth amendments contain a due process clause, only the latter contains an equal protection clause. Unless the equal protection clause is a constitutional redundancy, due process and equal protection must be qualitatively different.

Clark, *supra* note 20, at 1975-76 (citations omitted); *see also* Robert A. Bohrer, *Bakke, Weber, and Fullilove: Benign Discrimination and Congressional Power to Enforce the Fourteenth Amendment*, 56 IND. L.J. 473, 478 (1981); *but see* Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541, 554 (1977) (arguing that the Fifth and Fourteenth Amendments are the same with a few discrete exceptions).

169. Clark, *supra* note 20, at 1976-78 (chronicling the legislative history of the Fourteenth Amendment and emphasizing that the drafters granted Congress broad remedial powers because of their distrust of the Supreme Court and the states in enforcing the newly mandated constitutional rights contained in the Civil War Amendments); *see also* Bohrer, *supra* note 168, at 481 ("[T]he early congressional history of the fourteenth amendment establishes that from the outset it was seen as holding out the possibility of an unprecedented role for the federal government in protecting civil rights and privileges from both states and private infringement."); *see also id.* at 492.

170. As one commentator states:

> In the section five context, the Supreme Court defines the substantive scope of the fourteenth amendment; Congress may act only remedially within that scope. The Court's designation of suspect classes has been a primary mechanism for establishing the equal protection clause's substantive parameters. Once the Court has set the parameters, however, the preservation of Congress' enforcement power requires that Congress have the freedom to exercise discretion within those boundaries, and have remedial authority at least as broad as that of the judiciary. The courts still may act remedially in the absence of explicit congressional action, but once Congress acts, the constitutional allocation of functions requires judicial deference to Congress' remedial judgment. Reverse incorporation disturbs this careful balance of power . . . . Since incorporation means that constitutional provisions originally aimed at the federal government are applied identically against the states, *reverse* incorporation would treat congressional and state action as

If a benign remedial measure is enacted by Congress, it should be subject to intermediate scrutiny, not scrutiny that is "'strict' in theory, and fatal in fact."[171] Essentially, without an invidious purpose, there is no reason to subject congressional legislation to strict scrutiny analysis. Justice Brennan's one-way "ratchet,"[172] that allows Congress to expand the Fourteenth Amendment's guarantees,[173] builds upon this theme. Thus, under Brennan's rationale, Congress cannot enact legislation that would perpetuate caste based on race. Yet this does not mean that Congress must ignore race; it simply cannot use race in a manner that is repugnant to the principle of equality mandated by the Constitution. Because Congress is bound by the due process dictates of the Fifth Amendment, its legislation cannot be arbitrary or illegitimate. "Congress can, however, require that specific problems created by the historic deprivation of equality be redressed by specific, race-conscious programs of reasonable dimensions related to the effects of past violations."[174] However, the *Adarand* Court unnecessarily trampled on this well-settled principle of institutional competence by restricting governmental decisionmaking and substituting its own narrow view of the American polity. Clearly, *Adarand* follows the Court's similar decision in *Croson*, decided six years earlier.[175]

Certainly, section 5 of the Fourteenth Amendment does not dis-

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> interchangeable for equal protection review purposes. Therefore, when classifying by certain suspect criteria, Congress, like states, could pursue only compelling governmental interests via the least restrictive means. In this way, reverse incorporation would limit impermissibly the scope of congressional discretion mandated by the structure of the Constitution and essential to a meaningful congressional power to enforce the fourteenth amendment.

Clark, *supra* note 20, at 1979-81.

171. *See* Gerald Gunther, *The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); *see also* Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3, 34 (1983) ("Applying due process concepts in fifth amendment equal protection cases was quite possibly what the *Bolling* Court meant all along, without introducing the levels of scrutiny.").

172. *See* TRIBE, *supra* note 12, § 5-14, at 343.

173. *See* Bohrer, *supra* note 168, at 489 and accompanying text.

174. *Id.* at 494.

175. *See supra* note 166 and accompanying test. For example, "[t]he Court in [*Croson*] even went so far as to disallow Richmond's reliance on Congress' finding of discrimination in the construction industry, the same finding upon which the Court upheld the federal set-aside program in *Fullilove*. All such evidence, the Court said, did not show any 'identified discrimination' in the Richmond area." Eugene Doherty, *Equal Protection Under the Fifth and Fourteenth Amendments: Patterns of Congruence, Divergence and Judicial Deference*, 16 OHIO N.U. L. REV. 591, 611 (1989). The Court has become the ultimate "fact-finder" as well as the final interpreter of the Constitution. The Court goes one step further in *Adarand*, and substitutes its own view of polity for that of Congress. Clearly, the Court lacks the competence to make such determinations.

place the authority of the Court to interpret the Constitution;[176] conversely, the Court must not alter that section's positive grant of legislative power:[177]

> Furthermore, the identification of the fifth amendment standard with the fourteenth amendment standard of equal protection is demonstrably incorrect. Thus, Congress is bound neither by the compelling state interest standard nor by minimum rationality, but rather by an intermediate standard centered on the due process concept of fundamental fairness or, in the words of Chief Justice Burger, to remedial actions narrowly tailored to combat the present effects of past discrimination.[178]

2. THE ANTI-SUBJUGATION PRINCIPLE

Further, the *Adarand* Court's reinterpretation of *Bolling* is also at odds with two underlying conceptions of the Fourteenth Amendment—the anti-subjugation and anti-caste principles.

The anti-subjugation principle is premised on a historical interpretation of the Civil War Amendments:

> In *Strauder v. West Virginia*, the first postbellum racial discrimination case to reach the Supreme Court, Justice Strong recognized for a unanimous Court that subjugation was the very evil that the equal protection clause was meant to remedy: the clause is an "exemption from legal discriminations implying inferiority," which are "steps toward reducing [Blacks] to the condition of a subject race."[179]

Bolling embraced the principle that the due process clause of the Fifth Amendment, and its underlying notion of fundamental fairness, is an "exemption from legal discriminations implying inferiority."[180] If subjugation was the evil to be remedied by the equal protection clause's explicit prohibition on the exercise of *state* power to *subordinate* African-Americans, then the Fifth Amendment applies to forbid subjugation

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176. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

177. *See supra* note 170 and accompanying text.

178. Bohrer, *supra* note 168, at 512; *see also* Fair, *supra* note 11, at 80-81 (arguing by analogy that since the Constitution has never required "genderblindness" and the Court has employed middle-tier scrutiny in relation to gender, then the same analysis is applicable in race cases); thus, the salient queries are: (i) under the equal protection clause, are Blacks and whites similarly situated? (ii) if not, does the legislation (local, state, or federal) serve an important governmental objective?; and (iii) are the discriminatory means substantially related to the achievement of the legislative objectives? Because of the legislative mandate inherent in section 5, it could also be postulated that Congress has an even "freer hand" than states and localities that are constrained by section 1 of the Fourteenth Amendment. It is Congress' duty to *enforce* section 1; whereas the states have a duty to *abide* by the constitutional dictates of section 1.

179. TRIBE, *supra* note 11, § 16-21, at 1516 (concluding as well that the central rationale of *Brown v. Board of Education* was the eradication of the racial stigma of inferiority placed on Blacks).

180. *Id.*

by the federal government as well. As the Court stated in *Bolling*, there are instances where "discrimination may be so unjustifiable as to be violative of due process."[181] However, this should not be misunderstood as a limitation on Congress' section 5 power to eradicate conditions that perpetuate subjugation. There is a marked difference between affirmative action and invidious, state or federally sponsored, oppression.

The Court, in *Adarand*, attempted to distort this constitutional line. There, colorblindness shifted the focus from subordination to an acontextual interpretation of the Fourteenth Amendment where affirmative action is premised on race and the Constitution forbids any reliance on race as a factor in legislative decisionmaking. Consequently, a benign remedial purpose has become constitutionally insignificant. Yet, "[b]oth the anti-caste and anti-subjugation principles underlying the Equal Protection Clause explicitly acknowledge the eradication of a dubious hierarchy premised on [white supremacy]."[182]

3. THE ANTI-CASTE PRINCIPLE

The anti-caste principle permits fundamental distinctions to be made between racist governmental practices and affirmative action. Affirmative action is not antithetical to our conception of equality; it embraces equality by attempting to eradicate caste: "The legal claim might be understood not as an insistence of compensation for past wrong-doing, but instead on the elimination, in places large and small, of something in the nature of a caste system."[183] Thus, the Civil War Amendments were designed specifically to eradicate the American caste system based on color.[184] Race should not be ignored; rather, the question is: has race contributed to the maintenance of a caste-like system? If the answer to this question is "yes," then affirmative action is a permissible constitutional means to eradicate caste. This comports with the original meaning of the Fourteenth Amendment:

> Originally the Fourteenth Amendment was understood as an effort to eliminate racial caste—emphatically not as a ban on distinctions on the basis of race. A prohibition on racial caste is of course different from a prohibition on racial distinctions. A ban on racial distinctions would excise all use of race in decisionmaking. By contrast, a ban on caste would throw discriminatory effects into question and would allow affirmative action. In any case the question for the anticaste principle would be: Does the practice at issue contribute to a system with castelike features? It would not be: Have the similarly situated

181. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).
182. Powell, *supra* note 30, at 12.
183. CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 338 (1993).
184. *See id.* at 339.

been treated differently?[185]

However, in the Court's view, since the answer to the latter question will always be "yes," it becomes appropriate to turn the Fourteenth Amendment upside down and focus on the discriminatory effects visited upon whites in light of race-conscious remedies.[186] But this misses the point completely:

> Originally it was also understood that Congress, not the courts, would be the principal institution for implementing the Fourteenth Amendment. The basic idea was that Congress would transform the status of the newly freed slaves, engaging in a wide range of remedial measures. It was not at all anticipated that federal judges—responsible for the *Dred Scott* decision, establishing slavery as a constitutional right—would be enforcing the amendment. Indeed, the notion that judges would play a major role in helping to bring about equality under law was entirely foreign to the Civil War amendments.
>
> At some stage in the twentieth century, there was an extremely dramatic change in the legal culture's understanding of the notion of constitutional equality under the Constitution. The anticaste principle was transformed into an antidifferentiation principle. No longer was the issue elimination of second-class citizenship. Instead, it was the entirely different question whether those similarly situated had been treated similarly. This was a fundamental shift. Its occurrence remains one of the great untold stories of American constitutional history.[187]

This fundamental shift transformed the Court from an interpreter of the Constitution to an architect of political boundaries and severely diminished Congress' role as the institutional enforcer of the Fourteenth Amendment.[188] Yet, from the perspective of institutional competence, the Court is ill-equipped to take on the role of political decisionmaker.[189]

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185. *Id.* at 340.

186. Under the anti-caste theory:

> [A]ffirmative action does not appear an impermissible taking of any real entitlement held by whites and men. Because the existing distribution of benefits and burdens between blacks and whites and between men and women is not natural and sacrosanct, and because it is in part a product of current laws and practices having discriminatory effects, it is not so bad if some whites and men are disadvantaged as a result.

Id. at 343.

187. *Id.* at 340.

188. *See id.* at 341 (noting the "institutional insignificance" of Congress).

189. *See id.* at 343 ("The anticaste principle suggests a norm of equality that cannot be captured by standard ideas about compensation. If accepted, the principle would also have a series of consequences for present law. All these consequences are connected with a reading of the Civil War amendments that is not limited to the capacities of courts."). Professor Sunstein then suggests that race-conscious remedies are permissible even where there is no identifiable defendant because the ultimate goal is the elimination of caste. Indeed, there is a clear difference

In the absence of a clear malfunction of the political system, such as a state or federally-sponsored system of subordination or caste, the Court should refrain from imposing its view of "colorblindness" on the polity. This argument is bolstered when a state is going *above* the minimal prohibitory floor set in section 1 of the Fourteenth Amendment—(that no state shall deny equal protection of the laws), and when Congress, under section 5, is enforcing the dictates of equality embodied in the Fourteenth Amendment.[190]

C. *The Thirteenth Amendment: An Alternate Theory*

Building upon the anti-subjugation and anti-caste principles, the Thirteenth Amendment[191] is a positive grant of legislative power to Congress to eradicate caste:[192]

> In the words of Senator Trumbull, the principal draftsman of the Thirteenth Amendment and the civil rights bill, under that amendment "Congress is bound to see that freedom is in fact secured to every person throughout the land; he must be fully protected in all his rights of person and property; and any legislation or any public sentiment which deprived any human being in the land of those great rights of liberty will be in defiance of the Constitution; and if the states and local authorities, by legislation or otherwise, deny those rights, it is incumbent on us to see that they are secured."[193]

The Thirteenth Amendment states that Congress has the power "to enforce this article by appropriate legislation."[194] Thus, if there are present day vestiges of slavery, Congress should have a free hand to dismantle systemic oppression.[195] However, today there is a Second

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between race-conscious measures designed to perpetuate caste and those designed to eradicate it. *Id.* at 344.

190. I mean to suggest that Congress can, on its own initiative, implement programs designed to eradicate caste. That is, section 1 is not a limit on Congress' power under section 5 of the Fourteenth Amendment.

191. U.S. CONST. amend. XIII, §§ 1-2.

192. "Clearly Congress is empowered under Section 2 but perhaps even states may act to prohibit badges of servitude. Section 2 is there in order to provide enumerated federal power, but states don't generally need such enumeration in order to act." Akhil Reed Amar, *Remember the Thirteenth*, 10 CONST. COMMENTARY 403, 407 (1993).

193. Gressman, *supra* note 76, at 1327.

194. *See supra* note 24.

