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Remedial Purpose and Affirmative Action: False Limits and Real Harms

Lisa E. Chang†

The platitude that government-sponsored, race-related affirmative action must have a remedial purpose to withstand challenge based on the Equal Protection Clause is at risk of becoming legal doctrine. In *City of Richmond v. J.A. Croson Co.*, 1 a majority of the Supreme Court held that strict scrutiny applies to state-sponsored affirmative action programs, 2 and a plurality of the Supreme Court held that remedial purpose—and only remedial purpose—can satisfy the compelling interest prong of that strict scrutiny. 3 Last year, two circuit courts addressed directly the issue of remedial purpose as the sole permissible basis for affirmative action and reached different conclusions. 4 The Supreme Court was set to hear a case challenging the use of affirmative action to promote diversity, but it settled on the eve of argument. 5

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2. See id. at 493-94; id. at 520 (Scalia, J., concurring in judgment) (agreeing with strict scrutiny standard).

3. See id. at 493. For a discussion supporting the assertion that a plurality and not a majority adopted a remedial purpose requirement, see infra note 64.

4. The Fifth Circuit became the first federal court of appeals to adopt the Croson plurality’s position, holding in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), reh’g and reh’g en banc denied, 84 F.3d 720, cert. denied, 116 S. Ct. 2581 (1996), that a state-sponsored affirmative action program is valid only if it has a remedial purpose. See id. at 944. Four months after the Fifth Circuit adopted a remedial purpose requirement, however, the Seventh Circuit rejected remedial purpose as the sole compelling interest for government-sponsored affirmative action. See Wittmer v. Peters, 87 F.3d 916, 919 (7th Cir. 1996), cert. denied, 117 S. Ct. 949 (1997).

5. See Taxman v. Board of Educ. of Township of Piscataway, 91 F.3d 1547 (3d Cir. 1996) (en banc), cert. granted, 117 S. Ct. 763 (1997). Taxman involved a Title VII challenge to a race-based layoff decision by a town board of education. Faced with laying off one of two teachers, the board invoked its affirmative action policy to retain the black teacher on the ground of promoting diversity. The Third Circuit held that a non-remedial affirmative action plan could not pass muster under Title VII. It found reliance on equal protection cases misplaced, because the Supreme Court had not imported equal protection standards into Title VII analysis, but the court indicated in dicta that were it to import equal protection analysis, it would not find promoting diversity a compelling interest. The Taxman case presented the Supreme Court with an opportunity to issue a definitive ruling about a remedial purpose requirement. However, the parties settled the matter shortly before it was to be argued before the Supreme Court. See, e.g., Abby Goodnough, *Affirmative Action Settlement: The Decision*, N.Y. TIMES,
Poised as we are for remedial purpose to become the sole permitted basis for race-related affirmative action, this Article considers the impacts and consequences of such a requirement. This Article finds that remedial purpose is not constitutionally required, and argues that such a requirement would present a number of troublesome dynamics. Imposing a remedial purpose requirement will force the political branches to resolve problems in a judicial manner and will exacerbate racial tensions by masking the politics that are still involved in implementing or rejecting affirmative action programs. Heightened proof requirements threaten to leave unremedied less traceable, but nonetheless pervasive, impacts of discrimination. Moreover, a remedial purpose requirement will create divergent interests and perceptions between majority and minority citizens and will squelch debate about racial problems. At the same time that a remedial purpose requirement exacerbates racial tensions, such a requirement will handicap the political branches from addressing that tension in a timely and effective manner.

Part I of this Article focuses on the emergence of a remedial purpose requirement for government-implemented affirmative action.\(^6\) This Part briefly traces the case law discussing remedial purpose. The Part then discusses in detail the Supreme Court decisions key to understanding the current status of a remedial purpose requirement, namely *City of Richmond v. J.A. Croson Co.*,\(^7\) as well as the subsequent decision of *Adarand Constructors, Inc. v. Pena*.\(^8\) Part I will also discuss the recent circuit court decisions that have reached different conclusions about a remedial purpose requirement. Part II of this Article reviews to what degree the Constitution requires remedial purpose for affirmative action. It looks critically at the notion that the Constitution's guarantee of personal rights mandates imposition of a remedial purpose requirement. This section also queries whether and how well a remedial purpose requirement achieves instrumental goals identified in *Croson*.

Part III of the Article looks more broadly at the impacts of a remedial purpose requirement. It identifies troubling ramifications and impacts of such a requirement. It argues that the politics associated with any race-related action taken by the legislative or executive branches of government cannot be eliminated, even within a remedial purpose framework. More importantly, this Part argues that a remedial purpose requirement will exacerbate racial tensions and, at the same time, impair government's ability to address racial problems.

Finally, in Part IV, this Article urges the adoption of discrete requirements.

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6. A separate and distinct category of cases, not addressed in this Article, involves judicially-implemented affirmative action, but those cases necessarily involve remedial purpose because that is the nature of judicial power within our system of government.


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to mitigate the risks potentially associated with affirmative action, rather than an overarching remedial purpose framework. Requirements such as time limits and the equivalent of affirmative action business plans would ensure containment, periodic political review, and reassessment of race-conscious measures. Affirmative action business plans would require identification of goals, the establishment of tracking measures to ascertain whether the goals are being achieved, and accumulation of data to adjust the measures being taken. Adoption of such discrete measures minimizes the risks associated with affirmative action without constraining too greatly the power of the political branches to deal with race-related problems.

I. AFFIRMATIVE ACTION TODAY

Affirmative action refers to a broad array of programs directed at increasing the participation of individual members of groups perceived to be unacceptably absent. This absence is usually perceived to be a consequence of past or present discrimination directed at members of the group. At their core, affirmative action programs eschew reliance on the free market or race- or gender-neutral government action to allocate jobs and benefits. With affirmative action programs, the government mandates or undertakes steps to increase the participation of identified groups.

Affirmative action programs have sought to increase participation in a number of ways. The Supreme Court has disallowed quotas and other affirmative action programs that rigidly eliminate possibilities for non-minority candidates, but the Court has permitted or at least tolerated flexible.

9. The broad and imprecise meaning of affirmative action is highlighted in Brief for The Equal Employment Advisory Council As Amicus Curiae In Support Of Neither Party, (No. 96-679), available in 1997 WL 523712, recently filed in Taxman. In its brief, the Equal Employment Advisory Council observes that affirmative action is not synonymous with race-based preferential treatment, but includes such things as expanded recruiting efforts, specialized training, mentoring and support programs. Id. at *8-9.

10. This Article focuses on race-related affirmative action and does not discuss gender-based affirmative action. The standard of review for gender-based distinctions, much like the standard for race-based distinctions, has caused the Court much difficulty, but the standard appears to be intermediate scrutiny, requiring an important interest and a substantial relationship between the means chosen and that interest. See, e.g., Mississippi Univ. for Women v. Hogan, 485 U.S. 718, 724 (1982) (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)). As intermediate scrutiny is less harsh and does not require a compelling interest for the government action to survive, the issue of remedial purpose as a sole compelling interest does not arise, though some of the analysis and policy discussed herein may nonetheless be relevant to gender-based programs.

11. See, e.g., Croson, 488 U.S. 469 (striking down local set-aside program that required prime contractor on every city contract to subcontract at least 30% of the dollar amount of the contract to minority-owned business); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (prohibiting the layoff of white teachers with more seniority to preserve the positions of junior minority teachers); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (striking down racial quota for the admission of medical students); cf. United States v. Paradise, 480 U.S. 149 (1987) (striking down a court-ordered one-black-for-one-white promotion quota); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) (holding that a federal judge overstepped authority in ordering override of a seniority system to
affirmative action programs. For purposes of this Article, "affirmative action" refers to race-based preference programs but does not include quotas and programs mandating the selection of particular candidates, which the Supreme Court has found to be impermissible. In referring to affirmative action, this Article refers to flexible programs designed to target for inclusion, but not mandate for inclusion, members of identified groups.

Affirmative action undeniably takes account of and adds race or ethnic origin to the criteria used for selecting candidates or distributing benefits, which is what troubles critics of affirmative action. Critics argue that taking account of race or ethnicity, no matter how limited or well-intentioned, can only lead to further race- or ethnic-based classifying and hostilities. As Justice Stewart stated in a dissenting opinion on affirmative action, any action based on race "is by definition invidious discrimination."

Critics of affirmative action often argue the Constitution is colorblind. Colorblindness is the notion that our Constitution tolerates no government preserve the jobs of junior African-American firemen facing layoffs).


13. Flexible programs are viewed as less of an affront to the individual rights of non-minorities. In contrast to absolute prohibitions on hiring, using or promoting a non-minority irrespective of his or her individual strengths and characteristics, flexible programs provide only a preference to minority citizens, so an individual non-minority still has a chance. See, e.g., Croson, 488 U.S. at 493 (observing that a rigid rule denies personal rights to be treated with equal dignity and respect). But see Ian Ayres, Narrow Tailoring, 43 U.C.L.A. L. Rev. 1781, 1784 (1996) (arguing quotas may be more narrowly tailored to achieve remedial interest than many racial preferences).

14. As Justice Scalia stated in Croson, "It is plainly true that in our society blacks have suffered discrimination immeasurably greater than any directed at other racial groups. But those who believe that racial preferences can help to 'even the score' display, and reinforce, a manner of thinking by race that was the source of the injustice and that will, if it endures within our society, be the source of more injustice still." 488 U.S. at 527-28; see also ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 133 (1975) (noting that "discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society"); Morris B. Abram, Affirmative Action: Fair Shakers and Social Engineers, 99 Harv. L. Rev. 1312, 1321 (1986) (asserting that "the attempt to end discrimination through color-conscious remedies must inevitably degenerate into a crude political struggle between groups seeking favored status"); Charles Fried, Affirmative Action After City of Richmond v. J.A. Croson Co.: A Response to the Scholars' Statement, 99 Yale L.J. 155 (1989) (seeing in Croson an affirmation that government use of race affronts "a deep value of our constitutional polity" and must be used only in a narrow remedial context where it becomes victim-conscious, not race-conscious); William Bradford Reynolds, Individualism vs. Group Rights: The Legacy Of Brown, 93 Yale L.J. 995 (1984) (arguing that government's use of group-oriented racial preferences has made society increasingly racially polarized and insensitive to individual rights).