195. This is not a far-fetched notion given the recent findings of the Glass Ceiling Commission. For example:

> 1) Black men held only 2.3 percent of the executive, administrative, and managerial jobs in all private sector industries; they held 3.9 percent of these jobs in the public and private sectors combined;
>
> 2) Black women held 2.2 percent of the executive, administrative, and managerial jobs in all private sector industries; they held 4.6 percent of these jobs in the public and private sectors combined;

Deconstruction,[196] a jurisprudential counterrevolution against localities, states, and Congress when these institutions attempt to eradicate the vestiges of discrimination.[197] This doctrinal shift is contrary to the history and intent of the Civil War Amendments, and in particular, the Thirteenth Amendment.

Essentially, the Court should reaffirm the expansive meaning of freedom that was adopted in *Jones v. Alfred H. Mayer Co.*[198] There, after more than one hundred years of dormancy, the Court revived the Thirteenth Amendment and "held for the first time that a private developer's refusal to sell a home to an African American family perpetuated one of slavery's primary badges—the inability to own property."[199] The constitutional mandate of the Thirteenth Amendment and the Court's reasoning in *Jones v. Alfred H. Mayer Co.* lead to the conclusion that legislative power can, and should, be exercised to eradicate the badges and incidents of slavery.

Reading section 2 of the Thirteenth Amendment and section 5 of the Fourteenth Amendment together, it becomes readily apparent that Congress has the power to eradicate racial caste and its incidents as well as to secure equality.[200] Thus, the emphasis should not be on identifying particularized findings of discrimination,[201] but on eradicating the systemic inequality that is the linchpin of oppression based on racial caste.[202] The Court must recognize that societal discrimination is not amorphous—it is real. There are *present* day effects that have their

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3) Private sector industries that showed the most progress in promoting Black men to executive, administrative, and managerial positions were: communications (3.7 percent) and business services (3.5 percent);

4) Those industries in which Black men had made the least progress were: wholesale trade (1.2 percent), other professional services (1.2 percent), manufacturing (1.6 percent), and construction (1.9 percent);

5) Private sector industries that showed the most progress in hiring and promoting Black women to executive, administrative, and managerial positions were: communications (4.9 percent) and insurance (3.0 percent);

6) Those industries in which Black women had made the least progress were: construction (0.3 percent), wholesale trade (0.3 percent), business services (0.5 percent), and manufacturing (0.9 percent).

THE FEDERAL GLASS CEILING COMMISSION, *supra* note 45, at 77-78.

196. I refer to a period of retrenchment, much like that immediately following the First Reconstruction, following the gains of the Second Reconstruction—the modern civil rights era. *See generally* Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1 (1995) (discussing the legislative history of the Thirteenth Amendment and articulating a theory of liberation based on section 2 of the Thirteenth Amendment).

197. *See infra* note 203 and accompanying text.

198. 392 U.S. 409 (1968).

199. Colbert, *supra* note 196, at 2.

200. *See supra* notes 192-94 and accompanying text.

201. *See supra* note 66.

202. *See supra* notes 183-91 and accompanying text.

roots in the past. Unfortunately, the constitutional metaphor of color-blindness de-emphasizes equality and promotes an ahistorical analysis in which the primacy of the Civil War Amendments is drastically undercut:

> First, the Court focuses on the principle of "color-blindness," rather than racial equality, as the goal of equal protection. The principle of color-blindness for some justices has become more important than achieving racial equality . . . .
>
> Second, by ignoring this nation's history of racism, the justices reframe the Reconstruction Amendments' specific purpose of ending whites' oppression of African Americans into a generalized prohibition of "race discrimination." This abstracted conception of discrimination led the justices to oppose affirmative action on the grounds that it "discriminates" against innocent third parties predominantly white males who have benefited from this nation's exclusionary employment policies. Current equal protection interpretation thereby rejects the historical justification for affirmative action remedies: a response to centuries of excluding people of color from educational opportunities and better-paying professional and skilled jobs.[203]

By viewing the Thirteenth and Fourteenth Amendments as complementary constitutional mandates—the former breaking the shackles of caste *and* its underlying manifestations and the latter ensuring equality under the law—it is clear that Congress' power to adopt creative remedial measures to obliterate private and public discrimination is firmly embedded in the Constitution. Thus, the appropriate analysis in cases like *Croson* and *Adarand* would not be limited to identifying particularized findings of discrimination, but would instead focus, under the Thirteenth Amendment, on the *historical* exclusion of qualified African-American contractors.[204] Thus, such "race-neutral" factors as bonding, financing, bidding prices, and the ability to repay loans would be viewed in their proper context[205] placing the present day manifestations of caste in a historical context.

Perhaps most importantly, Thirteenth Amendment analysis preserves the notion of institutional power—Congress is charged not only with the eradication of slavery, but also must destroy its badges and incidents as well.[206]

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203. Colbert, *supra* note 196, at 33-34.

204. If the Thirteenth Amendment guarantees "the freedom to buy whatever a white man can buy, the right to live wherever a white man can live," *see* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968), certainly this guarantee must include the right to pursue a livelihood free from the badges and incidents of slavery.

205. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 550 (1988) (Marshall, J., dissenting) (noting the theoretical allure of race-neutral measures, but concluding that such measures are basically ineffectual).

206. *See* Colbert, *supra* note 196.

III. *ADARAND*: CONGRESS AS CITY COUNCIL

Adarand marks a sharp departure from the model of institutional competence previously employed by the Court.[207] Following a Fifth Amendment analysis premised on colorblindness, the Court ignores history and context in the name of skepticism,[208] consistency,[209] and congruence.[210] Applying strict-scrutiny to a congressionally-enacted program, the Court places Congress on the same constitutional plane as a city council. This equal protection heralds the beginning of the Second Deconstruction, a period in which the gains of the Second Reconstruction are summarily dismantled.

Both *Croson* and *Adarand* were wrongly decided because the Court misconstrued section 1 of the Fourteenth Amendment as a *limitation* on both state and federal remedial power. Ironically, the Court's focus was not on a principled differentiation between section 1 and section 5 of the Fourteenth Amendment, but on how section 1 ultimately limits federal power. This misconstruction was accomplished by the hollow incantation that the Fifth and Fourteenth Amendments are the "same." Certainly, these amendments mean the same thing in *prohibiting* invidious discrimination by the federal and state governments, but this should not mean that states and localities are precluded from *voluntarily* eradicating racial caste. Moreover, it should not mean that Congress is limited, under section 5, to merely imposing its conception of equality on the states. This approach is "dangerously narrow."[211] Congress should be

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207. For the first time, the Court applies strict-scrutiny analysis to a congressionally-enacted, race-conscious remedial program.

208. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2111 (1995).

209. *See id.*

210. *See id.*

211. Discussing Justice O'Connor's *Metro Broadcasting* dissent, Professor Katz prophetically observes how, at least implicitly, section 1 significantly narrows Congress' power under section 5—Congress only has unique powers to act with respect to the states. Thus, the states and Congress are subject to the same standard of review when race-conscious remedies are employed:

> O'Connor now claimed ["in an extraordinary reversal of her prior position" in *Croson*] that strict scrutiny should be applied to all race-based distinctions, whether they are imposed by the states or the federal government.
>
> . . . She distinguished *Croson* by narrowing it beyond recognition. Her own opinion in *Croson*, she maintained, meant only that section 5 gave Congress special powers to act "respecting the states." This seems to mean that Congress may impose race-conscious remedies on the state and local sector subject to relaxed scrutiny [under section 5], but may not impose identical requirements on its own regulatory agencies without a compelling interest. Congressional oversight of state action is what is empowered by Section 5, not any generalized power to make real the ideal of equal protection. This distinction would carve out a narrow area in which Congress is free to enact wide-ranging race conscious provisions to be imposed on the states, including many that seriously disadvantaged non-minority citizens, even though the states could not do exactly the same thing voluntarily, a

able to adopt, on its own initiative, race-conscious approaches to deeply rooted systems of oppression.

Section 1 is merely a constitutional edict against state discrimination, it is not a proscription against a state's voluntary adoption of remedial measures designed to eradicate racial caste. Thus, not only is section 1 not a prohibition on positive, noninvidious state remedial efforts, it also does not apply to the federal government. Conversely, while the federal government is prohibited from discriminating by the due process and implicit equal protection components of the Fifth Amendment, it is clear that section 5 neither pre-empts state power to adopt race-conscious remedies, nor narrows the exercise of federal power to "state" matters. As Justice Marshall suggested in his *Croson* dissent:

> With respect, first, to § 5, our precedents have never suggested that this provision—or, for that matter, its companion federal-empowerment provisions in the Thirteenth and Fifteenth Amendments—was meant to pre-empt or limit state police power to undertake race-conscious remedial measures. To the contrary, in *Katzenbach v. Morgan*, we held that § 5 "is a *positive* grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." Indeed, we have held that Congress has this authority even where no constitutional violation has been found
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> . . . .
>
> As for § 1, it is too late in the day to assert seriously that the Equal Protection Clause prohibits States—or for that matter, the Federal Government, to whom the equal protection guarantee has largely been applied—from enacting race-conscious remedies.[212]

The Court's most recent approach to the Fourteenth Amendment blurred the line between section 1, which is an express prohibition of state discrimination, and section 5 which is an express grant of federal enforcement power. The result is that Congress, in enacting race-conscious remedies, now has little more power than the Richmond City Council in *Croson*—both are held to the highest standard of judicial scrutiny.

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dangerously narrow view that fortunately was not adopted by the majority of the Court.

Lucy Katz, *Public Affirmative Action and the Fourteenth Amendment: The Fragmentation of Theory After Richmond v. J.A. Croson Co. and Metro Broadcasting, Inc. v. Federal Communications Commission*, 17 T. MARSHALL L. REV. 317, 318 (1992). Four short years later, the Court, in *Adarand*, adopted the "dangerously narrow view" that Professor Katz forbodingly chronicled in her article. *See Adarand*, 115 S. Ct. at 2113, 2117-18; *cf. infra* note 225 and accompanying text.

212. City of Richmond v. J.A. Croson Co., 488 U.S. 461, 557-58 (1989) (second emphasis added).

Justice Stevens took a different approach, instead of drastically rearranging the boundaries of legislative and judicial power, he attempted to define the interests that may be legitimately pursued in the eradication of racial discrimination. While this approach is effective in preserving some semblance of section 5 power, it is inadequate in addressing the systemic nature of racism.

Essentially, Justice Stevens adhered to the colorblind approach while endorsing the primacy of legislative decisionmaking—race is inherently suspect, but governmental entities are free to adopt remedial approaches that focus on non-racial, forward-looking factors. Under this reasoning, only a *portion* of racial caste is addressed because its history is ignored. This explains why Justice Stevens could dissent in *Fullilove*,[213] and then look "forward" in *Wygant*[214]; he then repeated this doctrinal approach when he rejected any consideration of past discrimination as the basis for amelioration in *Croson*[215] and later acknowledged diversity as a legitimate goal in *Metro Broadcasting*.[216]

A. *The Jurisprudence of Justice Stevens: The Institutional Competence Model*

Several themes emerge from Justice Stevens' institutional competence model:

1) Congress has broad power, but it must act impartially;[217]

2) Race is inherently suspect, and should not be used as a proxy for a perverse form of reparation based upon an overbroad remedy;[218]

3) While race is not always irrelevant to sound governmental decisionmaking, it is the judicial system, not the legislative branch, that is best equipped to identify *past wrongdoers* and to fashion remedies;[219]

4) Diversity and other forward-looking factors are legitimate interests that can and should be pursued by the government in the eradication of caste;[220]

5) There is a distinct difference between invidious and benign

213. *See* Fullilove v. Klutznick, 448 U.S. 448, 532 (1980) (Stevens, J., dissenting).

214. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 313 (1986) (Stevens, J., dissenting).

215. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511-18 (1989) (Stevens, J., concurring).

216. *See* Metro Broadcasting v. FCC, 497 U.S. 547, 601-02 (1990) (Stevens, J., concurring).

217. *See* Fullilove v. Klutznick, 448 U.S. 448, 548 (1980) (Stevens, J., dissenting).

218. *See id.* at 537 (Stevens, J., dissenting).

219. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 513-14 (1989) (Stevens, J., concurring).

220. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 313 (1986) (Stevens, J., dissenting) ("[I]t is not necessary to find that the Board of Education has been guilty of racial discrimination in the past to support the conclusion that it has a legitimate interest in employing more black teachers in the future"); *see also* Metro Broadcasting v. FCC, 497 U.S. 547, 601 (1990) (Stevens, J., concurring) (embracing the concept of future benefit and concluding that broadcast diversity is a legitimate interest).

discrimination;[221]

6) In institutional terms, there is a marked difference "between Congress' institutional competence and constitutional authority to overcome historic racial subjugation and the states' lesser power to do so;"[222] and

7) Congress' section 5 power is not limited, in any way, by section 1's express limitation of state power—"Congress . . . can *expand* the coverage of section 1 by exercising its power under section 5 when it acts to foster equality."[223]

Justice Stevens acknowledges the suspect nature of race, but he does not, for the sake of some hollow notion of consistency[224] or congruence,[225] categorize *all* race-conscious remedies as constitutionally invalid. Instead, he adopts a flexible approach that draws distinctions between discrete spheres of institutional power, invidious and benign discrimination, and validates legitimate forward-looking remedies. But as Justice Stevens' doctrinal model is traced from *Fullilove* to *Metro Broadcasting*, it is clear that his notion of institutional competence actually dilutes legislative power by focusing almost exclusively on future benefits or forward-looking remedial approaches. Certainly, the forward-looking approach has significant theoretical advantages when compared to an approach rooted in notions of past sin.[226] However, total allegiance to this approach cuts off a significant portion of the analysis in affirmative action cases ignoring systemic racism and past discrimination. In many ways, "past discrimination" is an odd term—it is as if racism has been completely eliminated and vanished into a distant past. Instead, racism is deeply-rooted, adaptable, and systemic—"past discrimination" is always replaced with something *new* that maintains racial caste. Professor Bell states:

> Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary "peaks of progress," short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance. This is a hard-to-accept fact that all history verifies. We must acknowledge it, not as a sign of submission, but as an act of ultimate defiance.[227]

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221. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2120-23 (1995) (Stevens, J., dissenting).