15. Fullilove, 448 U.S. at 526 (Stewart, J., dissenting).

16. See, e.g., Croson, 488 U.S. at 521 (Scalia, J., concurring in judgment); Fullilove, 448 U.S. at 522 (Stewart, J., dissenting); see also supra note 14.
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classifications or action on account of race or ethnicity. Advocates of colorblindness tout it as the most moral and even-handed way to interpret the Equal Protection Clause. Despite vociferous support for colorblindness, however, the Supreme Court has never declared the Constitution colorblind. Instead, the Court thus far has contained affirmative action programs by applying strict scrutiny, which requires a compelling interest and a narrowly tailored response.

When the Court first adopted strict scrutiny in Croson, a plurality of the Court suggested that only remedial purpose would suffice as a compelling interest capable of sustaining an affirmative action program. This section discusses the meaning of remedial purpose and then traces the emergence of remedial purpose in the case law on affirmative action. This section also discusses in detail the recent decisions that have set the stage for a remedial purpose requirement.

A. Defining Remedial Purpose

"Remedial purpose" does not have a clear meaning. About the only concrete sense that emerges is a backwards-looking orientation. "Remedial"

17. See, e.g., Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("Our constitution is color-blind, and neither knows nor tolerates classes among citizens.").
18. Colorblindness has much appeal in a society that values individual liberty and would like to believe individuals get what they deserve; those who work hard will succeed, even in the face of group handicaps that might temporarily remain as the result of discrimination. See, e.g., Lino A. Graglia, Special Admission of the "Culturally Deprived" to Law School, 119 U. PA. L. REV. 351, 352 (1970) ("[S]ocietally approved racial discrimination . . . undermines our most basic ideal that individual merit and individual need should be the only relevant considerations for societally distributed rewards and benefits"). Colorblindness also creates an unambiguous and easily applicable standard by which to interpret the Equal Protection Clause.
19. Actual colorblindness as a constitutional requirement not only would affect what the legislative and executive branches of government could do, but also would constrain courts. Colorblindness would not eliminate the power to provide a remedy to identified victims of identified discrimination, because such a particularized exercise of remedial power would not require recognition of race except incidentally as the identifying factor that provoked the harm in the first place. See, e.g., Croson, 488 U.S. at 526 (Scalia, J., concurring in judgment). But colorblindness would eliminate the power to award any relief for less easily attributable harms experienced by minorities generally. Given the Supreme Court's key role and experience with dismantling discrimination in education, among other areas, and given the evidence that race and ethnicity still make a difference and provoke discrimination, the Court's reluctance to adopt colorblindness may be due to a reluctance to forego its own power. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, Forward: Law as Equilibrium, 108 HARV. L. REV. 27 (1994). Thus, the Supreme Court has not declared the Constitution colorblind. As Professor Aleinikoff states, however, the Croson decision is "grounded in the metaphor of colorblindness." T. Alexander Aleinikoff, A Case for Race Consciousness, 91 COLUM. L. Rev. 1060, 1061 (1991).
20. Strict scrutiny was adopted for state-sponsored affirmative action programs in Croson, 488 U.S. at 493-94; id. at 520 (Scalia, J., concurring in judgment) (agreeing with the strict scrutiny standard). Strict scrutiny was adopted for federally-sponsored programs in Adarand, 515 U.S. at 227 (1995).
23. See Id.
implies that something wrong has occurred before and now needs attention.\textsuperscript{24} With a remedial orientation, one is not free to act as one chooses; rather, one's actions are limited by and must somehow be fitted to the wrong that has gone before.\textsuperscript{25}

A remedial purpose requirement establishes an orientation to the past but does not answer to what degree present action must fit or be dictated by the past wrong. The diverse positions of the Justices in \textit{Croson} who professed to endorse remedial purpose demonstrate the types and degrees of past wrongs that can be cast into a remedial purpose paradigm. Justice Marshall embraced remedial purpose, but in his view it encompassed broad-based programs designed to remedy societal inequities attributable to the legacy of slavery.\textsuperscript{26} Justice Scalia embraced the narrowest concept of remedial purpose, one tied to identification of particular individuals who had suffered discrimination directly as a result of government action.\textsuperscript{27} The \textit{Croson} plurality ultimately endorsed a remedial purpose requirement neither so broad as to encompass societal discrimination, nor so narrow as to require the identification of specific victims of specific instances of discrimination; it endorsed a view of remedial purpose requiring a “strong basis in evidence” of “identified discrimination.”\textsuperscript{28}

B. \textit{Towards Croson and Beyond}

Remedial purpose received its most extensive analysis from the Court in \textit{Croson}, but the Court's opinions\textsuperscript{29} on government-sponsored affirmative action reflect consideration of remedial purpose from the beginning. In the beginning, however, remedial purpose was used in a broad sense. Most importantly, in the early cases, consideration of a remedial purpose requirement was tempered by Justices who cautioned against impairing the political branches.

From the very beginning, remedial purpose meant different things to

\textsuperscript{24} See DAVID SCHOENBROD, ET AL., REMEDIES: PUBLIC AND PRIVATE 1, 10 (1990).
\textsuperscript{25} Professor Paul Gewirtz explains with respect to judicial power that a violation in equal protection cases “is not simply a trigger for judicially-mandated action, unleashing a freewheeling judicial policy-making power. Rather, the remedy must be linked to the violation as a corrective, a measure that seeks to eliminate the violation’s harmful effects.” Paul Gewirtz, \textit{Choice in the Transition: School Desegregation and the Corrective Ideal}, 86 COLUM. L. REV. 728, 732 (1986).
\textsuperscript{26} See \textit{Croson}, 488 U.S. at 542-46.
\textsuperscript{27} See \textit{id.} at 524-26.
\textsuperscript{28} \textit{Id.} at 509-10 (quoting \textit{Wygant} v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986)).
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different Justices. In *Regents of the University of California v. Bakke*, Justice Powell, who announced the Court’s judgment and authored an opinion, asserted that judicial decisions condoning racial preferences had all arisen in the context of determinations that past discrimination had occurred. Justice Powell believed such determinations rendered substantial the government interest in extending a preference. Justice Powell concluded the Court could not enjoin California from ever considering race, because the state had “a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.”

In *Bakke*, Justices Brennan, White, Marshall and Blackmun agreed with Justice Powell that the state could not be enjoined from ever considering race. They thought remedying the effects of past societal discrimination could be an important interest justifying race-conscious admissions. However, these Justices cautioned against requiring “a judicial determination” of a violation as a predicate for race-conscious remedial actions, and they deemed remedial purpose “largely irrelevant” to resolving the constitutional claim of an innocent majority citizen asked to bear the burden of the purported remedy.

Broad interpretations of remedial purpose prevailed when the Court next

30. The *Bakke* case involved a challenge under the Equal Protection Clause, as well as Title VI, to a special admissions program at the Medical School of the University of California at Davis. The challenged program set aside 16 admission slots for minorities and evaluated minority applicants for those slots separately from other candidates. Minorities could also participate in the general application process for the remaining 84 slots. See *Bakke*, 438 U.S. at 272-75.

31. No opinion commanded a majority in *Bakke*. Rather, the Justices issued a total of six opinions. The dissent argued that the constitutional issue concerning racial preferences should not be reached. *Id.* at 408-21 (Stevens, J., joined by Burger, C.J. and Stewart and Rehnquist, JJ., dissenting).

32. *Id.* at 302.

33. According to Justice Powell, after judicial, legislative or administrative findings of constitutional or statutory violations have been made, “the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined.” *Id.* at 307-08. Significantly, Justice Powell did not state any criteria or standard for the underlying determinations of violations, nor did he identify what degree of fit should be required between such determinations and the preference extended.

34. *Id.* at 320.

35. See *id.* These Justices thought claims of the law’s colorblindness to be aspirational rather than descriptive of reality. See *id.* at 327.

36. See *id.* at 362. Indeed, Justice Marshall wrote separately to endorse remedying “the cumulative effects of society’s discrimination.” *Id.* at 396 (Marshall, J., concurring in part, dissenting in part).

37. Justices Brennan, White, Marshall and Blackmun felt that requiring a “judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial action would be self-defeating,” *id.* at 364, because such a requirement would undermine voluntary efforts to comply with the law against discrimination.

38. *Id.* at 365. These Justices observed that the burden placed on a majority citizen did not involve any pervasive or stigmatic injury and thus was “not distinguishable from disadvantage caused by a wide range of government actions, none of which has ever been thought impermissible for that reason alone.” *Id.* at 373.

decided an equal protection challenge to a federal set-aside program in *Fullilove v. Klutznick*. There, Chief Justice Burger stressed and deferred to Congress's power to determine public policy. The Chief Justice approved Congress's remedial purpose, meaning a general intent to avoid further skewing of opportunities due to race or ethnicity. He expressly rejected the suggestion that Congress had to act in a colorblind manner. Finally, Chief Justice Burger rejected objections based on the disappointment of nonminority firms due to individual burden and under- or over-inclusiveness.

Justice Powell, writing separately, found that the program challenged in *Fullilove* served a compelling interest because it was a remedy designed to eradicate the continuing effects of past discrimination. Justice Powell felt that appropriate findings were crucial to establishing permissible remedial action, but he accepted a lack of specific factual findings from Congress

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39. 448 U.S. 448 (1980). The minority business enterprise provision of the Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116, 42 U.S.C. § 6701 et seq, required that at least 10% of federal funds granted for local public works be used by the state or local grantee to purchase services or supplies from businesses owned by minority group members. See 448 U.S. at 463. The program provided for an administrative waiver in the event a minority business enterprise could not be found at a reasonable price. See id. at 469-71. Associations of construction contractors and subcontractors and others brought a facial challenge to this federal law.

40. Chief Justice Burger announced the Court's judgment and in his opinion was joined by Chief Justice White and Powell. See *Fullilove*, 448 U.S. at 453.

41. For instance, Chief Justice Burger noted that Congress was charged to provide for the general welfare, see id. at 472; that Congress could legislate without the particular evidentiary record required in judicial or administrative proceedings, see id. at 477-78; that in Congress reposed the most comprehensive remedial power, charged as it is by the Constitution "with competence and authority to enforce the equal protection guarantees," id. at 483; that Congress, and not the courts, bears the "heavy burden of dealing with a host of intractable economic and social problems," id. at 486; and that Congress needed latitude to experiment and meet those social and economic problems, see id. at 490.

42. Chief Justice Burger referred to Congress's general intent to avoid "practices that Congress had decided might result in perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities." Id. at 473. He also condoned Congress's acting on the basis of "evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises," and Congress's determination that the burden was imposed "by 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." Id. at 478.

43. See id. at 482. He noted that courts have the power to consider race to remedy constitutional or statutory violations, so Congress also must have the power to consider race because the Constitution gives it even broader remedial power than the courts. See id. at 483-84.

44. See id. at 484-85. Chief Justice Burger found permissible a sharing of the burden by innocent parties because the burden was relatively light and "it was within congressional power to act on the assumption that in the past some nonminority business may have reaped competitive benefits over the years from the virtual exclusion of minority firms from these contracting opportunities." Id. at 484. Chief Justice Burger also rejected arguments that the program was underinclusive, as he found no invidious discrimination at work and noted that Congress had the power to act in steps. See id. at 485-86. Finally, the Chief Justice rejected claims that it was overinclusive, because the waiver and an administrative review process provided sufficient checks on abuses and an opportunity on a case-by-case basis to fit the program to its remedial purposes. See id. at 486-89.

45. See id. at 496 (Powell, J., concurring). Justice Powell also approved of a remedial purpose designed to ameliorate the disabling effects of identified discrimination. See id. at 497.

46. See id. at 498.
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because it had a broader mission than courts and had made a reasonable
determination "that private and governmental discrimination had contributed
to the negligible percentage of public contracts awarded minority contrac-
tors." 47

Justices Marshall, Brennan and Blackmun concurred in the Fullilove
judgment, but they united behind Justice Marshall's separate opinion. 48 Justice
Marshall advocated an intermediate standard of scrutiny 49 for racial classifications
designed to "provide benefits to minorities for the purpose of remedying
the present effects of past racial discrimination." 50 Justice Marshall believed
the federal set-aside met the intermediate standard of review. He felt that
Congress had reasonably determined the set-asides "were necessary to break
down the barriers confronting participation by minority enterprises in federally
funded public works projects." 51

A narrow concept of remedial purpose was first embraced in Wygant v.
Jackson Board of Education. 52 There, a majority of the Court 53 found that

47. Id. at 503. Justice Powell noted, "Congress is not an adjudicatory body called upon to resolve
specific disputes between competing adversaries. Its constitutional role is to be representative rather than
impartial, to make policy rather than to apply settled principles of law." Id. at 502.

48. Justice Stewart wrote a dissenting opinion that was joined by Justice Rehnquist, and Justice
Stevens wrote a separate dissent. The Stewart opinion argued for a colorblind interpretation of the
Constitution. Justice Stewart thought judicial decrees from a court of equity that considered race were
"wholly different from generalized legislation," id. at 525 n.4 (Stewart, J., dissenting), and that the
legislative branch of government "has neither the dispassionate objectivity nor the flexibility that are
needed to mold a race-conscious remedy around the single objective of eliminating the effects of past
or present discrimination." Id. at 527 (Stewart, J., dissenting). Justice Stevens, however, was not
convinced that the Fourteenth Amendment contained "an absolute prohibition against any statutory
classification based on race." Id. at 548. He felt the legislation at issue was poorly drafted to suit its
alleged purposes, see id. at 537-47, and that Congress had given only perfunctory consideration to an
unprecedented policy of profound constitutional importance. See id. at 548-54. Justice Stevens urged
rejection of the federal legislation on the ground that it was not narrowly tailored, but he thought
Congress conceivably could legislate on the basis of race if it were shown that the beneficiaries were
victims of unfair treatment in the past, or that they were less able to compete in the future. See id. at
553.

49. Specifically, he advocated an inquiry that asks whether the racial classifications "serve
important governmental objectives and are substantially related to achievement of those objectives." Id.
at 519.

50. Id. at 518.

51. Id. at 521.

52. 476 U.S. 267 (1986). The Jackson Board of Education and the union agreed to lay off teachers
in proportion to their racial representation on the faculty as a whole; as a consequence, minority teachers
with less seniority were retained while nonminority teachers were laid off. See id. at 272.

53. Four Justices dissented. Justices Marshall, Brennan and Blackmun believed the Court had
approved of affirmative action and that the layoffs were a necessary corollary of an affirmative action
hiring policy. See id. at 302, 307 (Marshall, J., dissenting). These Justices rejected any suggestion that
the Board of Education had to have formal findings of discrimination, which would only have exposed
the Board to further litigation and liability. See id. at 304. Justice Stevens rejected the requirement of
past discrimination and found instead a legitimate interest in employing more black teachers to advance
the public interest in educating children for the future. See id. at 313 (Stevens, J., dissenting).
Moreover, he believed the layoff policy had been fairly adopted after careful negotiation with the Board
and the union. See id. at 317-18.
racially motivated layoffs violated the Equal Protection Clause, and a plurality rejected the role model justification for retaining minority teachers. The plurality asserted that prior decisions embracing remedial purpose had only allowed government to use racial classifications if there was prior discrimination by the governmental unit involved and the classifications were designed to remedy such discrimination. Moreover, for the first time, remedial purpose was linked to a specific evidentiary standard; according to the plurality, there had to be "convincing evidence that remedial action is warranted." 

A requirement of remedial purpose received its narrowest interpretation and its fullest discussion in City of Richmond v. J.A. Croson, Co. There, a plurality adopted a remedial purpose requirement narrowly modeled after corrective justice. There too, the requirement of remedial purpose was tightly bound to a strict evidentiary standard.

The Court in Croson reviewed an equal protection challenge to a Minority

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54. Justice Powell wrote an opinion that Justices Rehnquist and Burger joined in total, see id. at 269, 283, and that Justice O'Connor joined in all but one part. See id. at 294-95. Justice White wrote separately to join in the judgment on the basis that none of the interests asserted by the Board of Education, either singly or together, justified a racially discriminatory layoff policy. See id. at 295.

55. Supposedly, the role model justification had no "logical stopping point" and could lead to the very system rejected in Brown v. Board of Education, 347 U.S. 483 (1954). See Wygant, 476 U.S. at 275-76.

56. See Wygant, 476 U.S. at 274.

57. Id. at 277. Justice O'Connor, who later would author the Croson plurality decision requiring remedial purpose, apparently was reluctant in Wygant to embrace a narrowed remedial purpose requirement. The Justice wrote separately to emphasize that government can remedy past or present racial discrimination so long as it has "a firm basis for believing that remedial action is required." Id. at 286 (O'Connor, J., concurring in judgment). She expressly acknowledged promotion of diversity in higher education as a still valid interest under Bakke, and noted that the Court was saying nothing in Wygant that foreclosed the possibility of other compelling interests. Id. While Justice O'Connor cautioned against imposing evidentiary requirements that would undermine public employers' incentive to meet their civil rights obligations. Voluntary efforts by public employers were important because they set an example, and if discrimination by the government was tolerated, minorities would be mistrustful of and alienated from government, and government would be less aware of and less equipped to address minority concerns. See id. at 290-91.

58. 488 U.S. 469 (1989). Croson involved a lawsuit by J.A. Croson Company against the city of Richmond, Virginia. The company sued when it lost a city contract that it previously had been awarded. At the time, Richmond had in place a five-year Minority Business Utilization Plan (the "Plan") that required at least thirty percent of the dollar amount of each public contract be subcontracted to one or more minority business enterprises. The Croson company lost the city contract because it could not find a local minority business enterprise to participate at an acceptable price. The city denied the company's requests for either a waiver of the Plan's requirement or an increase in the contract price to accommodate a late-bidding and expensive minority business enterprise. Instead, the city rebid the contract. See id. at 482-83.

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Business Utilization Plan that had been adopted by the Richmond City Council. A majority of the Court adopted strict scrutiny as the appropriate standard of review. Justice O'Connor wrote that Fourteenth Amendment rights are guaranteed to individuals and that a "rigid rule erecting race as the sole criterion" denied personal rights to be treated with "equal dignity and respect." She concluded that strict scrutiny was necessary to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.

A plurality in *Croson* held that only if a local program has a remedial purpose can it serve a compelling interest and satisfy strict scrutiny. "Classifications based on race carry a danger of stigmatic harm. Unless they

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60. The Richmond City Council had considered the Plan at a public hearing during which five members of the public voiced opposition and two voiced support. Proponents of the Plan relied on a study that demonstrated only 0.67% of the city's prime construction contracts had been awarded to minority businesses from 1978 to 1983, even though the general population of Richmond was 50% African American. Also established was the virtual absence of minority business members within a variety of contractor associations. However, no direct evidence of race discrimination by the city or the city's prime contractors was produced; public witnesses testified that minority contractors were just not available. See *Croson*, 488 U.S. at 479-80.

Ultimately, the City Council adopted the Plan, declaring it to be remedial and for the "purpose of promoting wider participation by minority business enterprises in the construction of public projects." *Id.* at 478. A minority business enterprise was defined as any business of which at least 51% was owned and controlled by minority group members, who in turn were defined as "citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Id.* A minority business enterprise from anywhere in the United States could avail itself of the Plan. See *id.* At the time of the Plan's adoption, African Americans held five of nine seats on the City Council. See *id.* at 495.

61. Justice O'Connor wrote on behalf of a plurality. See *id.* at 493-94. However, Justice Scalia endorsed strict scrutiny in a separate opinion. See *id.* at 520 (Scalia, J., concurring in judgment).

62. *Id.* at 493 (citing *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)). Justice O'Connor concluded that 

63. Justice Scalia concurred with the judgment of the majority, but wrote separately that there is only "one circumstance in which the states may act by race to 'undo the effects of past discrimination': where that is necessary to eliminate their own maintenance of a system of unlawful classification." 488 U.S. at 524. Justice Scalia’s opinion arguably indicates that a majority of the Court has endorsed a remedial purpose requirement. See, e.g., *Hopwood v. Texas*, 78 F.3d 932, 944-45 (5th Cir. 1996); T. Alexander Aleinikoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 Mich. L. Rev. 588, 613 (1993) (observing that a majority of the Court in *Croson* demands that racial classifications be strictly reserved for remedial settings). Justice Scalia’s remedial purpose requirement, however, is so stringent and narrow as to be wholly different from the plurality’s, and thus intolerant of affirmative action. Indeed, Justice Scalia perceived the difference as so great that he felt compelled to write a separate opinion. Moreover, if the Court did adopt a remedial purpose requirement in *Croson*, then one would have expected the Court not to remand in the later case of *Adarand*, or at the very least to have instructed the lower courts that not only did the remanded case have to be evaluated with strict scrutiny, but that the only compelling interest permitted was a remedial purpose. Instead, and despite Justice O’Connor authoring the Court’s opinion in *Adarand*, the *Adarand* decision fails to mention a remedial purpose requirement.