222. *See id.* at 2125 (Stevens, J., dissenting).

223. *See id.* at 2126 n.11 (Stevens, J., dissenting) (emphasis added).

224. *See id.* at 2111.

225. *See id.*

226. *See* Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 98 (1986) ("Trapped in the paradigm of sin, the Court shrinks, even in upholding affirmative action plans, from declaring that the benefits of building a racially integrated society for the future can be justification enough.").

227. DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 12 (1992).

Indeed, *Croson* and *Adarand* offer strong support for Professor Bell's conclusion: The Court has decided that it is inappropriate to apply the Constitution to the immediate plight of Blacks. Affirmative action has thus reached its logical stopping point. However, while Justice Stevens' forward-looking approach is limited because it is premised on a modified view of colorblind constitutionalism,[228] he does recognize that affirmative action is still a viable tool in the eradication of caste.

1. *FULLILOVE*: JUSTICE STEVENS' DISSENT: AN EXACT FIT

Construing a congressionally-enacted Minority Business Enterprise ("MBE")[229] program, the *Fullilove* Court, in a plurality opinion authored by Chief Justice Burger, adopted a deferential[230] standard premised on the notion that Congress was exercising an "amalgam"[231] of its constitutionally mandated powers. Rejecting colorblind constitutionalism as a

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228. Justice Stevens does not embrace the view, shared by Justices Scalia and Thomas, of pure colorblindness where race is *never* a factor in legislative decisionmaking.

229. The Public Works Employment Act ("PWEA") of 1977 which amended the Local Public Works Capital Development and Investment Act of 1976, and authorized an additional $4 billion appropriation for federal grants to be disbursed by the Secretary of Commerce, through the Economic Development Administration (EDA), to state and local governmental units for use in local public works projects. *See* Fullilove v. Klutznick, 448 U.S. 448, 453 (1980). Section 103 (f)(2) of the PWEA defines MBEs and provided, in relevant part:

> Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term "minority business enterprise" means a business at least 50 per centum of which is owned by minority group members or, in [the] case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts.

Public Works Employment Act of 1977 § 103(f)(2), 42 U.S.C. § 6705 (1977). "Although the statutory MBE provision itself outlines only the bare bones of the federal program, it makes a number of critical determinations: the decision to initiate a limited racial and ethnic preference; the specification of a minimum level for minority business participation; the identification of the minority groups that are to be encompassed by the program; and the provision for an administrative waiver where application of the program is not feasible." *Fullilove*, 448 U.S. at 468. A set of regulatory guidelines set out the grantee's obligations to seek out qualified, bona fide MBEs; to provide training and technical assistance; and to assist MBEs in negotiating the intricacies of the contract bidding process. *See id.* at 468-69. The guidelines also provide for either a total or partial administrative waiver of the 10% MBE requirement and a complaint procedure. *See id.* at 469.

230. *Fullilove*, 448 U.S. at 472 (stating that Congress is a "co-equal" branch which should be accorded deference in legislative decisionmaking).

231. *Id.* at 473-79 (noting that the PWEA of 1977 is "primarily an exercise of the Spending Power;" that Congress could have regulated the practices of prime contractors on federally funded public works projects by utilizing the Commerce Power; and that "as the MBE program pertains to the actions of state and local grantees, Congress could have achieved its objectives by use of its power under § 5 of the Fourteenth Amendment.").

limit on Congress' remedial powers,[232] the plurality concluded that the MBE program was neither underinclusive[233] nor overinclusive[234]—Congress acted well within its constitutionally enumerated powers. Significantly, the Court explicitly articulated a conception of institutional competence that embraced the primacy of Congress as the national legislature:

> With respect to the MBE provision, Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination. Congress, of course, may legislate without compiling the kind of "record" appropriate with respect to judicial or administrative proceedings. Congress had before it, among other data, evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises. This disparity was considered to result not from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct.[235]

In *Fullilove*, the Court explicitly acknowledged the systemic nature of racism—it is not only driven by an invidious intent but also by lingering discriminatory effects. At least with respect to congressional remedial efforts, the Court rejected colorblindness. By contrast, Justice Stevens embraced the notion of colorblindness and this ultimately shaped his conception of institutional power.[236] He concluded that

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232. *Id.* at 482. The Court even states that "[i]t is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms." *Id.* at 484.

233. There has been no showing in this case that Congress has inadvertently effected an invidious discrimination by excluding from coverage an identifiable minority group that has been the victim of a degree of disadvantage and discrimination equal to or greater than that suffered by the groups encompassed by the MBE program.

Id. at 486.

234. The overinclusiveness challenge is essentially that businesses receive a windfall solely because of race or ethnicity "which cannot be justified on the basis of competitive criteria or as a remedy for the present effects of identified prior discrimination." *Id.* at 486. Noting that the administrative scheme provides for waiver and exemption, the Court rejected this contention: "That the use of racial and ethnic criteria is premised on assumptions rebuttable in the administrative process gives reasonable assurance that application of the MBE program will be limited to accomplishing the remedial objectives contemplated by Congress and that misapplications of the racial and ethnic criteria can be remedied." *Id.* at 489.

235. *Id.* at 477-78.

236. Justice Stevens even went so far as to suggest that "[i]f the National Government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the [Nazi Germany] Reichs Citizenship Law of November 14, 1935." *Id.* at 534 n.5. This cynical suggestion seems to conflict directly with Justice Stevens' later assertion, in *Adarand*, that there is no moral equivalence between invidious

"[t]he 10% set-aside contained in the Public Works Employment Act of 1977... creates monopoly privileges in a $400 million market for a class of investors defined solely by racial characteristics."[237]

Rejecting the plurality's deferential approach, Justice Stevens advanced several criticisms: i) the 10% set-aside is nothing more than a perverse form of reparation;[238] ii) the 10% set-aside is too broad to right any past wrong;[239] iii) the spectre of racial politics renders this congressional enactment constitutionally invalid;[240] and iv) while greater minority participation in a competitive economic marketplace is "unquestionably legitimate," the statute is not designed to remove any barriers to entry.[241]

As to (i), Justice Stevens noted that while there may be groups, such as Blacks, who are entitled to "special reparations,"[242] the PWEA was so broadly drafted that it included other groups who have no special claim to entitlement: "Quite obviously, the history of discrimination against black citizens in America cannot justify a grant of privileges to Eskimos or Indians."[243] To Justice Stevens, the racial classifications in *Fullilove* are nothing more than a proxy for special privileges based upon a random and inequitable formula.[244] While historical discrimination cannot be ignored, "[i]t does not necessarily follow that each of those subclasses suffered harm of identical magnitude."[245]

Under (ii), Justice Stevens relied on "the scarcity of litigated claims on behalf of [MBEs] during this period."[246] to justify his conclusion that "the law has generally been obeyed."[247] Employing this rather optimistic approach, Justice Stevens then concluded that the statutory remedy was "much broader than is necessary to right any such past wrong."[248]

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and noninvidious governmental conduct. *See Adarand*, 115 S. Ct. at 2120-23 (Stevens, J., dissenting).

237. *Fullilove*, 448 U.S. at 532 (Stevens, J., dissenting) (citations omitted).

238. *See id.* at 536-38.

239. *See id.* at 539-40.

240. *See id.* at 541-42.

241. *See id.* at 542-48.

242. *See id.* at 537.

243. *Id.*

244. *See id.* at 538-39.

245. *Id.* at 538.

246. *Id.* at 540.

247. *Id.*

248. *Id.* Justice Stevens sets out five preferential classes:

> 1) those minority-owned firms that have successfully obtained business in the past on a free competitive basis and undoubtedly are capable of doing so in the future as well; 2) firms that have never attempted to obtain any public business in the past; 3) firms that were initially formed after the Act was passed, including those that may have been organized simply to take advantage of its provisions; 4) firms that have tried to obtain public business but were unsuccessful for reasons that are unrelated

Perhaps the most striking feature of Justice Stevens' *Fullilove* dissent was his invocation of the racial politics rationale.[249] He disparaged the Congressional Black Caucus for wanting "a piece of the action" of the Federal Government's $4 billion public contract business.[250] He then concluded that "[t]he legislators' interest in providing their constituents with favored access to benefits distributed by the Federal Government is, in my opinion, a plainly impermissible justification for this racial classification."[251] Justice Stevens expressed concern that this type of statutory preference may amount to nothing more than political patronage by the party in power which is particularly distressing when benefits are distributed on the basis of race.[252]

Finally as to (iv), Justice Stevens found that the statute was not designed to remove any barriers to entry.[253] Thus, even though greater minority participation in the federal public contracting market is a legitimate interest, the legislative history of the statute does not detail any barriers to minority participation. He viewed systemic factors such as unfamiliarity with the bidding process and difficulties in obtaining financing as purely neutral, nonracial factors that were functions of the marketplace.[254] He took this notion one step further when he concluded that prejudice is less likely in the public sector—because of state and federal laws prohibiting discrimination—than in the private sector.[255]

According to Justice Stevens, race classifications enacted by the federal government, particularly where such classifications were "unnecessary," were subject to the *same scrutiny* applied to state initiatives: "Whenever Congress creates a classification that would be subject to

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to the racial characteristics of their stockholders; and 5) those firms that have been victimized by racial discrimination.

Id. at 540-41. He concluded that the firms listed in 1-4 have not been wrongfully excluded from the marketplace, so there is no need for a statutory preference for these firms. *Id.* at 541. Since there was a judicial remedy available for those firms in the fifth category, then it is "inappropriate to regard the preference as a remedy designed to redress any specific wrongs." *Id.*

This analysis turns the PWEA on its head—Justice Stevens ignored the waiver and administrative exemption provisions, see *supra* note 229, in order to conclude that the statute is too broad. In other words, categories 1-4 would probably be excluded under the PWEA, and the fifth category is squarely within the ambit of the statute. Justice Stevens disregarded the legislative findings of Congress. Ironically, in *Adarand*, he took a deferential view of the very same institutional power.

249. This view is the linchpin of Justice O'Connor's analysis in *Croson*, and to a certain extent, in *Adarand*. *See Croson*, 488 U.S. at 495; *Adarand*, 115 S. Ct. at 2111.

250. *See Fullilove*, 448 U.S. at 542.

251. *Id.*

252. *See id.*

253. *See id.* at 543.

254. *See id.* at 543-44.

255. *See id.* at 544-45. Justice Stevens also noted that racial preferences foster resentment. *See id.* at 545.

strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment if it had been fashioned by a state legislature, it seems to me that judicial review should include a consideration of the procedural character of the decisionmaking process."[256]

In *Fullilove*, Justice Stevens embraced a theory of institutional competence that *limited* congressional power under section 1 of the Fourteenth Amendment refusing to "look forward" or to accord any deference to legislative decisionmaking. Thus, he obliterated the line between state and federal power that he would later redraw in *Adarand*.

A number of doctrinal shortcomings are present in Justice Stevens' *Fullilove* model: 1) By ignoring the systemic inequality that contributes to racial caste—the structural aspects of the federal public contracting marketplace are obscured;[257] 2) although the PWEA was concededly not drafted in the most artful way, this approach illustrates that the Court is not competent to make these types of legislative choices—the focus should be on discrimination, not definitional categories;[258] 3) particularly where there is no evidence of an invidious purpose, invalidation should not be automatic simply because a statute employs racial classifications;[259] 4) the historic anti-caste principle embodied in the Fourteenth Amendment is ignored thereby diluting congressional power;[260] and 5) the racial politics rationale may perpetuate the very stereotypes that Justice Stevens rejected under his *Fullilove* model.[261]

Further, Justice Stevens' dissent in *Fullilove* offered a very narrow

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256. *Id.* at 550-51.

257. For example, Justice Stevens does not address the stark disparities in the public contracting marketplace.

> While minority persons comprise about 16 percent of the Nation's population, of the 13 million businesses in the United States, only 382,000, or approximately 3.0 percent, are owned by minority individuals. The most recent data from the Department of Commerce also indicates that the gross receipts of all businesses in this country totals about $2,540.8 billion, and of this amount only $16.6 billion, or about 0.65 percent was realized by minority business concerns.

Id. at 465 (plurality opinion). These disparities may be directly attributable to systemic factors such as bonding, financing, and accessibility to the marketplace. As the Glass Ceiling Report illustrates not much has changed during the sixteen years since *Fullilove*. *See supra* note 45 and accompanying text.

258. *See supra* notes 155, 249, and 255 and accompanying text.

259. *See Fullilove*, 448 U.S. at 518 (Marshall, J., concurring) ("[p]rinciples outlawing the irrelevant or pernicious use of race were inapposite to racial classifications that provide benefits to minorities for the purpose of remedying the present effects of past racial discrimination."). Paradoxically, Justice Stevens later criticized the *Adarand* majority for placing invidious and noninvidious conduct in the same category.