65. Justice Stevens disagreed expressly "with the premise that seems to underlie today's decision that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong." *Id.* at 511 (Stevens, J., concurring in part and concurring in the judgment).
are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.” The plurality also held that remedial purpose can only be established with a strong basis in evidence approaching a prima facie case of a constitutional or statutory violation.

According to the *Croson* plurality, remedial purpose is required because Fourteenth Amendment rights are guaranteed to individuals, thus protecting only personal rights, and because several instrumental concerns implicate personal rights. These concerns can be summarized as stigma, uncontained race-based action, disruption of the status quo and racial divisiveness.

A majority in *Croson* found Richmond’s Plan unconstitutional. Writing for the Court, Justice O’Connor rejected as compelling a “generalized assertion that there has been past discrimination in an entire industry,” because this provided no guidance as to the scope of the injury to be remedied and “no logical stopping point.” According to the majority, Richmond’s plan...

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66. *Id.* at 493.

67. See *id.* at 500. The evidence proffered by Richmond’s city council was held not to meet the standard delineated in *Croson*. A majority of the Court found that though the Richmond council alleged a remedial purpose, only a few of its findings were based on hard statistical (as opposed to opinion) evidence, and the council’s statistical evidence only chronicled disparities between both the number of contracts minorities were awarded and minorities’ representation in various trade organizations versus their representation in the general population. The majority of Justices viewed the ability to do prime or subcontracting work in public construction projects as a special qualification that made comparisons to the general public nonprobative. See *id.* at 500-03. Likewise, the majority found the dearth of minorities in the trade organizations relevant only if linked to the number of local MBE’s eligible for membership. Justice O’Connor wrote: “If the statistical disparity between eligible MBE’s and MBE membership were great enough, an inference of discriminatory exclusion could arise.”

68. See *id.* at 493-98, 510.

69. Justice O’Connor reached this conclusion in part III.B of her opinion, in which Justices Rehnquist, White, Kennedy, and Stevens joined. Although Justice Stevens joined in finding the Plan unconstitutional, he wrote separately to explain that rather than use strict scrutiny’s notions of compelling interest and narrow tailoring, he would have characterized the Plan as not rational. See *id.* at 514 n.6. Justice Scalia also found the Plan unconstitutional, because he felt that a government could not remedy anything other than its own discrimination, making a program like Richmond’s overly broad and not compelling. See *id.* at 524.

70. In *Croson*, both the plurality and Justice Scalia believed the Richmond City Council’s actions reflected one racial group favoring itself. Noting that the City Council was majority Black, and that Blacks constituted approximately fifty percent of the population, the plurality suggested this was not an instance of a majority group disadvantaging itself to advantage a minority group. The “random inclusion” in the Plan of other racial groups that had likely never entered Richmond’s construction industry, let alone resided in Richmond, indicated to the plurality that “perhaps the city’s purpose was not in fact to remedy past discrimination.” *Id.* at 506. Justice Scalia believed that Richmond’s plan represented “the enactment of a set-aside clearly and directly beneficial to the dominant political group, which happens also to be the dominant racial group.” *Id.* at 524.

71. *Id.* at 498 (quoting *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986)). Ironically, Justice O’Connor went on to say that “relief for such an ill-defined wrong could extend until the percentage of public contracts awarded to [Minority Business Enterprises] in Richmond mirrored the percentage of minorities in the population as a whole.” Though many criticisms surely could be leveled at a goal of proportionality, lack of logic is not one. See Martin J. Katz, *The Economics Of Discrimination: Three Fallacies of Croson*, 100 YALE L.J. 1033, 1035-39 (1991).

72. The dissent, by Justice Marshall, objected to strict scrutiny. They thought a government’s race-conscious classifications designed to further remedial goals were acceptable if they served important...
failed both because none of the City Council's general findings provided a "strong basis in evidence for its conclusion that remedial action was necessary," and the City Council neither considered race-neutral alternatives nor narrowly fitted its race-conscious methods to the alleged problem.

Croson severely narrowed the scope of permissible affirmative action by applying strict scrutiny and strongly suggesting both that remedial purpose and substantial evidence would be required. However, Croson dealt with a local affirmative action program and the Court limited its adoption of strict scrutiny to state and local programs. When the Supreme Court addressed affirmative action by the federal government in Metro Broadcasting, Inc. v. FCC, remedial purpose was not discussed by the majority because intermediate scrutiny was applied to the federal government. In dissent, however, Justice O'Connor argued not only for strict scrutiny but also for remedial purpose as governmental objectives and were substantially related to achievement of those objectives. See Croson, 488 U.S. at 535. The dissent thought Richmond had two powerful interests: eradicating the effects of past discrimination and ensuring that government spending did not perpetuate the effects of past discrimination. See id. at 536. On behalf of the dissent, Justice Marshall decried the majority's disaggregation of and piecemeal attack on Richmond's evidence establishing those interests, see id. at 541, as well as the majority's lack of respect for local government. See id. at 543-44. Justice Marshall also thought the Plan was substantially related to its purposes; it was narrowly tailored to address the situation at hand and appropriately modeled in light of federal experiences. See id. at 548-50.

73. Richmond's City Council had relied on a study that showed only 0.67% of the city's prime contracts had been awarded to minority businesses in the preceding five years, even though 50% of the city's population was African American, as well as evidence demonstrating the virtual absence of minority businesses within six local construction industry associations. See id. at 479-80. Justice O'Connor thought the 30% set-aside of the Plan could not "in any realistic sense be tied to any injury suffered by anyone", in part because it would be "sheer speculation how many minority firms there would be in Richmond absent past societal discrimination." Id. at 499.

74. Id. at 500 (quoting Wygant, 476 U.S. at 277).

75. Justice O'Connor identified many of the entry problems facing minority businesses as race-neutral ones, such as lack of capital or inability to meet bonding requirements. Accordingly, she thought Richmond should have first tried race-neutral measures, such as providing city financing for small businesses. See id. at 507. Justice O'Connor also thought the Plan's 30% goal was too broad, approaching a call for outright racial balancing; she suggested a case-by-case review would be appropriate, especially as bids had to be evaluated individually anyway. See id. at 507-08.

76. See id. at 490-91.


78. The Court applied intermediate scrutiny to a federal program directed at increasing minority ownership of broadcasting stations and upheld the program. The FCC's race-conscious programs were enacted after the FCC documented the failure of race-neutral approaches to increase both minority station ownership and program diversity. See id. at 555-56. A majority of the Court found the promotion of programming diversity on scarce electromagnetic frequencies to be an important governmental objective, which bore a substantial relationship with the means chosen, namely facilitating minority ownership of broadcast stations. The majority did not defer, but did pay close attention, to the expertise of the FCC and the factfinding of Congress with respect to the "complex empirical question" about the "nexus between minority ownership and programming diversity." Id. at 569. Justice Brennan found constitutional 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." Id. at 564-65. Justice Stevens endorsed the majority's focus on future benefit rather than remedial justification, as utilized in Croson and Wygant. See id. at 601 (Stevens, J., concurring).
the only compelling interest.⁷⁹

Remedial purpose became a relevant concept at the federal level when *Metro Broadcasting*’s intermediate scrutiny standard was rejected in *Adarand Constructors, Inc. v. Pena.*⁸⁰ There the Court reviewed an equal protection challenge to a federal set-aside program of the United States Department of Transportation. Five justices held that a strict scrutiny standard of review should apply, and the majority accordingly overruled *Metro Broadcasting* “to the extent inconsistent” with *Adarand.*⁸¹

Strangely, Justice O’Connor did not discuss remedial purpose when she wrote the majority opinion in *Adarand.* Despite the strong suggestion in *Croson* that remedial purpose would be required for the survival of any government-sponsored affirmative action program, and Justice O’Connor’s *Metro Broadcasting* dissent wherein she advocated a remedial purpose requirement, remedial purpose was not addressed in *Adarand.*

C. Conflict In The Circuits

Not until the Fifth Circuit decision in *Hopwood* did a circuit court squarely wrestle with whether the only compelling interest for affirmative action is remedial purpose.⁸² Shortly thereafter, the Seventh Circuit in *Wittmer* reached a conclusion opposed to that of the Fifth Circuit. In the case that was before the Supreme Court, the Third Circuit did not address the issue directly, but indicated in dicta that it sided with the Fifth Circuit.

In *Hopwood v. Texas,*⁸³ a white plaintiff challenged the University of Texas School of Law’s affirmative action program. The law school used a two-track admissions process to benefit African Americans and Mexican Americans.⁸⁴ The stated purpose of the program was to meet an “aspiration” of

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⁷⁹. Justice O’Connor was joined in dissent by Justices Rehnquist, Scalia and Kennedy. The dissent expressly disavowed increasing the diversity of broadcast viewpoints as a compelling interest because it was “too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications.” *Id.* at 612 (O’Connor, J., dissenting).


⁸¹. *Id.* at 227. In adopting strict scrutiny, the majority expressly pointed out that it was not meant to be “strict in theory, but fatal in fact.” *Id.* at 237 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980)).

⁸². After *Croson,* courts proceeded on the assumption that remedial purpose was at least one compelling interest. *See, e.g., Aiken v. City of Memphis, 37 F.3d 1155, 1162 (6th Cir. 1994) (stating that a compelling interest exists when a state actor is remedying past discrimination); Stuart v. Roache, 951 F.2d 446, 449 (1st Cir. 1991) (stating that compelling state interest unquestionably exists where a race-conscious program remedies past and present discrimination); Coral Constr. Co. v. King County, 941 F.2d 910, 916 (9th Cir. 1991) (identifying several factors suggesting the existence of a compelling interest); Baker v. United States, 34 Fed. Cl. 645, 655 (1995) (holding that a compelling interest exists when there is convincing evidence that prior discrimination occurred and that remedial action is warranted).”

⁸³. 78 F.3d 932 (5th Cir. 1996), cert. denied, 116 S. Ct. 2581 (1996).