260. *See id.* at 510 (Powell, J., concurring) ("I conclude, therefore, that the Enforcement Clauses of the Thirteenth and Fourteenth Amendments confer upon Congress the authority to select reasonable remedies to advance the compelling state interest in repairing the effects of discrimination.").

261. *See* supra notes 145-47 and accompanying text.

conception of institutional power, he later repeats this view in *Croson* thereby placing Congress and the states on the same constitutional plane. However, he abandons this narrow view of Congressional power in *Wygant* and *Metro Broadcasting*. *Wygant* and *Metro Broadcasting* represent Justice Stevens' forward-looking approach to racially conscious remedial efforts. But the central tension remains: Why is Justice Stevens able to "look-forward" in *Wygant* and *Metro Broadcasting* after refusing to do so in *Fullilove* and *Croson*?

It seems that the answer to this query lies in Justice Stevens' willingness to endorse remedial approaches that offer some future benefit. *Fullilove* and *Croson* fall on the opposite side of Justice Stevens' doctrinal line because the remedial approaches in these cases sought to eradicate some aspect of past discrimination based on race. Under Justice Stevens' forward-looking approach, racial preferences should not be used to correct past injustices but to attain the aspirational goal of color-blindness. Thus, it is easier to justify decisions like *Wygant* (where Black public school teachers are role models for the future benefit of Black students) and *Metro Broadcasting* (where broadcast diversity is a legitimate goal, not a remedy for past discrimination against Black broadcast entrepreneurs). Yet, Justice Stevens fails to acknowledge that any future benefits are directly related to the eradication of the *present* effects of *past discrimination*.

2. *WYGANT*: FORWARD-LOOKING APPROACH

In *Wygant v. Jackson Board of Education*,[262] the Court analyzed a race-based layoff system agreed upon in the collective bargaining agreement between the Jackson, Michigan Board of Education and the Jackson Education Association (teacher's union), the Court concluded that such a system is constitutionally invalid:

> No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and overexpansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.[263]

The plan in *Wygant* would displace nonminority teachers with greater seniority "in order to retain minority teachers with less seniority."[264] Rejecting the theory that racial preferences are a constitutionally permissible means to eradicate societal discrimination because they help

262. 476 U.S. 267 (1986).
263. *Id.* at 276.
264. *Id.* at 282.

retain minority teachers and provide "role models" for minority school children, the Court stated that societal discrimination is too amorphous to remedy[265] and that the layoff plan was not "sufficiently narrowly tailored."[266] The Court suggested that hiring goals were much less intrusive than layoffs which would unduly burden innocent nonminority teachers.[267]

There is something doctrinally perverse about the Court's reasoning in *Wygant* when it is placed alongside *Washington v. Davis*.[268] The Court has consistently refused to look at the state of the victim's existence—subjugation—or systems of caste. Professor Tribe writes:

> In *Washington v. Davis* the Supreme Court feared that adoption of a disparate impact test for equal protection analysis would threaten a whole panoply of socioeconomic and fiscal measures that inevitably burden the average poor black more than the average affluent white. That might be a concern if all resource allocations that had a statistically differential impact by race were automatically subject to strict scrutiny. . . .
>
> The antisubjugation principle does not argue for adopting disparate impact as a *per se* rule; strict judicial scrutiny would be reserved for those government acts that, given their history, context, source, and effect, seem most likely not only to perpetuate subordination but also to reflect a tradition of hostility toward an historically subjugated group, or a pattern of blindness or indifference to the interests of that group.[269]

Yet, the Court refused to make this basic differentiation between governmental action that maintains subjugation and non-invidious action that is designed to eradicate the present effects of historical subordination.[270] Thus, where the disparate impact is on innocent whites, the Court is willing to *assume* that there is some underlying discriminatory purpose.[271] "On the one hand, the Court bends over backwards not to impose penalties for intentional discrimination, by presuming the intentional discrimination is not present unless the evidence establishes otherwise. On the other hand, the Court presumes invidious intentional discrimination when examining benign discrimination policies."[272] This is a revealing departure from the Court's treatment of disparate impact

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265. *See id.* at 276.

266. *Id.* at 283.

267. *See id.* at 283-84.

268. 426 U.S. 229 (1976).

269. TRIBE, *supra* note 111, § 16-21, at 1519-20.

270. *See supra* notes 171-74 and accompanying text.

271. *See supra* notes 138-46 and accompanying text.

272. Mark Strasser, *The Invidiousness of Invidiousness: On the Supreme Court's Affirmative Action Jurisprudence*, 21 HASTINGS CONST. L.Q. 323, 402-03 (1994).

when the burden is on African-Americans: then, there *must* be a showing of discriminatory purpose.[273]

Discussing this doctrinal incongruity, Professor Chang observes:

> [U]nder *Davis*, the harm that this individual *black* jobholder would have suffered from a traditional last-hired, first-hired principle is constitutionally irrelevant. Under *Wygant*, the harm that the *white* jobholder did suffer from a nontraditional policy of compensating for effects of past racial discrimination provides a basis for invalidation.[274]

If the Court is going to require discriminatory purpose where disparate impact is established, then it must do so consistently. In the absence of racial animus or discriminatory purpose, then the "impact" on whites in cases like *Wygant*, *Croson* and *Adarand* must be—as it was in *Davis* when the impact was on Blacks—constitutionally irrelevant.[275] "[T]he Court's inconsistent treatment of harmful impact in *Davis* and *Wygant* also drives *Croson's* restrictive definition of when a purpose to redress the effects of past racial discrimination is permissible."[276] There must be a distinction made between the varying strains of disparate impact and how they affect Blacks and whites differently: There is a marked difference between the burdens that are a product of subordination and those that are the product of our pursuit of equality. It is not enough to say that discriminatory impact should be constitutionally irrelevant, when determining remediable forms of racial discrimination, impact must be analyzed as a product of subordination and caste.[277]

Justice Stevens managed to avoid the *Wygant* plurality's inconsistent approach in instances of non-invidious governmental conduct. "In *Wygant*, Justice Stevens would have upheld a collective bargaining agreement to maintain the prevailing percentage of minority teachers .... He found a valid purpose behind the agreement, not in redress for 'sins that were committed in the past,' but rather in the value of 'educating children for the future.'"[278] Because compensation for past discrimination is irrelevant under Justice Stevens' forward-looking paradigm, it cannot be suggested that innocent whites are being penalized for conditions that they did not create. Thus, African-Americans are not receiving compensation for past discrimination that is difficult to define in

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273. *See, e.g.*, Washington v. Davis 426 U.S. 229 (1976).

274. David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?*, 91 COLUM. L. REV. 790, 799 (1991) (emphasis added).

275. *See id.* at 805-09, 817.

276. *Id.* at 821.

277. *See* SUNSTEIN, *supra* note 183, at 345.

278. Note, *Justice Stevens' Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146, 1156-57 (1987).

terms of oppressed and "oppressor." The Black school teachers in *Wygant* were not being compensated for the lingering effects of past discrimination; instead, the school children were receiving a *future* benefit—a quality education.

Justice Stevens rejected the notion that the agreement at issue in *Wygant* would unfairly burden others, who were not responsible for past discrimination, to attain equality. This is a noticeable departure from his position in *Fullilove* where he was quite concerned with the plight of innocent victims, particularly in light of what he viewed as a broad congressional remedy.[279] Obviously, there would be a burden placed on whites; however, Justice Stevens defined this burden as a future benefit defined in the public interest:

> [I]t is not necessary to find that the Board of Education has been guilty of racial discrimination in the past to support the conclusion that it has a legitimate interest in employing more black teachers in the future. Rather than analyzing a case of this kind by asking whether minority teachers have some sort of special entitlement to jobs as a remedy for sins that were committed in the past, I believe that we should first ask whether the Board's actions advances the public interest in educating children for the future. If so, I believe we should consider whether that public interest, and the manner in which it is pursued, justifies any adverse effects on the disadvantaged group.[280]

Further, Justice Stevens posed three basic questions: "What class is harmed by the legislation, and has it been subjected to a 'tradition of disfavor' by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment?"[281]

Concluding that "race is not always irrelevant to sound governmental decisionmaking,"[282] Justice Stevens reasoned that, in the context of public education, there are distinct benefits in retaining minority teachers: "It is one thing for a white child to be taught by a white teacher that color, like beauty, is only 'skin deep'; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process."[283] Thus, there was an "unquestionably legitimate basis"[284] for the Board's decision even though it disadvantaged some white school teachers.

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279. *See Fullilove*, 448 U.S. at 538-48 (Stevens, J., dissenting).
280. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 313 (1986) (Stevens, J., dissenting).
281. *Id.* at 313 n.1.
282. *Id.* at 314.
283. *Id.* at 315.
284. *Id.* at 315-16.

Second, the public purpose was one of *inclusion*—the race-conscious plan of *Wygant* was quite different from an invidious plan of *exclusion*. Justice Stevens declared, "[c]onsideration of whether the consciousness of race is exclusionary or inclusionary plainly distinguishes the Board's valid purpose in this case from a race-conscious decision that would reinforce assumptions of inequality."[285] Significantly, the fact that whites were not, and never had been, a "traditionally disfavored group" drove this analysis—inclusion does not reinforce racist notions of inferiority. The fact that some whites would be displaced by this race-specific retention policy did not contribute to assumptions of inequality. In essence, equality means that the majority must share some burden so that the minority can participate freely in society.

Finally, in assessing the harm to the disadvantaged teacher, Justice Stevens found that the race-conscious policy was adopted in a fair procedural framework "with [the] full participation of the disadvantaged individuals," and with a narrowly circumscribed berth for the policy's operation.[286] Moreover, there were non-racial factors, such as economic conditions, that contributed to the layoffs.[287] Thus, the decision to include more minority teachers "transcends the harm"[288] to the white school teachers.

Again, there are limitations in Justice Stevens' forward-looking approach. His notion of inclusion as a normative equal protection principle is only partially inclusive—he presents a fragmented view of racial discrimination that ignored the minority school teacher's plight and overemphasized the "future benefit" to the minority students. Thus, he had great difficulty in reconciling his notion of inclusion in *Wygant* with *Fullilove*:

> Justice Stevens' views on affirmative action have developed over time. His earlier opinion in *Fullilove v. Klutznick*, cannot be reconciled with the view he expressed in *Wygant*, despite his apparent intent that the two opinions be seen as consistent. Although he applied the rhetoric of his equal protection inquiry in *Fullilove*, his examination there did not reflect a concern with inclusion as a norm of equality. The only conceivable bases he could imagine for differentiation based on race were that the members of the preferred class had been victims of unfair treatment in the past or that they would be less able than others to compete in the future.[289]

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285. *Id.* at 316-17.
286. *Id.* at 318.
287. *See id.* at 318-19.
288. *Id.* at 320.
289. *See supra* note 278, at 1157 n.59 (citations omitted).

But there is something more at work in Justice Stevens' variant *Fullilove* and *Wygant* institutional competence models—race. In the ultimate paradox, Justice Stevens had to recognize race in order to move towards colorblindness: in *Fullilove*, he was disturbed that members of the Congressional Black Caucus "want a piece of the action,"[290] and in *Wygant*, he was relieved that the disadvantaged class, white school teachers, fully participated in the collective bargaining agreement that would ultimately displace them.[291] Thus, his willingness to accept some form of race-conscious remedy hinges on his conception of how race structures polity. It is inevitable that the forward-looking approach will be selective in its reach; thus, *Fullilove* and *Croson* did not fit in this forward-looking conception because both involve some aspect of "racial politics."[292] Conversely, *Wygant*, *Metro Broadcasting*, and *Adarand*, all fit nicely into Justice Stevens' conception of institutional competence because he can argue that diversity or, to a lesser degree, economic competitiveness justified the use of race-conscious remedial approaches rooted in the future.[293]

Yet, he has never articulated how the normative principle of inclusion is distinguishable in cases like *Fullilove* and *Croson* and fully operative in cases like *Wygant*, *Metro Broadcasting*, and *Adarand*. Again the paradox emerges—Justice Stevens must walk a doctrinal tightrope. Analytically, his approach in dissent in *Fullilove* mirrors his concurrence in *Croson*; thus, when he attempted to preserve Congress' section 5 power in *Adarand* he was forced to distinguish *Fullilove*[294] and *Croson*.[295]

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290. *See supra* notes 249-52 and accompanying text.

291. *See supra* notes 286-88 and accompanying text.

292. *See supra* notes 249-52 and accompanying text; *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 516 n.9 (1989) (Stevens, J., concurring) (suggesting the possibility that the predominately Black Richmond City Council engaged in racial patronage).

293. *See, e.g.*, Adarand Constructors v. Pena, 115 S. Ct. 2097, 2128-31, (1995) (noting forward-looking components of the Surface Transportation and Uniform Relocation Assistance Act (STURAA) and concluding that "[t]his program, then, if in part a remedy for past discrimination, is most importantly a forward-looking response to practical problems faced by minority subcontractors"); Metro Broadcasting v. FCC, 497 U.S. 547, 601 (1990) (Stevens, J., concurring) (diversity is "unquestionably legitimate"); *Wygant*, 476 U.S. at 313 (Stevens, J., dissenting).

294. To distinguish *Fullilove*, Justice Stevens focused on the forward-looking components of the STURAA as compared to the race-specific PWEA in *Fullilove*. *Adarand*, 115 S. Ct. at 2128-31 (Stevens, J., dissenting).

295. To distinguish *Croson*, Justice Stevens has to reconstruct the line between federal and state power that he previously had attempted to erase in *Fullilove*. *Adarand*, 115 S. Ct. at 2123-26 (Stevens, J., dissenting) (rejecting the notion of congruence and stating that Congress should be accorded greater deference than states or municipalities).

3. *CROSON*: JUSTICE STEVENS' CONCURRENCE: REJECTION OF BACKWARD-LOOKING APPROACH

Croson is a particularly devastating opinion because the Court, for the first time, adopted a strict scrutiny standard that narrowly constrains governmental power. In many ways, *Croson* is the mirror image of *Fullilove*, but the Court here began the doctrinal course that inevitably led to *Adarand*—colorblind constitutionlism displaced constitutional analysis of caste. In a 6-3 opinion, Justice O'Connor, writing for the Court, invalidated the City of Richmond's Minority Business Enterprise (MBE) program.[296] Specifically, Justice O'Connor rejected the five factual predicates underlying the City of Richmond's MBE program: (i) the ordinance was remedial in nature;[297] (ii) there was ample evidence of past discrimination in the construction industry;[298] (iii) minority businesses received 0.67% of prime contracts from the city while minorities constituted 50% of the city's population;[299] (iv) there were only a small number of minority contractors in local and state contractors' associations;[300] and (v) in 1977, Congress had made a determination that the effects of past discrimination stifled MBEs nationally.[301]

Justice O'Connor found that "[n]one of these 'findings,' singly or together, provided the city of Richmond with 'a strong basis in evidence for its conclusion that remedial action was necessary.'"[302] Thus, absent particularized findings of discrimination—namely, some form of *de jure* discrimination by the city of Richmond itself—there could be no remedial efforts to cure amorphous, "societal discrimination."[303]

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296. The City program was patterned after the MBE program upheld in *Fullilove*:

> The Plan required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more [MBE's] . . . .
>
> The 30% set-aside did not apply to city contracts awarded to minority-owned prime contractors.
>
> The plan defined an MBE as "[a] business at least fifty-one (51) percent of which is owned and controlled . . . by minority group members." "Minority group members" were defined as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts."

Croson, 488 U.S. at 477-78 (citations omitted). There was a provision for partial or complete waiver of the 30% set-aside, *id.* at 478-79; there was no direct administrative appeal from a denial of a waiver request, *id.* at 479; however, there was a general right of protest where a bidder was denied an award for failure to comply with the MBE requirements. *Id.*

297. *See id.* at 499.

298. *See id.*

299. *See id.*

300. *See id.*

301. *See id.*

302. *Id.* at 500 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (plurality opinion)).

303. *See id.* at 497.

Considering factual predicate (i), Justice O'Connor stated that "the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight."[304] Specifically, if a race-conscious remedy negatively impacts innocent third parties, like Croson, then legislative "labelling" will not pass constitutional muster.[305] Again, no distinction between invidious and non-invidious discrimination was recognized.

In her analysis of factual predicate (ii), Justice O'Connor built upon her analysis of the first factual predicate and ignored the City of Richmond's legislative fact finding that there was racial discrimination in the construction industry locally, statewide, and nationally:

> [W]hen 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 . . . . 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.[306]

Moving to factual predicate (iii), Justice O'Connor concluded that the minuscule percentage of MBE contracts awarded to minorities was statistically insignificant because there was no evidence of how many *qualified* MBEs there were to undertake the prime contracts.[307] Moreover, because the record was "silent" as to the enforcement history of Richmond's anti-discrimination statutes, the 30% set-aside was based "on the unsupported assumption that white prime contractors simply will not hire minority firms."[308]

Reviewing factual predicate (iv), Justice O'Connor stated that low MBE membership in local contractors' associations, standing alone, "is not probative of any discrimination in the local construction industry."[309] Because there was no linkage made between those MBEs eligible for membership in the associations and the low minority membership, these low numbers were deemed irrelevant[310]—perhaps, Blacks simply had other career interests or opportunities.

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304. *Id.* at 500.

305. *Id.*

306. *Id.* at 500-01 (citations omitted); *see also* Korematsu v. United States, 323 U.S. 214, 235-40 (1944) (Murphy, J., dissenting). It is chillingly ironic that in order to support her rejection of the legislative record in *Croson*, Justice O'Connor has to rely on *Korematsu*, the infamous Japanese internment case which is the only instance where an *invidious* governmental initiative has passed strict scrutiny. *See infra* note 390 and accompanying text.

307. *See Croson*, 488 U.S. at 501-03, 502 n.3. This is nothing more than an artful use of the rhetorical myths discussed previously. *See supra* notes 121-29 and accompanying text.

308. *Croson*, 488 U.S. at 502.

309. *Id.* at 503.

310. *See id.*

To discard the final factual predicate, (v), Justice O'Connor drew upon the clearly defined boundaries of institutional power that she would later reject in *Adarand*:

> [T]he city . . . relied on Congress' finding in connection with the set-aside approved in *Fullilove* that there had been nationwide discrimination in the construction industry. The probative value of these findings for demonstrating the existence of discrimination in Richmond is extremely limited.
>
> . . . Congress was exercising its power under § 5 of the Fourteenth Amendment in making a finding that past discrimination would cause federal funds to be distributed in a manner which reinforced prior patterns of discrimination. While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.[311]

Finally, applying strict scrutiny, Justice O'Connor found the Richmond program constitutionally invalid because the 30% set-aside was not narrowly tailored and there was no identified discrimination that would support a compelling state interest to adopt a race-conscious remedy.[312] The Richmond program was not colorblind; therefore, it was inherently suspect.

However, Congress is not limited to combatting particularized instances of discrimination. Its section 5 powers give it a broad constitutional mandate to eradicate prior discrimination. Therein lies the glaring paradox of *Croson*—it acknowledged Congress' section 5 power while taking it away because the notion of colorblindness would lose much of its vitality if it were limited to the exercise of local or state power: If race is inherently suspect, without regard to context, then it was inevitable that Congress would be similarly limited under the doctrine of reverse incorporation.[313] Thus, *Croson* is the doctrinal precursor of *Adarand*.

Racial politics, the central theme of *Croson*, is premised on colorblindness. Indeed, what triggered strict scrutiny analysis in *Croson* was not the presence of invidious discrimination, but the Court's conception of majoritarian politics. Following the Court's reasoning, since Blacks were in the majority politically, they could not be classified as "discrete and insular minorities."[314]

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311. *Id.* at 504.

312. *See id.* at 506-09.

313. *See supra* note 170 and accompanying text.

314. *See* United States v. Carolene Prod. Co., 304 U.S. 144, 152-53 n.4 (1938) (dictum).

Justice O'Connor noted:

> [B]lacks constitute approximately 50% of the population of the city of Richmond. Five of the nine seats on the city council are held by blacks. The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened [strict] judicial scrutiny in this case.[315]

Thus, clearly *Croson* was a decision about pluralistic notions of process and demands that race not displace the proper functioning of the process. Ultimately, the virtues of a free flowing political process are placed above the attainment of substantive equality. In essence, color-blindness takes on an added twist—race must be ignored because it is constitutionally irrelevant unless, of course, the political "majority" happens to be Black—the notion of reverse discrimination was constitutionalized in *Croson*.

In *Croson*, the Court, placing process above reality, settled for superficial equality:

> At the heart of the Court's jurisprudential instability lies a profound vacillation between two very different notions of equality: equal access and equal achievement. The equal access construct [as in *Croson*] defines equality in terms of the removal of overt barriers to employment, contracting, housing, voting, and so forth. The equal achievement construct [as in *Metro Broadcasting*] goes beyond removal and adds a compensatory element to make up for the lingering effects of years of societal discrimination.[316]

Since racism is an aberration in an otherwise properly functioning process, judicial review should be employed sparingly or only in those rare instances where the process has malfunctioned:

> [T]he Richmond City Council was controlled by minority group members. Thus, it was a "minority" majority that voted to enact the MBE program. This highly unusual fact pattern led the Court to view the set-aside with great suspicion. Attempting to hoist the proponents of the equal achievement construct by their own petard, the majority opinion even quoted Professor Ely: "Of course, it works both ways: a law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature."[317]

After determining that the process had malfunctioned, the Court freely ignored the stark realities contained in the legislative history prof-

315. *See Croson*, 488 U.S. at 495-96.

316. Mary C. Daly, *Rebuilding the City of Richmond: Congress's Power to Authorize the States to Implement Race-Conscious Affirmative Action Plans*, 33 B.C. L. REV. 903, 904-05 (1992).

317. *Id.* at 926.

fered by the Richmond City Council,[318] and insisted on a panoply of failed race-neutral alternatives.[319] Thus, *Croson* skewed not only defined boundaries of legislative decisionmaking, but nearly obliterated the concept of institutional competence. States and localities are now literally paralyzed from performing their legislative function because the Fourteenth Amendment now operates as a near absolute prohibition of *remedial efforts*, rather than prohibiting *discrimination* by the states.[320]

Again, Justice Stevens offered a "solution" to the harsh result in *Croson* by focusing on future benefits.[321] "In his *Croson* concurrence . . . Justice Stevens repeated his view, which he first articulated in dissent in *Wygant*, that government units should, in certain circumstances, be allowed to look forward and adopt racial classifications for non-remedial purposes."[322] However, Justice Stevens' forward-looking approach undercut notions of institutional competence, ignored the far reaching effects of *past* discrimination, and selectively addressed the systemic nature of racial discrimination.

"[A]gree[ing] with the Court's explanation of why the Richmond ordinance cannot be justified as a remedy for past discrimination,"[323] he embraced the process-oriented approach of the majority that emphasizes mere access rather than substantive equality.[324] Thus, he accepted the majority's analysis of the factual record in *Croson* as well as its summary rejection of the legislative record.[325] This shaped his conception of institutional competence, and ultimately led him to displace state and local legislative initiatives. Here, his institutional competence model was advanced by his focus on three factors: i) the public interest in the efficient performance of construction contracts;[326] ii) the distinction between judicial and legislative decisionmaking;[327] and iii) the disparate

318. *See id.* at 928-29 (cataloguing the evidence of racial discrimination in Richmond, particularly the fact that the population was 50 percent African-American but only .67 percent of the public contracts were awarded to minority businesses).

319. *See id.* at 929-30.

320. See Nicole Duncan, *Croson Revisited: A Legacy of Uncertainty in the Application of Strict Scrutiny*, 26 COLUM. HUM. RTS. L. REV. 679 (1995) (noting localities' unwillingness to implement affirmative action plans following *Croson*); Katz, *supra* note 211, at 333 (noting that under *Croson*, "even a remedial use of [racial] criteria, so different from the racial barriers at which the post Civil War amendments were directed, was also strictly limited.").

321. *See* John Payton, *The Meaning and Significance of the Croson Case*, 1 GEO. MASON U. CIV. RTS. L.J. 59, 72 (1990).

322. *Id.* at 72.

323. *Croson*, 488 U.S. at 511-12 (Stevens, J., concurring in part and concurring in the judgment).

324. *See* Daly, *supra* note 315, at 904-05 and accompanying text.

325. *See supra* notes 302, 304-11 and accompanying text.

326. *See Croson*, 488 U.S. at 512-13 (Stevens, J., concurring in part and concurring in the judgment).

327. *See id.* at 513-14.

impact imposed on the disadvantaged class.[328]

Distinguishing *Wygant*, Justice Stevens concluded that "the city makes no claim that the public interest in the efficient performance of its construction contracts will be served by granting a preference to minority-business enterprises."[329] To Justice Stevens, *Croson* was markedly different from *Wygant*, where it was "quite obvious . . . that an integrated faculty could provide educational benefits to the entire student body that could not be provided by an all-white, or nearly all-white, faculty."[330] However, this conclusion is not nearly as "obvious" as Justice Stevens claimed it was. The same argument can be made for Black economic empowerment: A substantial, qualified body of MBEs, if *included* in the public contracting system, could provide benefits to the *entire* Richmond community—like the all-white faculty in *Wygant*, an all-white or nearly all-white network of contractors does not serve Richmond's diversity or economic interests.

Arguably, Justice Stevens' forward-looking approach is limited and selective in its reach. While it was "quite obvious" that African-American school teachers were needed in *Wygant*, it was inexplicably not obvious that MBEs would contribute to Richmond's public employment diversity and robust local economy.

Justice Stevens' forward-looking approach instead focused on access, and race became wholly insignificant: "In the case of public contracting. . . if we disregard the past, there is not even an arguable basis for suggesting that the race of a subcontractor or general contractor should have any relevance to his or her access to the market."[331] Yet this alone does not explain, why the public interest value of inclusion was weighed more in *Wygant* than in *Croson*. Perhaps Justice Stevens rests the distinction on the fact that there was no hint of racial politics in *Wygant* because the race-conscious layoff policy was adopted "with [the] full participation of the disadvantaged [white school teachers]."[332] Therefore, Justice Stevens could look forward to the *future* benefit to African-American students in *Wygant* because the decision to *include* more minority teachers "transcends the harm"[333] to the white school teachers. However, this exception was inapplicable to *Croson* because the Richmond MBE program was enacted by a "minority-majority" city council and attempted to eradicate *past* discrimination.

The forward-looking approach is ahistorical; and as a result, Justice

328. *See id.* at 514-18.
329. *Id.* at 512.
330. *Id.* at 512.
331. *Id.* at 512-13.
332. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 318 (Stevens, J., dissenting).
333. *Id.* at 320.