⁸⁴. The School of Law assigned admission candidates a Texas Index number, which was a composite of one’s undergraduate grade point average and Law School Aptitude Test score. The school also considered such things as the difficulty of one’s undergraduate school and degree, and one’s
admitting a class that roughly mirrored the proportion of African American and Mexican American students graduating from Texas colleges.\textsuperscript{85} The Fifth Circuit rejected the trial court's finding of two compelling interests to support the law school's affirmative action program.\textsuperscript{86} Two judges on the Fifth Circuit panel found that promotion of diversity as a government interest had never gained enough adherents on the Supreme Court to become law.\textsuperscript{87} Moreover, a majority found that \textit{Croson} and \textit{Adarand} indicated a critical mass on the Supreme Court had conclusively rejected diversity as a compelling interest.\textsuperscript{88} The majority in \textit{Hopwood} cleaved to Justice O'Conner's plurality opinion in \textit{Croson} and found that only remedial purpose could be a compelling interest.\textsuperscript{89}

Judge Wiener wrote a specially concurring opinion to disagree with his colleagues on the Fifth Circuit that diversity could never be a compelling interest.\textsuperscript{90} He agreed that the majority's position might "well be a defensible extension of recent Supreme Court precedent" and that it offered an attractive "bright-line rule," but he noted that \textit{Bakke} had never been "declared dead" and believed it was for the Supreme Court to do so.\textsuperscript{91}

Judge Weiner's position in \textit{Hopwood} was echoed a short time later by the Seventh Circuit. In \textit{Wittmer v. Peters},\textsuperscript{92} a unanimous court rejected the Fifth
Circuit position that only remedial purpose could be a compelling interest sufficient to support government affirmative action.

Defendants in *Wittmer*, officials of the Illinois Department of Corrections, admitted that race had been a factor in promoting an African American correctional officer in an experimental boot camp. They defended their decision with experts attesting to the penological necessity for the appointment; these experts explained that the predominantly black group of inmates would not play the "boot camp game" if there were no blacks in authority in the camp. The trial court, however, held that defendants' expert reports did not satisfy the defendants' stringent burden of justifying racial discrimination, so the trial court awarded summary judgment to plaintiffs on liability.

The Seventh Circuit reversed. Writing for a unanimous bench, Judge Posner agreed that strict scrutiny applied, but he noted strict no longer was to be a euphemism for fatal. Judge Posner acknowledged that reverse discrimination had been permitted in a remedial context, but he took this to demonstrate that reverse discrimination was not per se illegal. Judge Posner dismissed as mere dicta the idea that reverse discrimination could be tolerated only in the remedial context. He found the case did not involve what he characterized as the discredited "role model" justification. The Seventh Circuit upheld the race-based promotion because it was necessary to the fiercely intimate operation of the predominantly black camp, and that necessity had been backed up with unrebutted expert evidence.

The *Wittmer* opinion raises concerns about a narrow remedial purpose requirement that recall concerns raised by some of the Justices in earlier Supreme Court cases. In contrast, the Supreme Court's *Croson* decision demonstrates a surprising lack of analysis concerning possible broader and  

93. See id. at 918.

94. See id.

95. See id. at 919. Judge Posner was adamant that remedial purpose is not the sole compelling interest, but he circumscribed the Seventh Circuit's condoning of a race-conscious measure to the particular facts before the court in *Wittmer*. Judge Posner carefully pointed out that the court was not approving racial balancing of the security staff, nor was it approving yielding to extortionate demands the prisoners might make for guards of a similar race. He also pointed out that the court was not taking a position for or against considering race in the staffing of an ordinary prison. See id. at 920.

96. Id. at 919-20.

97. To some degree, Judge Posner's and the Seventh Circuit's decision may partake of the deference generally accorded government in the area of operating prisons. See, e.g., *Sandin v. Conner*, 515 U.S. 472, 482 (1995) ("Federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment.") (citations omitted).

98. Judge Posner admitted that defendants' experts had little experience with boot camps per se, but he observed that the boot camps were an experiment, "too recent to have been studied exhaustively," and "[i]f academic research is required to validate any departure from strict racial neutrality, social experimentation in the area of race will be impossible despite its urgency." See *Wittmer*, 87 F.3d at 920. Judge Posner dismissed plaintiffs' expert reports, which stated that belonging to the same race as inmates was not required to be effective as a guard, as "naked conclusions" that failed to join issue with defendants' experts. Id.
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unintended impacts arising out of a narrow remedial purpose requirement. Instead, the Croson decision focuses more immediately on reasons to implement a remedial purpose requirement. The next section looks critically at those reasons.

II. EVALUATING THE BASES FOR A REMEDIAL PURPOSE REQUIREMENT

According to Croson, remedial purpose is required by the Constitution because of personal rights and because of several instrumental concerns related to personal rights. The next section demonstrates, however, that remedial purpose is not required by the Constitution. Moreover, the assumptions and predictions implicit in the plurality's instrumental goals are not borne out.

A. A Principle External to the Constitution

Croson's narrow remedial purpose requirement gives the appearance of a considered and ascertainable constitutional standard. It is tied closely to notions of corrective justice,\textsuperscript{99} which in turn appears to create objective criteria and limits.\textsuperscript{100} Nonetheless, a remedial purpose requirement is not mandated by the Constitution.\textsuperscript{101} The language of the Fourteenth Amendment's Equal Protection Clause, its legislative history, and the case law interpreting the amendment do not mandate such a requirement. Rather, the remedial purpose requirement incorporates an external principle.

What the Fourteenth Amendment guarantees is "equal protection." The edict of equal protection, however, has no resolving power unless and until a principle external to the Equal Protection Clause is supplied.\textsuperscript{102} "Equal protection is a principle external to the Constitution. See Kent Roach, The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies, 33 ARIZ. L. REV. 859, 868 (1991) (citing II ARISTOTLE, THE NICOMACHEAN ETHICS III (D. Ross trans., J.L. Ackrill & J.D. Urmson rev. ed. 1925). Corrective justice is attractive in its 'self-contained rationality'; its promise that justice can be done through rectification and without 'continuous interference with people's lives'; and because it does not rely on problematic instrumental judgments about what is needed to achieve reform in the future." Roach, supra note 99, at 868. "In corrective justice, right and remedy are fused, and the exercise of remedial discretion is guided by considerations of liability and causation, which also determine whether rights have been violated." Id. at 859. Corrective justice also contains a sense of durational limits; the power to act endures only so long as the correction or remedy is not yet achieved. "Time becomes a pervasive preoccupation: looking backward, the corrective approach seeks to purge the present of the past; looking forward, it always anticipates the end of its efforts." Gewirtz, supra note 25, at 735.

101. This Section draws heavily on previous analyses and is meant only as a brief background to provide context for other sections.

102. This is a well-established and thoroughly explored idea. Professor Sunstein notes that all constitutional interpretation requires the use of interpretive principles that are the product of substantive commitments not found in the Constitution. See CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 8, 93 (1993). Similarly, commenting on the history of the Equal Protection Clause in particular, Professor Kull observes that the words equal protection "tell us little or nothing about a theory of classification"; another theory is needed to determine what are appropriate classifications. ANDREW KULL, THE COLOR-BLIND CONSTITUTION 81-82 (1992). Among other scholars addressing the Equal Protection Clause,
"equal protection" cannot require the government to treat everyone identically as the heart of legislation involves drawing distinctions and lines. So equal protection has been interpreted to require government to treat similarly all persons who are similarly situated. The challenge is determining which differences are inconsequential, leaving people nonetheless similarly situated and deserving of similar treatment, and which differences justify different treatment.

When political action is challenged under equal protection, an external principle is necessary to evaluate the claim. This external principle is what identifies significant and acceptable or problematic differences for purposes of equal protection analysis. But the identification and adoption of this

Professor Terrance Sandalow refers to the need for a material or substantive principle, see Terrance Sandalow, Racial Preferences In Higher Education: Political Responsibility and the Judicial Role, 42 U. CHI. L. REV. 653, 655 (1975); and Professor Owen Fiss refers to a mediating principle, see Owen M. Fiss, Groups and the Equal Protection Clause, 5 PHIL. & PUB. AFFS. 107-08 (1976). In this Article, I will refer to the need for an external principle.

103. See Sandalow, supra note 102, at 655 ("The constitutional guarantee of 'the equal protection of the laws'... does not mean that everyone must be treated equally. The state may tax some individuals at a high rate, some at a low rate, and some not at all. It may maintain a system of publicly supported higher education which admits as students only those who meet established criteria. A prime function of law, indeed, is to mark out the bases for discrimination by government in its relations with the citizenry."); see also, Kent Greenawalt, Discrimination and Reverse Discrimination 27 (1983) ("The nature of laws is to classify, to treat some people differently from others in some respects; so the [fourteenth] amendment obviously cannot mean that all people must be treated equally in every respect.").

104. See Sandalow, supra note 102, at 655.

105. For example, intelligence may be deemed a significant difference in determining which citizens are entitled to a limited number of positions at a state university, but most people would agree intelligence is not a significant difference for purposes of determining who is entitled to a limited number of beds in a state-run hospital. The importance of one's finances to either decision probably is debatable. That factor, too, can shift. If, for example, the hospital were issuing a rare treatment that only the government could provide, one's financial status would (or should) be less relevant than if the hospital were delivering routine services that could be obtained at a private facility.

106. As Professor Sandalow points out, the Equal Protection Clause does offer guidance when the administration of law rather than its substance is at issue. In such a circumstance, the law itself provides the external principle or measure of similarity. An equal protection challenge to the substance of law, however, is a claim that legislation treats differently individuals who are similarly situated in all respects that matter. There, the clause cannot offer guidance as to what are the respects that matter. See Sandalow, supra note 102, at 656-57.

107. The need for an external principle and the chameleon-like ability of the Equal Protection Clause to change meaning depending on circumstances and times is rooted in the legislative history of the Fourteenth Amendment. The 39th Congress that produced the Fourteenth Amendment considered but did not adopt language that would have declared the Constitution colorblind. Representative Thaddeus Stevens unsuccessfully introduced into the House an amendment that stated "no discrimination shall be made on account of race and color." Kull, supra note 102, at 67. Instead, Congress deliberately endorsed a less clear guarantee of equal protection. See id. at 67-67. At the time of the 39th Congress, race-based distinctions in the states' laws abounded. Any attempt to eliminate race as a legally relevant category "would have opened too wide a gap between the law and the understanding of the time." Sandalow, supra note 102, at 665. The guarantee of equal protection eventually carried the day precisely because it could tolerate existing race-based classifications. See Greenawalt, supra note 103, at 27-28; see also Kull, supra note 102, at 4. Thus, the Reconstruction Congress that approved the Fourteenth Amendment also enacted race-specific programs for African Americans. See, e.g., Eric Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 VA. L. REV. 753 (1985).
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external principle involves value judgments not dictated by and often not derivable from the Constitution. Thus, for instance, from Bakke straight through to Adarand, we see a debate among the Justices concerning colorblindness versus various conceptions of remedial purpose, all of which embody alternative external principles.