Stevens is forced to select which cases will most appropriately fit his analytical framework: *Wygant* fits because whites were involved in the decision to "harm" themselves whereas *Croson* does not fit because the majority African-American city council chose the "harm" which threatened "innocent" whites.[334] This illustrates the fallacy of an approach that ignores history. Both *Wygant* and *Croson* present underlying facts that clearly illustrate embedded systems of caste.[335] Yet, by ignoring the history of discrimination in both cases and by defining harm on the basis of the disadvantaged race, Justice Stevens skewed his notion of inclusion. Therefore, "inclusion" means one thing in *Wygant* and something quite different in *Croson.*

Thus, Justice Stevens missed an important public interest dimension of the remedial efforts initiated by the City of Richmond: "Arguably, attention to societal discrimination would expand the relevant pool of black candidates. Thus, in *Croson* the issue would not be the percentage of contracting dollars received by *existing* MBEs, but rather the extent to which discrimination elsewhere blocked the formation of MBEs."[336]

Addressing the distinction between judicial and legislative decisionmaking, Justice Stevens made a bold statement in *Croson*—the judicial system is better equipped than the legislatures to identify past wrongdoers and fashion remedies.[337] The appropriate sphere for governmental conduct is thus limited to the promulgation of rules to govern future conduct: "This litigation involves an attempt by a legislative body, rather than a court, to fashion a remedy for a past wrong. Legislatures are primarily policymaking bodies that promulgate rules to govern future conduct."[338] Moreover, Justice Stevens invoked the Constitution's prohibition against *ex post facto* laws, and bills of attainder, and in

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334. Professor Aleinikoff writes:

> [I]n a perverse way, the extent of previous discrimination works against blacks: because past societal racial discrimination is recognized by all, virtually any program could be justified by reference to it and illicit, self-dealing motives could thereby be hidden.
>
> . . .
>
> [T]he apparent assumption that any program adopted by black elected officials to help black entrepreneurs is an exercise in self-dealing seems to violate the colorblind principles under which the Justices profess to be operating.

Aleinikoff, *supra* note 16, at 1102.

335. *See Wygant*, 476 U.S. at 297-98 (Marshall, J., dissenting); *see also* Aleinikoff, *supra* note 16, at 1073-74 (summarizing the history of invidious discrimination in Richmond, Virginia, the former cradle of the Confederacy).

336. Aleinikoff, *supra* note 16, at 1099.

337. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 513-14 (1989) (Stevens, J., concurring in part and concurring in the judgment).

338. *See id.* at 513.

so doing indicts the action of the Richmond City Council.[339] Thus, to Justice Stevens, the Richmond City Council acted well outside its proper sphere.

This approach limits governmental power and substitutes the Court's judgment, on inherently local matters, for sound legislative decisionmaking. Clearly, if a governmental enactment is noninvidious, the Court should not substitute its judgment for that of the legislature. The Fourteenth Amendment is a prohibition on discrimination, not a ceiling on positive governmental efforts to eradicate caste:

> A legislature which adopts affirmative action guidelines might have any of a number of legitimate goals: rectifying past discrimination, assuring that there are role models within particular professions, etc. None of these involve an attempt to impose a stigma or assert the inferiority of the disadvantaged group. A legislature which adopts discriminatory measures against a minority is presumably trying to impose a stigma or assert the dominant group's superiority. While the former group of goals is quite compatible with (and indeed supports) the ideals reflected in the Fourteenth Amendment, the latter set is incompatible with those goals. By equating these two practices, the court obfuscates an important difference between them.[340]

This obfuscation makes it easy for the Court to trammel principled legislative efforts to achieve substantive equality. Indeed, Justice Stevens' assertion of reverse institutional competence—that the Court is better equipped to remedy past discrimination—obscured the bright line of distinct state-federal roles that he would later attempt to draw in *Adarand*.[341]

Finally, Justice Stevens, as he has since his dissent in *Wygant*, eschewed the traditional, multi-tiered equal protection analysis employed by the Court and instead adopted an analysis focusing on "the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment."[342] Thus, Justice Stevens employed some of the myths[343] underlying the affirmative action debate in order to concur in the invalidation of the Richmond program:

> [T]he composition of the disadvantaged class of white contractors presumably includes some who have been guilty of unlawful discrimination, some who practiced discrimination before it was forbidden by law, and some who have never discriminated against anyone on the basis of race. Imposing a common burden on such a disparate

339. *See id.* at 513-14.

340. Strasser, *supra* note 272, at 401-02.

341. *See infra* notes 393-07 and accompanying text.

342. 488 U.S. at 514 (Stevens, J., concurring in part and concurring in the judgment).

343. *See supra* notes 121-28 and accompanying text.

> class merely because each member of the class is of the same race stems from reliance on a stereotype rather than fact or reason.[344]

Buttressing the assertion above is the notion of racial patronage.[345] This rationale utilizes colorblindness to turn the Fourteenth Amendment on its head—African-American city officials are now the oppressors. Arguably, this use of colorblindness undermines legislative power, ignores institutional competence, and perpetuates caste:

> This approach maligns the integrity of African-American city officials by insinuating that because they are African-American, they are not capable of making fair decisions. It insults their intellectual ability by implying that they cannot properly define the kind of discrimination that merits racial preferences, despite the fact that they probably have been the victims of such discrimination themselves and can, therefore, define it all too well. Ironically, such misguided judgments about the aptitudes of African-American city officials amounts to the kind of racism which the set-asides attempt to eliminate. It is this same racism which the Court fears that African-American majorities may be manifesting when they enact racial preferences that benefit their own race.[346]

Justice Stevens' forward-looking approach clearly embraces form over substance allowing him to advance a formulaic view of equality that severely limits legislative decisionmaking. While he did not explicitly adopt the *Croson* majority's use of strict scrutiny analysis premised on the "numerical superiority"[347] of African-Americans in the Richmond City Council, he nevertheless, reached the same conclusion by focusing on the harm imposed on the disadvantaged class. Under either rationale, clearly defined notions of institutional competence are summarily discarded:

> This approach ignores the principle that local government officials, regardless of race, are, by virtue of their proximity to and their expertise with local affairs, exceptionally well-qualified to make determinations of public good concerning the award of public contracts within their spheres of authority. Courts should not be in the position of managing the everyday affairs of local governments. Instead, it is within the purview of local government to decide to step in and prevent private industry from practicing racial discrimination.[348]

The forward-looking approach is merely a variation on colorblind

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344. *Croson*, 488 U.S. at 516 (Stevens, J., concurring in part and concurring in judgment).

345. *See id.* at 516 n.9.

346. Cassandra D. Hart, *Unresolved Tensions: The Croson Decision*, 7 HARV. BLACKLETTER J. 71, 84-5 (1990); *see also* Aleinikoff, *supra* note 16, at 1105-06 and accompanying text.

347. Hart, *supra* note 346, at 85.

348. *Id.*; *see also* Aleinikoff, *supra* note 16, at 1105-07 (noting how colorblindness obscures meaningful analysis of the different power relations facing white and black politicians).

constitutionlism—it ignores race only when it is convenient to do so—explaining the varying outcomes under Justice Stevens' approach.

4. *METRO BROADCASTING*: JUSTICE STEVENS' CONCURRENCE: DIVERSITY AS A LEGITIMATE GOAL

In *Metro Broadcasting*,[349] Justice Stevens embraced race as a factor in reaching future diversity. *Metro Broadcasting* is significant on several levels: it was Justice Brennan's final decision before his retirement from the Court; it was the last decision in which the Court employed intermediate scrutiny to evaluate congressionally enacted racial preferences; and Justice Stevens is the sole member of the *Metro Broadcasting* majority still on the Court.[350]

In *Metro Broadcasting*, applicants for broadcast licenses alleged that FCC policies favoring minority firms violated the equal protection component of the Fifth Amendment. Under one policy, the FCC considered "minority ownership as one factor in comparative proceedings for new licenses."[351] Under the other "distress sale" policy, an exception was created to the general rule that "a licensee whose qualifications to hold a broadcast license [came] into question may not assign or transfer that license until the FCC resolved its doubts in a noncomparative hearing."[352] The exception "allow[ed] a broadcaster whose license has been designated for a revocation hearing, or whose renewal application has been designated for hearing, to assign the license to an FCC-approved minority enterprise."[353] In a 5-4 decision, authored by Justice Brennan, the Court upheld both policies:

> We hold that *benign* 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.[354]

Reaffirming *Fullilove* and adopting middle-tier scrutiny, the Court explicitly acknowledged the uniqueness of congressional power in eradicating racial discrimination. *Metro Broadcasting* clearly distinguished

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349. 497 U.S. 547 (1990).

350. "Justice Stevens was the only Justice to join the judgment of the Court in *Croson*, and the majority opinion in *Metro Broadcasting*," Aleinikoff, *supra* note 16, at 1061-62 n.10 (citations omitted).

351. *Metro Broadcasting*, 497 U.S. 547, 556-57.

352. *Id.* at 557.

353. *Id.*

354. *Id.* at 564-65 (emphasis added).

between invidious and noninvidious governmental action.[355] Concluding that the FCC minority ownership policies passed constitutional muster, the Court stated that the policies "serve the important governmental objective of broadcast diversity"[356] and that "they are substantially related to the achievement of that objective."[357] Drawing upon Justice Powell's decision in *Bakke* and Justice Stevens' dissent in *Wygant*, the Court determined that:

> [T]he interest in enhancing broadcast diversity is, at the very least, an important governmental objective and is therefore a sufficient basis for the Commission's minority ownership policies. Just as a "diverse student body" contributing to a "robust exchange of ideas" is a "constitutionally permissible goal" on which a race-conscious university admissions program may be predicated . . . the diversity of views and information on the airwaves serves important First Amendment values.[358]

Relying upon the legislative history of Congress and the FCC,[359] the Court also concluded that the policies were substantially related to the achievement of the government's objective:

> The judgment that there is a link between expanded minority ownership and broadcast diversity does not rest on impermissible stereotyping . . . . Rather, both Congress and the FCC maintain simply that expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity. A broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethically homogenous group.[360]

Moreover, the minority ownership policies were found to be "appropriately limited in extent and duration, and subject to reassessment and reevaluation by the Congress prior to any extension or re-enactment."[361] Finally, noting the impact on nonminorities, the Court concluded that the burden was "slight."[362] Specifically, because there was "no settled expectation that [nonminority] applications [would] be granted without consideration of public interest factors such as minority ownership,"[363]

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355. *See id.* at 564 n.12 (rejecting Justice Kennedy's view that there is no difference between benign race-conscious remedies and South African apartheid, the "separate-but-equal" doctrine of *Plessy*, and the internment of Japanese Americans in *Korematsu*).

356. *Id.* at 566.

357. *Id.*

358. *Id.* at 568 (citations omitted).

359. *See id.* at 569-600.

360. *Id.* at 579.

361. *Id.* at 594 (quoting Fullilove v. Klutznick, 448 U.S. 448, 489 (1980)).

362. *Id.* at 597.

363. *Id.*

the policies did not contravene any protected rights or interests.[364]

Metro Broadcasting represents a clear articulation of the parameters of congressional power—section 5 is a positive grant of legislative power. According the FCC policies the appropriate level of deference, the Court correctly found that enacting the policies was a constitutional exercise of congressional power.[365] Significantly, Congress was not legislating to eradicate a system of *state* discrimination, rather, pursuant to its unique fact-finding powers as the national legislature, it was legislating on its own initiative to dismantle systems of caste. The essence of congressional power is that, in the absence of invidious governmental conduct underlying a particular legislative initiative, section 5 is not limited by equal protection principles:

> Put another way, the Court in both *Croson* and *Fullilove* read section five to confer upon Congress not only the authority to remedy equal protection violations identified by the Court but also the authority to define what constitutes an equal protection violation. As these decisions indicate, this interpretation of section five forecloses meaningful application of the equal protection component of the fifth amendment. It is difficult if not impossible for the Court to impose an equal protection limitation upon Congress while simultaneously allowing Congress' power to define the scope of the equal protection clause when it legislates under section five. This is perhaps best shown in *Metro Broadcasting*, where Justice Brennan framed the question as "whether [the FCC policies] violate the equal protection component of the Fifth Amendment," but devoted no further attention either to the content of the equal protection component or to its relationship to section five.[366]

Indeed, in the absence of invidious discrimination by Congress itself, there was no need for a further explanation—the FCC policies were squarely within the ambit of Congress' constitutionally mandated powers. Thus, *Metro Broadcasting* is doctrinally distinct from *Bolling v. Sharpe*.[367] Yet the flaw in the Court's reasoning in *Metro Broadcasting* was that while it recognized the broad deferential standard accorded Congress in *Fullilove,* it never clarified the boundaries of that standard. Congressional power was left "unchecked," and this inevitably led to a dissent by Justice O'Connor which became the majority opinion in *Adarand*.[368]

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364. *See id.*

365. *See id.* at 564-65.

366. Edward D. Rogers, 24 COLUM. J.L. & SOC. PROBS. 117, 150 (1990) (alteration in original). This is precisely why Justice O'Connor invents the doctrine of congruence—the Court is then free to analyze a federal legislative initiative under the highest level of judicial scrutiny.

367. *See supra* notes 159-78 and accompanying text.