B. The Tenuous Connection Between Remedial Purpose and Personal Rights

One of the key reasons stated in Croson for a remedial purpose requirement is concern for personal rights. The reference to “any person” in the Equal Protection Clause arguably makes the individual the relevant focus of equal protection concern. Nonetheless, this emphasis hardly resolves whether remedial purpose should be required in the affirmative action context.

To say that equal protection requires emphasis on individual or personal rights neither informs us when government action implicates such rights, nor eliminates the relevance of group-based analysis and response. If government has a limited benefit to award and must choose between two individuals, no matter what choice government makes, the loser has experienced an individual impact and arguably has had personal rights affected. As discussed, all legislation classifies, some with ill effect on particular individuals, but not all impacts experienced by an individual as a consequence of that classification process result in an actionable violation of personal rights.

So what about unrestricted affirmative action results in an impermissible violation of personal rights? The fact that an individual experiences a bad outcome is not sufficient. And if personal rights are implicated only when particular bad outcomes are imposed, then some factor other than individual

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108. These value judgments “cannot be made ‘without positing a certain scale of values, a determination of what is important and what is not. It is our view of the world, the way we distinguish what has value from what has none,’ that leads us to conclude whether individuals are similarly or differently situated.” Sandalow, supra note 102, at 655-6 (quoting C. PERELMAN, THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT 27 (1963)). The most dramatic illustration of an external principle at work in the context of equal protection is the imposition of the “separate but equal” doctrine and the discarding of that doctrine over fifty years later. “Separate but equal” is, of course, the infamous external principle adopted by Plessy v. Ferguson, 163 U.S. 537, 548 (1896). That external principle tolerated extreme race consciousness and still found no violation of equal protection. Only when there was a change in societal values such that “separate but equal” could be discarded by Brown v. Board of Education, 347 U.S. 483, 495 (1954), could one even begin to argue realistically for the external principle of colorblindness.

109. Justice O'Connor concluded in Croson that personal rights are implicated in the equal protection clause because it is “any person” to whom equal protection is guaranteed. Croson, 488 U.S. at 493.

110. Justice O'Connor's use in Croson of the term “personal rights” is not defined, but it seems to mean the right to be considered on an individual and equal basis. Id. at 493.

111. See supra text accompanying note 103.
impact must be involved. In other words, the reference to personal rights does not have any inherent resolving power. The Croson plurality relied on an unstated a priori understanding of what bad outcomes implicate personal rights, an understanding that led them to conclude racial criteria are unacceptable.

A deprivation based on the Croson remedial framework offers no less of an affront to majority citizens' personal rights than a deprivation based on some other race-based paradigm. The remedial purpose framework erected by the Croson plurality is not strictly based on identifying individual victims and perpetrators and thus requires some consideration of groups. The Croson plurality acknowledged a role for redressing government-caused or government-tolerated discrimination, which it also recognized could only be effected at the expense of individual majority citizens who may or may not have had a hand in or derived a benefit from the discrimination. Thus, within Croson's remedial framework, it is somehow permissible to group majority citizens and attribute to them, or at least make them pay for, discrimination effected by groups of earlier, presumably majority citizens. The Croson plurality failed to articulate, however, why this grouping of majority citizens is less of an affront to the individual rights of each affected majority citizen.

Emphasizing individual rights also does not rule out the importance of group analysis to the determination and remediation of an equal protection violation. Given the inherent differences between almost any two individuals, how meaningfully to compare and evaluate the protection offered one individual or another is difficult to envision. At some level, group comparison, which can control for or otherwise smooth out the passing, irrelevant differences among individuals and can reveal what are the common elements that might be the subject of discrimination, seems necessary. Indeed, rule

112. In Croson, to illustrate the personal rights point, Justice O'Connor called upon the reverse discrimination scenario: she referred to the personal rights of majority citizens denied the opportunity to compete on an equal footing with minority citizens for a fixed percentage of public contracts. See 488 U.S. at 493. Justice O'Connor objected to the fact that race was the sole criterion used to eliminate an opportunity to these citizens. The Justice did not explain, however, why race as a criterion implicates personal rights more than say intelligence as a sole criterion.

113. Recall that in Bakke, Justices Brennan, White, Marshall and Blackmun deemed remedial purpose "largely irrelevant" to resolving the majority citizen's constitutional claims, because the burden of affirmative action did not involve pervasive or stigmatic injury and thus was indistinguishable from disadvantage caused by a wide range of government action. See 438 U.S. at 365, 375. Thus, these Justices apparently rejected the unstated understanding that motivates Justice O'Connor's Croson decision. Moreover, as Judge Posner found in Witmer, the fact that remedial purpose is permitted proves that reverse discrimination is not per se unconstitutional. See Witmer, 87 F.3d at 918.


115. Professor Sunstein recently made this same point, noting that "claims of unconstitutional discrimination are always group-based claims, even if they are made by 'any person.'" Cass R. Sunstein, Public Deliberation, Affirmative Action, and the Supreme Court, 84 CAL. L. REV. 1179, 1188-89 (1996).

116. Professor Owen Fiss commented some time ago on the antidiscrimination principle and the Equal Protection Clause, noting that the antidiscrimination principle was attractive to the Supreme Court in no small part because of its implicit individualistic focus, but that the individualistic appearance was
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of law advocates, far from seeking individualistic law, seek group-oriented classifications out of concerns for equality, constancy and continuity.

C. Remedial Purpose and Its Flawed Instrumental Goals

The *Croson* plurality addressed the issue of personal rights as though it were dispositive of the remedial purpose requirement, but the plurality nonetheless felt compelled to identify less abstract, more instrumental goals for adopting remedial purpose. These instrumental goals can be summarized as: eliminating stigma caused by affirmative action; containing the scope of affirmative action; limiting affirmative action to achievement of the status quo ante; and eliminating racial politics. These instrumental goals do not much advance the case for a remedial purpose requirement.

1. Eliminating Stigma

Remedial purpose is supposed to eliminate stigma, but such a requirement eliminates only one type of stigma and creates or exacerbates other types of stigma. Broad affirmative action programs not guided by remedial purpose are believed to cause stigma because they allegedly allow benefits to go to minority citizens who have not experienced discrimination but are simply unqualified. Thus, majority citizens so inclined may view all minority citizens as unworthy recipients of affirmative action rather than as qualified individuals.

The remedial framework, which connotes identification of wronged parties, wrongdoers and the scope of the wrong, is supposed to eliminate stigma by making race just a shorthand way of identifying the wronged party. The

misleading. The antidiscrimination principle requires courts to determine what are legitimate state purposes and what are compelling interests, as well as what are suspect classifications. As Professor Fiss observed, these categories incorporate "elements of groupism" and afford "some recognition to the role or importance of social groups or natural classes." Fiss, supra note 102, at 123-24. Professor Fiss further noted that the individualistic focus is particularly attenuated in the remedial context. See id. at 144-45. Indeed, the infamous footnote found in *Carolene Products* implicitly recognized a necessary role for group analysis when it spoke of "discrete and insular minorities," a group reference and not a reference to individuals. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).


118. Justice O'Connor stated that racial classifications have to be strictly reserved for remedial settings lest they promote notions of racial inferiority. See *Croson*, 488 U.S. at 493; see also id. at 516-17 (Stevens, J., concurring) (noting the stigma imposed on the beneficiaries of affirmative action).


120. This fusion of right and remedy occurs only because the Supreme Court has mandated a remedial purpose based on corrective justice rather than acknowledging distributive justice as a legitimate additional end of government. See supra note 99 and accompanying text. As Justice Scalia
remedial framework is supposed to make clear that only some minority citizens are beneficiaries of affirmative action, and those beneficiaries are not inherently unable to compete and succeed; rather, they have been victims of discrimination. Conversely, the remedial framework also is supposed to make clear that majority citizens are not excluded due to any lack of talent or qualifications, but only because redress must be effected.

The consideration of stigma that underlies Croson's remedial purpose requirement is unduly limited because it endorses perspectives of stigma held primarily by majority citizens about minority citizens, perspectives that may themselves be the product of pre-existing racist notions. There are some but not many minority citizens complaining of stigma as a consequence of affirmative action. Minority citizens are likely to be more concerned, or at least equally concerned, about stigmas that attach when they cannot obtain jobs or advance. And if at some point stigma becomes a widespread

pointed out in Croson, a stringent requirement of remedial purpose based on corrective justice should eliminate the need for any racial classifications:

[A] fundamental distinction must be drawn between the effects of "societal" discrimination and the effects of "identified" discrimination . . . . In my view, however, the reason that would make a difference is not, as the Court states, that it would justify race-conscious action . . . but rather that it would enable race-neutral remediation. Nothing prevents Richmond from according a contracting preference to identified victims of discrimination. While most of the beneficiaries might be black, neither the beneficiaries nor those disadvantaged by the preference would be identified on the basis of their race. In other words, far from justifying racial classification, identification of actual victims of discrimination makes it less supportable than ever, because more obviously unneeded.

488 U.S. at 526-27; see also GREENAWALT, supra note 103, at 45 (stating that if remedies are given only to people who actually suffered discrimination, then those people are favored "only because a denial of their rights has been established, not (except indirectly) because they are black").

121. As Justice O'Connor stated in dissent in Metro Broadcasting: "The remedial interest may support race classifications because that interest is necessarily related to past racial discrimination; yet the interest in diversity of viewpoint provides no legitimate, much less important, reason to employ race classifications apart from generalizations impermissibly equating race with thoughts and behavior." Metro Broadcasting, 497 U.S. at 615 (O'Connor, J., dissenting).

122. A remedial purpose requirement fails to consider and exacerbates other possible stigmas that should be of concern, as discussed later. See infra Part III.B.