368. *See Metro Broadcasting*, 497 U.S. at 602-03 (O'Connor, J., dissenting) (narrowly

It is particularly interesting that Justice Stevens did not, in any way, attempt to define congressional power under section 5. The views he later expressed in his *Adarand* dissent[369] would have been particularly useful in his *Metro Broadcasting* concurrence. Instead, he returned to the familiar theme of future benefits, and offered no explanation of why *Metro Broadcasting* was different from *Fullilove*. Thus, it is unclear why he dissented in *Fullilove* and concurred in *Metro Broadcasting*. Perhaps the distinction is that in *Fullilove*, there was no articulation of a forward-looking policy; while in *Metro Broadcasting*, diversity was regarded as the future benefit of the policies: "The public interest in broadcast diversity like the interest in an integrated police force, diversity in the composition of a public school faculty or diversity in the student body of a professional school—is . . . unquestionably legitimate."[370]

Again, this illustrates the selective nature of Justice Stevens' approach and its affect on institutional power:

> Justice Stevens' concurring opinion in *Metro* portends trouble for federal affirmative action programs that cannot be tied to a concern for "diversity" of ideas and information. Justice Stevens is generally unimpressed with backward-looking remedial justifications . . . . Unless a program can be explained as an attempt to enlighten the public on issues of race, it is not likely to win the vote of Justice Stevens . . . .[371]

Justice Stevens' concurrence narrowly cabined congressional power to select situations where the pursuit of a forward-looking remedy is "unquestionably legitimate":

> Justice Stevens is a fan of diversity but is highly skeptical of other affirmative action goals . . . . Justice Stevens dissented from the upholding of the federal construction set-asides in *Fullilove,* and he joined the majority in striking down Richmond's program for minority contractors. Twice in his short concurring opinion in *Metro*, Justice Stevens uses the word "extremely." The situations for which race will provide a relevant basis for disparate treatment are "extremely rare"; the category of permissible race-based classifica-

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construing section 5 and concluding that *Metro Broadcasting* is not a section 5 case because Congress is not acting with respect to the states); *see also* Douglas O. Linder, *Review of Affirmative Action After Metro Broadcasting v. F.C.C.: The Solution Almost Nobody Wanted*, 59 UMKC L. REV. 293, 295-97 (1991) (noting the doctrinal weaknesses of *Metro Broadcasting*). Justice Brennan's *Metro Broadcasting* opinion embraces a lower standard of review when Congress is exercising an amalgam of its constitutionally mandated powers. 497 U.S. at 564-65; *accord* Fullilove v. Klutznick, 448 U.S. 448 (1980).

369. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2126 (1990).

370. *Metro Broadcasting*, 497 U.S. at 601-02 (Stevens, J., concurring).

371. Linder, *supra* note 368, at 318.

tions is "extremely narrow." Broadcast diversity is one of the "extremely rare" situations where Justice Stevens would allow race-based classifications.[372]

Interestingly, Justice Stevens' forward-looking approach is better suited analytically to the *Metro Broadcasting* decision if it is viewed as a First Amendment case. If the concern is simply access to the ideological marketplace, then the diversity interest that Justice Stevens viewed as legitimate is well-served—a variety of viewpoints will be added to the cultural marketplace.[373] The marketplace will be open to all, including those who have been traditionally shut out. But *access*, even in the theoretical paradigm of the marketplace of ideas, is rarely enough.[374]

B. *Affirmative Inaction: The Emergence of the Inverted Strict Scrutiny Standard*

In *Adarand*, the Court, for the first time, held congressional action to the same level of strict judicial scrutiny as aplied to states and localities. Thus, *Croson* has been federalized—city councils, state legislatures, and Congress are now on the same constitutional plane. The allure of doctrinal uniformity and colorblindness has shifted the focus from the pursuit of equality to contrived doctrines of skepticism, consistency, and congruence. Further, *stare decisis* is ignored, the Fourteenth Amendment is turned inside out and consequently an inverted strict scrutiny emerges—the question is not whether a particular governmental enactment is invidious, it is whether it is based on race. Thus, *Adarand* precludes any analysis into the systemic underpinnings of racism; indeed, it has already spawned what will be a cynical legacy of colorblind jurisprudence.[375]

1. THE O'CONNOR MAJORITY

In 1989, the Central Federal Lands Highway Division (CFLHD), a division of the United States Department of Transportation, awarded a price contract for a highway guardrail construction project to Mountain Gravel and Construction Company ("Mountain Gravel").[376] "Adarand,

372. *Id.*

373. *See* Patricia J. Williams, *Metro Broadcasting, Inc. v. FCC: Regrouping In Singular Times*, 104 HARV. L. REV. 525, 537 (1990).

374. *See* Powell, *supra* note 30.

375. *See, e.g., Hopwood v. Texas*, 84 F.3d 720 (5th Cir. 1996) (holding that the University of Texas School of Law's interests in achieving a racially diverse student body and in eliminating the present effects of past discrimination were not sufficiently compelling to justify the law school's use of race *as a factor* in the student admissions process). The Fifth Circuit relied on *Adarand* to reach this dubious result.

376. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2102 (1995).

a Colorado-based highway construction company specializing in guardrail work, submitted the low bid,"[377] and Mountain Gravel awarded the subcontract to Gonzales Construction Company, a Disadvantaged Business Enterprise ("DBE") that had submitted a somewhat higher bid.[378]

Adarand filed suit and was unsuccessful in both the district court and the Tenth Circuit: the district court disposed of Adarand's Fifth Amendment claim by granting summary judgment in favor of the Government; and the Tenth Circuit, applying intermediate scrutiny, held that the subcontracting program was narrowly tailored to achieve its important purpose of benefitting small disadvantaged businesses.[379] The Supreme Court took a drastically different approach to the DBE program.

Justice O'Connor's majority opinion advanced three central tenets: (i) skepticism (race is inherently suspect and should be viewed skeptically); (ii) consistency (an injured party's race is irrelevant—the Fourteenth Amendment demands the equal treatment of all races); and (iii) congruence (equal protection under the Fifth Amendment and equal protection under the Fourteenth Amendment mean the same thing; therefore, local, state, and federal race-conscious remedial measures are all subject to strict scrutiny).

a. Skepticism

In order to establish the new doctrine of skepticism in analyzing benign race-conscious remedies, Justice O'Connor rejected the institutional model she had embraced in *Croson*[380] and instead relied on an expansive reading of *Croson*: although *Croson* did not implicate Con-

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377. *Id.*

378. *See id.* "The contract in Adarand was formed as a result of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (the "STURAA"). The STURAA reserves at least ten percent of funding for Disadvantaged Business Enterprises (DBEs) as defined by the Small Business Act. As a recipient of federal highway funds, the CFLHD used a Subcontracting Compensation Clause ("SCC") program. Under federal regulations promulgated in response to STURAA, a DBE is defined as a small business that is at least fifty-one percent owned and managed by disadvantaged individuals." Terrence M. Lewis, Comment, *Standard of Review Under the Fifth Amendment Equal Protection Component: Adarand Expands the Application of Strict Scrutiny*, 34 DUQ. L. REV. 325, 326-27 (1996) (citations omitted).

379. *See* Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240 (D. Colo. 1992), *aff'd sub. nom.* Adarand Constructors, Inc. v. Pena, 16 F.3d 1537 (10th Cir. 1994), *vacated*, 115 S. Ct. 2097 (1995); *see also* Lewis, *supra* note 378, at 328.

380. In her opinion for the Court in *Croson*, Justice O'Connor acknowledged and relied on Congress' unique powers in enforcing the Fourteenth Amendment. Indeed, Justice O'Connor even cited *Katzenbach v. Morgan* for the proposition that, under section 5, Congress has a positive grant of legislative power "to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Croson*, 488 U.S. at 490. This is precisely what Congress did in *Adarand*; however, Justice O'Connor never offered an explanation for her abandonment of this conception of institutional power.

gress' section 5 powers, it articulated a uniform standard of strict scrutiny for *all* race-based remedial efforts. Thus, O'Connor declared that *Metro Broadcasting* was a doctrinal aberration:

> [Metro Broadcasting] turned its back on *Croson's* explanation of why strict scrutiny of all governmental racial classifications is essential: "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics .... We adhere to that view today, despite the surface appeal of holding 'benign' racial classifications to a lower standard, because 'it may not always be clear that a so-called preference is in fact benign.'"[381]

Again, colorblindness constricted the boundaries of legislative power—racial classifications are inherently suspect so that any use of race is presumptively unconstitutional. Here, the fear of racial politics[382] was extended beyond programs passed by minority-majority city councils to those adopted by Congress as well. Justice O'Connor moved from scrutinizing the *racial composition* of the Richmond City Council in *Croson* to proscribing the use of race as a factor in congressional decisionmaking. In both cases, the Court was blinded by color and viewed racial classifications as used not to achieve the aspirational goal of equality, but to perpetuate caste.

b. Consistency

In response to Justice Stevens' assertion, in dissent, that the majority's conception of consistency "ignores the difference . . . between a 'No Trespassing' sign and a welcome mat."[383] Justice O'Connor stated that "[c]onsistency *does* recognize that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be."[384] However, while Justice O'Connor unified state and federal race-conscious remedies under one analytical standard, she failed to define the parameters of Congress' section 5 powers.[385] Clearly, Justice O'Connor could offer no brightline because to do so would have acknowledged Congress' unique section 5 powers and significantly weakened her notion of congruence.

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381. *Adarand*, 115 S. Ct. at 2112 (citations omitted).

382. *See supra* notes 315-17 and accompanying text.

383. *Adarand*, 115 S. Ct. at 2120, 2121.

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

385. *See id.* Justice O'Connor noted that various members of the Court have taken different views of Congress' section 5 powers, but left open the question of judicial deference to such power. *See id.*

c. Congruence

Justice O'Connor concluded that *Metro Broadcasting* was a departure from deeply-rooted principles of congruence:

> *Metro Broadcasting* squarely rejected one of the three propositions established by the Court's earlier equal protection cases, namely, congruence between the standards applicable to federal and state racial classifications, and in so doing also undermined the other two—skepticism of all racial classifications, and consistency of treatment irrespective of the race of the burdened or benefited group. Under *Metro Broadcasting*, certain racial classifications ("benign" ones enacted by the federal government) should be treated less skeptically than others; and the race of the benefitted group is critical to the determination of which standard of review to apply. *Metro Broadcasting* was thus a significant departure from much of what had come before it.[386]

The Court sidestepped the doctrine of *stare decisis*: "*Metro Broadcasting's* untenable distinction between state and federal racial classifications lacks support in our precedent, and undermines the fundamental principle of equal protection as a personal right. In this case, as between that principle and 'its later misapplications,' the principle must prevail."[387] There is a stark irony here: the Court constructs, from wholecloth, three new "doctrines" of constitutional interpretation and then invalidated *Metro Broadcasting* by invoking these new principles as well-settled propositions in its equal protection jurisprudence.

Concluding that the same standard of judicial scrutiny applied under both Fifth and Fourteenth amendments when evaluating racial classifications,[388] the Court overruled *Metro Broadcasting* and held that strict scrutiny applied to "all racial classifications, imposed by whatever federal, state, or local governmental actor."[389] That this uniformity is superficial, is belied by the fact that the Court never articulated what factors would suffice to satisfy the requisite compelling governmental interest, nor does the Court offer any guidance as to how a race-based remedial approach can be narrowly tailored.[390] Instead, the Court simply remanded the case while noting that strict scrutiny is not necessarily "strict in theory, but fatal in fact."[391] This pledge is not reassuring.

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386. *Id.* at 2112 (citations omitted).

387. *Adarand*, 115 S. Ct. at 2117.

388. *See id.* at 2107-08, 2112-13.

389. *Id.* at 2113. While not explicitly overruling *Fullilove*, the Court held that the deferential approach is no longer controlling. *Id.* at 2117.

390. *Id. See also* Duncan, supra note 320, at 682. (discussing *Croson's* failure to sufficiently articulate what is a compelling governmental interest).

391. *Adarand*, 115 S. Ct. at 2117.

Recall that the Court's infamous decision in *Korematsu v. United States*[392] is the best known and only instance where a race-based *invidious* governmental program has withstood strict judicial scrutiny.[393]

2. JUSTICE STEVENS' DISSENT: SKEPTICAL SCRUTINY

Justice Stevens' dissent offered an effective critique of the New Equal Protection. However, his approach was still limited,[394] focusing primarily on the forward-looking aspects of the DBE program to distinguish *Adarand* from his earlier dissent in *Fullilove*. Nevertheless, he answered the question the majority took great pains to avoid—he defined congressional power under section 5.

a. Skepticism and Illusory Uniformity

Justice Stevens exposed the heart of the matter in *Adarand*—doctrinal "uniformity" should not displace thoughtful analysis of issues that touch on the very essence of equality: "[B]ecause uniform standards are often anything but uniform, we should evaluate the Court's comments on 'consistency,' 'congruence,' and *stare decisis* with the same type of skepticism that the Court advocates for the underlying issue."[395]

Indeed, the doctrinal "uniformity" the majority heralded as the defining feature of its equal protection jurisprudence, is illusory. In fact, the majority manipulated precedent and created a new standard obliterating a once clear line between invidious and noninvidious governmental conduct. As a result, congressional power under section 5 was further undercut.

Although Justice Stevens dissented in *Fullilove*, he never questioned the primacy of Congress' enforcement powers under the Civil War Amendments.[396] Similarly, his dissent in *Adarand* recognized the breadth of Congress' remedial power to end discrimination. He stated, that while a court "should be wary of a governmental decision that relies upon a racial classification,"[397] it does not follow that Congress' remedial power should be summarily undercut by the Court's skepticism.[398]

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392. 323 U.S. 214 (1944).

393. *See* Reggie Oh & Frank Wu, *The Evolution of Race in the Law: The Supreme Court Moves from Approving Internment of Japanese Americans to Disapproving Affirmative Action for African Americans*, 1 MICH. J. RACE & L. 165, 183 (1996) ("[T]he *Adarand* opinion provides the foundation for a subsequent case which could follow *Korematsu* not only in its reasoning, but also in its result.").