123. See, e.g., STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991) (finding that racial preferences make African Americans doubt themselves and their abilities and encourage them to believe that they are weak victims); STANLEY CROUCH, THE ALL-AMERICAN SKIN GAME 21-32, 66-69 (1995) (noting that race-conscious measures suggest minority citizens are inferior and cannot cope with learning from others, achieving high standards, or having success); Richard Delgado, Affirmative Action As A Majoritarian Device: Or, Do you Really Want To Be A Role Model?, 89 Mich. L. Rev. 1222 (1991) (arguing that serving as a role model implies limits to inclusion, requires one to be overworked and to lie, and should be rejected as a device that serves primarily majority interests); Shelby Steele, Affirmative Action Must Go, N.Y. TIMES, Mar. 1, 1995, at A19 (disparaging affirmative action for the "indignity and Faustian bargain it presents to minorities," though expressing concern over how glibly its demise is urged); see also Randall Kennedy, Racial Critiques of Legal Academia, 102 Harv. L. Rev. 1745 (1989) (exploring minority scholars' claims of unique voice and viewpoint and voicing concern about anti-intellectual implications and stereotypes).

124. Professor Ian Ayres colorfully highlights the difference one's position as victim makes to one's outlook. He notes that the front page of a New York Times issue contained one article wherein President Clinton demanded of the Japanese government explicit numeric quotas to compensate for past systematic discrimination against U.S. imports, but another article relayed the President's opposition to quotas for
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case of minority citizens, then they can lobby against affirmative action. 125

Moreover, a narrow affirmative action program driven by remedial purpose eliminates stigma only if a causal relationship exists between the supposed lack of injury or entitlement in minority beneficiaries of past broad affirmative action programs and the stigmatic, denigrating opinions directed at those beneficiaries of affirmative action. If the denigrating opinions that supposedly cause stigma are merely a particular manifestation of racism that pre-dated the affirmative action programs, then there is little reason to believe those same or substantially similar denigrating opinions would not be directed at recipients of even stringent and narrowly tailored affirmative action programs, or simply directed at minority citizens for different reasons altogether. 126

2. Containing Affirmative Action

Another pragmatic or instrumental reason to impose a remedial purpose requirement is its purported ability to contain any race-based measures that might be implemented. Remedial purpose supposedly is self-limiting, whereas addressing general societal discrimination supposedly opens a Pandora's box. In Croson, the plurality contrasted the focused goal of remedying "'wrongs worked by specific instances of racial discrimination'" with remedying "'the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past.'" 127 A remedial purpose requirement is

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126. "Social Science research suggests that stereotypes serve as powerful heuristics, supplying explanations for events even when evidence supporting nonstereotypical explanations exists, and leading us to interpret situations and actions differently when the race of the actors varies." Aleinikoff, supra note 19, at 1067 (citations omitted); see also Jennifer L. Eberhardt & R. Richard Banks, Rutgers, Race and Reality, N.Y. TIMES, Mar. 11, 1995, at 23 (discussing political conservatives' and liberals' prevailing assumptions of African Americans' inferiority); Brent Staples, The Presumption of Stupidity, N.Y. TIMES, Mar. 5, 1995, at 14 (discussing assumptions about African Americans that exist independently of affirmative action). Even if one were convinced that a narrowly drawn, strictly remedial affirmative action program could eliminate the above-described stigma, the Croson requirement of remedial purpose is not sufficiently narrow. The Croson requirement does not insist that benefits flow only to particular individuals identified as injured, thus it does not dispel the above-described stigma. A requirement of remedial purpose that tolerates group-based analysis and response, albeit more narrowly drawn and rigorously supported by evidence, leaves intact at least to some degree the dynamic whereby individuals may be clumped according to race and may be assumed to have derived their particular positions or benefits primarily, if not solely, because of affirmative action.

expected to limit the scope and duration of any reverse discrimination that might be imposed.\textsuperscript{128}

Only an extremely narrow concept of remedial purpose has any "objective" limit with a concomitant power to contain affirmative action. The remedial purpose requirement provides an "objective" measure of limit only if it requires that affirmative action benefits flow to particular individuals who have been identified as victims of discrimination.\textsuperscript{129} Even then, however, the extent of a required remedy and at whose expense it should come is far from "objectively" evident.\textsuperscript{130}

Of course, the \textit{Croson} plurality did not insist on a particularized showing of harm; they expressly condoned the notion of group benefits, as well as the notion of government redressing situations where government is perpetuating private discrimination.\textsuperscript{131} A group of affirmative action beneficiaries may be determined according to race on account of well-identified past discrimination directed against that particular race, but this opens the door to an unlimited number of beneficiaries who are members of that race and who may or may not have personally suffered past discrimination.\textsuperscript{132}

The supposed containing power of the remedial purpose requirement also depends upon the questionable (and ironic) assumption that racial identities are

\begin{itemize}
\item \textsuperscript{128} Why concern with reverse discrimination should outweigh concern with discrimination is not clear. "[\textit{I}t is paradoxical to factor white resentment heavily into judicial review of democratically enacted affirmative action programs while discounting altogether black resentment of laws with racially discriminatory effect. . . . Utilitarian concern about the consequences of racial measures for social harmony should apply equally no matter whose ox is gored." Sullivan, \textit{ supra} note 59, at 1623.
\item \textsuperscript{129} As Professor Sunstein notes:
\begin{quote}
The basic problem is that in ways large or small, [compensatory justice] principles are poorly matched to the best theories that underlie the legal claim. In these contexts, the relevant harm is not sharply defined, and it cannot be connected to a discrete event. The problem involves a shared, collective risk rather than an individual right. The defendant is not easily identifiable or has a highly ambiguous relation to the harm. Causation itself is doubtful and complex; we do not really know whether the defendant was responsible for the plaintiff's harm. The injured party cannot be specified in advance. The notion of restoration to a status quo ante seems logically incoherent, unworkable, or based on fiction. Perhaps most importantly, the status quo should itself be questioned, or taken as unjust and non-neutral, or as a product of the legal rule or the decision at issue.
\end{quote}

\begin{itemize}
\item SUNSTEIN, \textit{ supra} note 102, at 320.
\item \textsuperscript{130} See, e.g., Frank H. Easterbrook, \textit{Panel IV. The Limits On Judicial Power In Ordering Remedies}, 14 HARV. J.L. & PUB. POL'Y 103 (1991) (arguing that the reference to remedies has no meaning or content unless one understands the extent of the rights and to whom they belong with respect to the injury to be remedied).
\item \textsuperscript{131} See \textit{Croson}, 488 U.S. at 492.
\item \textsuperscript{132} The plurality in \textit{Croson} questioned why a 30% set-aside meant to compensate black contractors for past discrimination should be shared with an Aleut citizen who moved into Richmond tomorrow, see \textit{ id}. at 506, but the plurality never explained why sharing that set-aside with a black contractor who just moved into Richmond or a black citizen of West Indian origin who lived in Richmond for five years but was not subject to decades of discrimination against African Americans would be more acceptable. For a general criticism of \textit{Croson}'s guidelines on what constitutes narrow tailoring, see Ken Nickolai, \textit{Implementing Croson: Applying Illogic to the Elusive and Concluding the Obvious}, 17 WM. MITCHELL L. REV. 497, 523 (1991).
\end{itemize}

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fixed and determinable;¹³³ in fact, racial and ethnic identities are fluid.¹³⁴ Thus, any limit that a remedial purpose requirement can provide is contingent on the effectiveness and limit of racial and ethnic identification.¹³⁵

Whatever limit a remedial purpose requirement can provide is also contingent on elusive temporal determinations inextricably linked to determining when a remedy is accomplished. The Croson plurality asserted that remedial purpose would “assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.”¹³⁶ Remedial purpose implies a necessary ending point, but actually determining when that point occurs is difficult.¹³⁷

Remedial purpose per se has limited power to effect containment. Whatever limit can be attained is derivative of the degree to which underlying factors can be fixed, such as racial or ethnic identity of individuals and the time when remediation is accomplished. If those factors are not easily determined, then remedial purpose, even construed as narrowly as in Croson, cannot contain affirmative action.

3. The Status Quo Ante

The inability of remedial purpose to contain affirmative action is closely related to another Croson-identified instrumental goal, namely achieving the status quo ante. A requirement of remedial purpose is supposed to reassure majority citizens that affirmative action is not some unlimited payout brought

¹³³. Professor Gotanda points out that, though race is a way of classifying Americans, to curtail race-based decision-making implies a common understanding of what, exactly, is not to be considered. See Neil Gotanda, A Critique of “Our Constitution Is Color-Blind,” 44 STAN. L. REV. 1, 23 (1991).
¹³⁴. See id., at 28-35. For anecdotal and compelling stories of people experiencing life on both sides of the color line, see HENRY LOUIS GATES, JR., THIRTEEN WAYS OF LOOKING AT A BLACK MAN 180-214 (1997); SHIRLEE TAYLOR HAZLIP, THE SWEETER THE JUICE (1994); and GREGORY HOWARD WILLIAMS, LIFE ON THE COLOR LINE (1995).
¹³⁵. Under the Croson plurality’s reasoning, a remedy in Richmond, Virginia, may not be extended to Aleuts, but no criteria is stated for how to determine who is an African American for purposes of remediation to be extended to that group. See Croson, 488 U.S. at 506.
¹³⁶. Croson, 488 U.S. at 510. Justice Powell once expressed this concern in terms of the “inequity in forcing innocent persons . . . to bear the burdens of redressing grievances not of their making.” Bakke, 438 U.S. at 298.
¹³⁷. Witness the federal courts’ difficulty determining when past discrimination has been remediated in the context of school desegregation. One federal district court in Colorado, wrestling with whether a school desegregation case should be closed, observed:

This case is not unique. It is but one of many such cases across the country. What is common in the history of all of those cases is uncertainty. Thousands of pages have been written by scores of federal judges attempting to articulate guiding principles under the broad constitutional concept announced in Brown v. Bd. of Ed.

about by minority citizens' effective lobbying, but rather is a matter of compensation or entitlement that will end when minorities are restored to a position they would have occupied but for discrimination. The *Croson* plurality advocated adopting a remedial purpose requirement as a means of assuring that government in enacting affirmative action was not bestowing an advantage so much as restoring the status quo ante.

The status quo ante is a mythical state of equilibrium. "Restoring" the status quo ante with respect to past discrimination demands the impossible. How do we determine what the country might have looked like but for the enslavement and then segregation of African Americans, but for discrimination against Japanese, but for discrimination against Chinese, but for discrimination against Hispanics? This "status quo ante," having never actually existed, presents an impossible and totally imaginary end goal. A remedial purpose requirement fails to inform us when the status quo ante is restored.