394. *See supra* notes 265-70, 296-302, 337-53, 372-76, and accompanying text.

395. *Adarand*, 115 S. Ct. at 2120 (Stevens, J., dissenting).

396. *See* Fullilove v. Klutznick, 448 U.S. 448, 548 (1979) (Stevens, J., dissenting).

397. *Adarand*, 115 S. Ct. at 2120 (Stevens, J., dissenting).

398. *See id.* at 2125. Justice Stevens noted that the Court's precedents had explicitly

Thus, the Court's notions of "consistency" and "congruence" were inherently flawed.

b. Consistent Inconsistencies

Rejecting the majority's conception of consistency, Justice Stevens argued that there was a significant difference "between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of the minority notwithstanding its incidental burden on some members of the majority."[399]

Here, as he did in *Wygant*,[400] Justice Stevens readily acknowledged the fact that, in the pursuit of equality, some members of the majority will have to bear the burden when race-conscious remedial approaches are employed.[401] However, there is a clear difference between this incidental "burden" and invidious discrimination that perpetuates racial caste:

> There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society.[402]

Justice Stevens further underscored the inconsistencies inherent in the Court's doctrine of consistency—the Court treated fundamental differences as similarities:

> The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat. It would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African Americans off the Supreme Court on a par with President Johnson's evaluation of his nominee's race as a positive factor. . . . An interest in "consistency" does not justify treating differences as though they were similarities.[403]

Thus, Justice Stevens recognized that it is possible to distinguish between invidious and noninvidious discrimination, and that the Court's equal protection jurisprudence demands this analysis.[404]

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recognized the unique powers of Congress and accorded the exercise of those powers significant deference. *See id.*

399. *Id.* at 2120.

400. *See supra* notes 286-88 and accompanying text.

401. *See Adarand*, 115 S. Ct. at 2120 (Stevens, J., dissenting).

402. *Id.*

403. *Id.* at 2121.

404. *See id.* at 2121-22.

The glaring inconsistency of the Court's "consistent" approach is graphically illustrated by the ad hoc nature of its multi-tiered equal protection analysis. Justice Stevens highlighted this doctrinal flaw:

> [A]s the law currently stands, the Court will apply "intermediate scrutiny" to cases of invidious gender discrimination and "strict scrutiny" to cases of invidious race discrimination, while applying the same standard for benign classifications as for invidious ones. If this remains the law, then today's lecture about "consistency" will produce the anomalous result that the Government can more easily enact affirmative-action programs to remedy discrimination against women than it can enact affirmative-action programs to remedy discrimination against African-Americans—even though the primary purpose of the Equal Protection Clause was to end discrimination against the former slaves . . . . When a court becomes preoccupied with abstract standards, it risks sacrificing common sense at the altar of formal consistency.[405]

c. The Incongruity of Congruence

Moreover, the Court's preoccupation with formal consistency led it to construct the doctrine of congruence. If race is to be viewed skeptically, and if there is no difference between ameliorative action and caste-based discrimination, then governments should be substantially constrained in their adoption of race-conscious remedies. For purposes of constitutional analysis, Congress is constrained in much the same way as the local city council is when race is a component of the remedial framework. Justice Stevens forcefully rejected this view.[406]

In *Croson*, the Court imposed its own view of polity on the Richmond MBE program—the result was a substantial dilution of state and local governmental power. *Adarand* completed the trend of curtailment—congressional governmental initiatives are now also subjected to strict scrutiny whenever race is implicated. The doctrine of congruence served as the bridge to link the distinct spheres of state and federal power. Clearly, state power is explicitly limited by section 1 of the Fourteenth Amendment: no state shall deny its citizens the equal protection of the laws. However, section 1 says nothing about, nor does it serve as a prohibition on, voluntary, nonvidious state remedial efforts adopted in the spirit of equality that is the touchstone of the Fourteenth Amendment.

The doctrine of congruence obscured this bedrock principle—Congress' section 5 power to adopt race-conscious noninvidious remedies is subjected to the *same level* of scrutiny as *invidious* state discrimination

405. *Id.* at 2122 (citations omitted).
406. *See id.* at 2124.

would be under section 1 of the Fourteenth Amendment. This is a flawed approach because section 5 is not framed as a limitation on congressional power. Of course, Congress cannot discriminate on the basis of race, the Fifth Amendment and *Bolling* make this abundantly clear. But "congruence" must not mean that positive remedial efforts, by Congress, are constitutionally prohibited.[407] Justice Stevens addressed this issue emphasizing Justice Scalia's concurrence and Justice O'Connor's plurality opinion in *Croson* where both Justices explicitly acknowledged the distinct differences between section 5's positive grant of power to Congress and section 1's prohibition against unconstitutional discrimination by the states.[408]

Drawing upon conceptions of institutional competence and deference to a co-equal branch of government, Justice Stevens concluded:

> In the programs challenged in this case, Congress has acted both with respect to *private individuals* and, as in *Fullilove*, with respect to the States themselves. When Congress does this, it draws its power directly from § 5 of the Fourteenth Amendment . . . . The Fourteenth Amendment directly empowers Congress at the same time it expressly limits the states. This is no accident. It represents our Nation's consensus, achieved after hard experience throughout our sorry history of race relations, that the Federal Government must be the primary defender of racial minorities against the States, some of which may be inclined to oppress such minorities. A rule of "congruence" that ignores a purposeful "incongruity" so fundamental to our system of government is unacceptable.[409]

Concluding that *Fullilove* governed the result in *Adarand* and that the DBE program focused on economic status with race as a positive factor, Justice Stevens would have affirmed the Tenth Circuit's judgment that the program passed constitutional muster.[410] Notably, *Adarand* fits neatly into Justice Stevens' forward-looking approach: "This program, then, if in part a remedy for past discrimination, is most importantly a forward-looking response to practical problems faced by minority subcontractors."[411] This was a crucial distinction for Justice Stevens—*Adarand* can be justified as forward-looking because the underlying DBE program focused on economic status while *Fullilove* was more akin to racial patronage.

While Justice Stevens offered an approach, employing past cases, to preserve governmental power, he was unsuccessful in addressing the

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407. *See supra* notes 159-70, 180-81 and accompanying text.
408. *See Adarand*, 115 S. Ct. at 2124-25 (Stevens, J., dissenting).
409. *Id.* at 2126.
410. *See id.* at 2128-31.
411. *Id.* at 2129.

systemic nature of racism. His forward-looking approach again only addressed access, not substantive past discrimination, and his focus on the future threatens to limit governmental remedial efforts to only a portion of discrimination. While this is certainly better than the majority's approach, it was nevertheless limited—it was acontextual and ahistorical.

3. FLEXIBLE SCRUTINY

Flexible scrutiny provides a viable doctrinal alternative. Specifically, if governmental conduct is *noninvidious* and benefits a traditionally oppressed minority, then such affirmative efforts should be subject to intermediate scrutiny. States and localities that undertake positive ameliorative efforts above the prohibitory floor embodied in section 1 of the Fourteenth Amendment should be afforded deference; and Congress, when it acts pursuant to its section 5 powers, should be afforded substantial deference commensurate with its status as a co-equal branch of government. Flexible scrutiny recognizes separate spheres of governmental power while unifying these spheres under one standard—intermediate scrutiny.

Moreover, flexible scrutiny avoids the anomaly that Justice Stevens pinpointed in his *Adarand* dissent[412]—Government affirmative action programs for minorities and women would be reviewed under the same standard.[413] Of course, there are differences in the history of oppression visited upon minorities and women, but this analysis could be factored into the question of whether the governmental conduct was invidious. The question would be for race cases, as it is for gender cases: "[is there] some ground of difference having a fair and substantial relation to the object of the legislation, so all persons similarly circumstanced shall be treated alike."[414]

In *Croson* and in *Adarand*, there was a reason to prefer minority contractors over their majority counterparts—a history of rampant discrimination with present day effects. In situations where minorities are not similarly situated, the government should be free not only to provide access, but substantive equality. If the Court can reject genderblindness, it certainly can and should reject colorblindness.[415]

Thus, the flexible scrutiny analysis would ask three questions: i)

412. *See id.* at 2122 (Stevens, J., dissenting) (noting that the majority's approach will lead to disparate results—racial issues will be determined under the strict scrutiny prong while gender issues will be resolved under the intermediate scrutiny prong).

413. *See generally* Comment, *Gender-Based Affirmative Action: Where Does It Fit in the Tiered Scheme of Equal Protection Scrutiny?*, 41 KAN. L. REV. 591 (1991).

414. *See* Fair, *supra* note 11, at 73.

415. *See id.* at 73-81.

are Blacks and whites similarly situated? ii) does the statute serve important governmental objectives? and iii) are the discriminatory means employed by the government substantially related to the achievement of the objectives?[416] Appropriate deference would be the guiding principle under intermediate scrutiny—state and local legislative fact finding would be accorded due weight. Section 1 would still stand as a bar to state or local-sponsored discrimination; however, noninvidious governmental conduct in this sphere would not be summarily struck down.

Under flexible scrutiny, an analogous argument can be made when Congress exercises its section 5 powers. The Fifth Amendment would serve as a bar to discrimination by the federal government,[417] but where the congressional program is noninvidious, section 1 of the Fourteenth Amendment would not be employed to cramp federal power. In other words, intermediate scrutiny would apply to the local, state, and federal governmental spheres where the government is pursuing the dictates of equality embodied in the Fourteenth Amendment.

There is a policing mechanism in the Thirteenth and Fourteenth Amendments; namely, Congress has the responsibility to *enforce* these amendments by appropriate legislation. Thus, Congress fills the gap where the states have acted to undermine equality; however, enforcement also encompasses Congress' inherent power, as the national legislature, to *initiate* legislation that will remove systems of caste.[418] Conversely, where states and localities are acting in accord with the constitutional mandate of equality, their power to do so should not be limited by section 1 of the Fourteenth Amendment. *Croson* and *Adarand* were wrongly decided because the Court ignored this principle.

Finally, Justice Marshall offered a useful framework for flexible scrutiny analysis. In *City of Cleburne v. Cleburne Living Center*,[419] *Plyler v. Doe*,[420] and *San Antonio Independent School District v. Rodriguez*,[421] he adopted a flexible approach to equal protection analysis.[422]

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416. *See id.* at 80.

417. *See supra* Part II B.

418. *See* Comment, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029 (1993) (arguing that Congress has broad powers under section 5 and noting that the ratchet theory is consistent with this view); *see also supra* Part II B.

419. 473 U.S. 432 (1985).

420. 457 U.S. 202 (1982).

421. 411 U.S. 1 (1973).

422. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 455-78 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part); Plyler v. Doe, 457 U.S. 202, 230-31 (1982) (Marshall, J., concurring); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 70-133 (1973) (Marshall, J., dissenting).

Specifically, Justice Marshall noted a clear line between section 1's *prohibition* against state discrimination and the positive grant of power to Congress in section 5 of the Fourteenth Amendment:

> To the degree that this parsimonious standard [strict scrutiny] is grounded on a view that either § 1 or § 5 of the Fourteenth Amendment substantially disempowered states and localities from remedying past discrimination . . . the majority is seriously mistaken . . . . Certainly *Fullilove* did not view § 5 either as limiting the traditionally broad police powers of the States to fight discrimination, or as mandating a zero-sum game in which state power wanes as federal power waxes.[423]

Flexible scrutiny recognizes that section 1 is a prohibition against discrimination, as such, it does not limit positive governmental efforts—local, state, or federal—to eliminate racial subordination. States and localities are free to go beyond the negative proscription against state-sponsored discrimination; they can *actively* seek to eradicate the vestiges of past discrimination. Indeed, if states and localities adopt this approach, they are merely embracing the letter and spirit of section 1. More importantly, Congress is not limited to the exercise of the "police power" component of its section 5 powers. Justice Marshall recognized the breadth of section 5: "[W]e [have] held that § 5 'is a *positive* grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.' Congress has this authority even where no constitutional violation has been found."[424]

The Court simply went the wrong way in its *Croson* and *Adarand* decisions and significantly undermined governmental power in the name of uniformity. Instead, the Court should have embraced noninvidious remedial efforts as a sign that one day we will reach the colorblind society that it has already constitutionalized. As Justice Marshall declared in *Croson*, "[There is] no reason to conclude that the States cannot voluntarily accomplish under § 1 of the Fourteenth Amendment what Congress under § 5 of the Fourteenth Amendment may authorize or compel either the states or private persons to do."[425] The same argument is even more compelling when Congress exercises its section 5 powers—Congress has a constitutional duty to eradicate caste. This is precisely what it had attempted in *Adarand*.

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423. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 557-58 (Marshall, J., dissenting); *see also supra* note 224 and accompanying text.

424. *Croson*, 488 U.S. at 557 (Marshall, J., dissenting) (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)) (citation omitted).

425. *Id.* at 559 (alteration in original).

IV. CONCLUSION

The Court is blinded by color. Rather than acknowledging race as a positive factor in eradicating caste, the Court recognizes race only to ignore it. Colorblindness is employed to maintain a status quo based on the exploitation of oppressed minorities, and any meaningful discourse is subverted by a panoply of disconcerting labels and stereotypes. The New Equal Protection—where any use of race is presumptively unconstitutional—will usher in a period of affirmative inaction and cynical judicial pronouncements which ignore the present effects of centuries of subjugation. In so doing, the Court has restructured the boundaries of legislative power—we have come "full circle"[426] returning to the roots of our sorry history of racial discrimination.

426. *See* Regents of the Univ. of California v. Bakke, 438 U.S. 265, 402 (1978) (Marshall, J., concurring in the judgment in part and dissenting).