The larger question is why obtaining some imaginary status quo is a virtue, and a constitutional one at that. The *Croson* plurality assumes the status quo is an objectively determinable and neutral standard. This approach "disregards the ways in which existing distributions are a product of law, humanly

138. The harm to innocent victims is a principal concern behind the requirement of a showing of past discrimination. Under current law, affirmative action can be defended most easily as an effort to restore a status quo ante that has been unsettled by identifiable acts producing identifiable harms to identifiable actors. When the status quo is thus restored, the harm to innocent victims is acceptable. In such cases, the "victims" are disadvantaged only because of past discrimination. See *Sunstein*, supra note 102, at 331.

139. A remedial purpose requirement supposedly allows one to challenge as undeserved or excessive the benefits minorities might receive or try to take. For example, in *Croson*, Justice O'Connor contrasted the rigidity of Richmond's program with the program that was upheld in *Fullilove*; there a federal set-aside program's requirement of using a minority business was flexible and could be waived if a Minority Business Enterprise attempted "to exploit the remedial aspects of the program by charging an unreasonable price, i.e., a price not attributable to the present effects of prior discrimination." *Croson*, 488 U.S. at 489 (quoting Fullilove v. Klutznick, 448 U.S. 448, 488 (1980)); see also *Croson*, 488 U.S. at 510 (stating that proper findings reassure all groups that deviation from norm of race neutrality is a "temporary matter, a measure taken in the service of the goal of equality itself.").

140. See, e.g., Korematsu v. United States, 323 U.S. 214 (1944) (upholding the order directing the exclusion of all persons of Japanese ancestry from areas deemed militarily significant); Hirabayashi v. United States, 320 U.S. 81 (1943) (upholding a curfew directed only at citizens of Japanese ancestry).

141. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886) (reversing a state supreme court and lower federal court that had upheld discriminatory administration of a municipal ordinance against Chinese). For other examples of discrimination against people of Asian ancestry within the legal system, see generally ASIAN AMERICANS AND THE SUPREME COURT (Hyung-chan Kim, ed., 1992).


143. In an effort to calculate a "declining-credit curve" that would accurately reflect government's remedial benefit from marginal increases in minority participation, Professor Ayres analyzed data collected by governments to support affirmative action. He concluded that calculating such a curve was daunting. "There is little social consensus whether there are any remedial benefits to race-conscious remedies. It blinks reality to think that the government could calculate numeric credits that precisely capture its remedial interest." *Ayres*, supra note 13, at 1817.
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constructed, value-laden, and potentially unjust." Reliance on the status quo as a goal is particularly questionable in the context of race relations, where the Fourteenth Amendment was drafted to ensure, at the very least, the rejection of a status quo that endorsed the marketing of human beings.

4. Eliminating Racial Politics

The final Croson-identified instrumental goal to consider is the elimination of racial politics. A remedial purpose requirement supposedly eliminates racial politics, and any other approach to affirmative action supposedly encourages racial politics and racial divisiveness, all at the expense of individual rights. As the Croson plurality stated:

To accept Croson's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.

The Supreme Court does not want government to be involved in race-based distinctions any more than absolutely necessary, and a plurality sees those distinctions as absolutely necessary only where government must undo discrimination that it previously has condoned. In such a circumstance, remedial purpose advocates seem to suggest, government has no choice and individual rights, at least to a degree, must give way. This conception of government, however, posits the possibility of government making an apolitical determination about what must be done and when, and that simply is not possible.

The notion that remedial purpose will achieve a victory for individual rights by eliminating racial politics also draws a questionable dichotomy between individual rights and racial politics. One achieves individual political rights by participating in a group, whether purposefully or on a de facto basis. One does not give up or lose individual rights by lobbying and demanding a government response along lines dictated, say, by the Moral Majority.

144. SUNSTEIN, supra note 102, at 118.
146. See Croson, 488 U.S. at 505-06; see also id. at 520-21 (detailing Justice Scalia's observation along the same lines).
147. See infra Part III.A.
Similarly, one can make choices about his or her race or ethnicity.\textsuperscript{148} Even if one cannot "escape" one's race or ethnicity, one still has a choice to identify oneself and participate in the political process as a racial or ethnic minority, or perhaps instead to make affiliation with the Republican Party the focal point of one's participation. To the extent a government chooses to respond to the demands of any one group, whether racially organized or not, then to some extent the rights of groups in opposition are sacrificed.\textsuperscript{149} That phenomenon exists wherever groups are fighting over the allocation of government resources.

The elimination of racial politics is not necessarily a desirable goal.\textsuperscript{150} Moreover, only the appearance of racial politics is eliminated where one artificially imposes external constraints on how government can respond to racially organized groups. To the extent underlying impulses and desires to organize along racial lines remain, a government's inability to respond directly, efficiently and effectively has the potential to cause severe societal unrest.\textsuperscript{5}

The shortcomings of Croson's instrumental goals that were identified in this Section might provoke one to advocate the narrowest interpretation of remedial purpose. After all, several of the shortcomings are due to the Croson remedial purpose requirement tolerating too much play and not requiring identification of specific individual victims of specific government acts.\textsuperscript{152} But a remedial

\textsuperscript{148} See supra Part II.C.2.

\textsuperscript{149} As Professor Sandalow notes in the context of racial preferences in school admissions: The burden upon the excluded applicant is real, but it is not different from the burden borne by applicants excluded under traditional criteria. Moreover, it is imposed for precisely the same reason, a judgment that the public welfare will be better served by the admission of someone else. In that respect racial and ethnic admissions criteria do not differ from traditional criteria that are unquestionably constitutional.

Sandalow, supra note 102, at 674.

\textsuperscript{150} See infra Part III.B.

\textsuperscript{151} If minority citizens see little point in lobbying government because it cannot respond directly and must leave their concerns largely unaddressed, then minority citizens may see less point in peacefully participating in politics and society. It is only "[s]o long as the rules of the game are enforced in a systematic and even-handed fashion—so long as the authorities take the rights seriously— all those with a stake in the existing system will have good reason not to take the law into their own hands." STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS 24 (1974). Politics organized along racial lines may not always be pretty, but we are not dealing with a pretty problem. As Dr. Martin Luther King, Jr. pointed out:

[T]here is a type of constructive nonviolent tension that is necessary for growth. Just as Socrates felt that it was necessary to create a tension in the mind so that individuals could rise from the bondage of myths and half-truths to the unfettered realm of creative analysis and objective appraisal, we must see the need of having nonviolent gadflies to create the kind of tension in society that will help men to rise from the dark depths of prejudice and racism to the majestic heights of understanding and brotherhood.


\textsuperscript{152} For example, to the extent one required identification of specific victims of discrimination, then the problem of inaccurate racial categorization discussed in Part II.C.2 would disappear. See supra text accompanying note 135. Similarly, identification of specific victims with specific, measurable harms would enhance the ability of a remedial purpose requirement to contain the government response. See supra text accompanying note 137.
purpose requirement does not have problems merely in achieving its Croson-
identified instrumental goals; such a requirement presents broader and troubling
ramifications, even with the narrowest remedial purpose requirement. The next
section discusses some of these troubling ramifications.

III. NEGLECTED IMPACTS OF A REMEDIAL PURPOSE REQUIREMENT

Imposition of a remedial purpose requirement153 would have several
troubling outcomes that have yet to be fully considered; this Article identifies
three. First, there are unacknowledged institutional barriers to eliminating
racial politics by imposing on legislatures and executive agencies a remedial
purpose requirement. Second, a remedial purpose requirement evidences a
profound and unfounded distrust of the political branches and political process;
thus unsurprisingly, imposition of such a requirement severely handicaps the
political branches. Finally, a remedial purpose requirement has potential to
escalate racial tensions.

A. Institutional Barriers to Eliminating Racial Politics through a Remedial
Purpose Requirement

A remedial purpose requirement overlooks and collapses the institutional
differences among the judicial, legislative, and executive branches. The
Supreme Court in Croson identified the social goal of eliminating racial
politics, but it paid little attention to the institution or combination of
institutions best suited to achieving that goal.154 Instead, the judiciary and the
judicial world view were assumed to be best suited to the task, hence the rise
of the remedial purpose requirement.155 Such a requirement gives the
legislative and executive branches power to use racial criteria, but only if they
follow the judicial model in exercising that power.

153. This Section assumes that any remedial purpose requirement imposed by the Court at this point
in time would at least be as narrow and stringent as that endorsed by the plurality in Croson.

154. The federal courts have had ongoing involvement in a number of state institutions that may
have led to judicial lack of sensitivity to institutional differences and a faulty assumption that institutional
differences are easily managed. See John Choon Yoo, Who Measures The Chancellor's Foot?: The

155. Thus, for example, in Bakke, Justice Powell concluded a preference could be extended once
there were appropriate findings of past discrimination because victims' legal rights had to be vindicated. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307-08 (1978). Along the same lines, Justice
Stewart wanted to reject affirmative action because he believed the legislative branch lacked the
dispansionate objectivity and the flexibility of courts to mold race-conscious remedies with the objective
of eliminating past or present effects of discrimination. See Fullilove v. Klutznick, 448 U.S. 448, 527
(1980) (Stewart, J., dissenting). The Court's assumption about the superiority of the judicial approach
has been reinforced and shared by many commentators. Professor Sunstein notes that the judiciary has
long been viewed as the leading candidate to set civil rights policy through the process of constitutional
adjudication. See Cass R. Sunstein, Three Civil Rights Fallacies, 79 CAL. L. REV. 751, 765 (1991); see
also Choon Yoo, supra note 154, at 1128-37 (tracing the development of federal courts' broad equitable
powers after 1955 and the academic world's embrace of that development).
One cannot simply state a goal and then have different institutions achieve the stated goal or achieve it through similar means. Institutional choices must be made with respect to any stated goal: "Embedded in every law and public policy analysis that ostensibly depends solely on goal choice is the judgment, often unarticulated, that the goal in question is best carried out by a particular institution." Institutional characteristics can further or impede a goal, and sometimes institutional dynamics may be wholly incompatible with a particular goal. In the judicial realm, a requirement of remedial purpose based on a narrow corrective justice viewpoint may come close to eliminating race-based decisions and achieving colorblindness. It is less clear whether imposing such a remedial purpose requirement in the political sphere can obtain similar results.

The benefits that are supposed to come from a remedial purpose requirement—that is, affirmation of personal rights, elimination of stigma, containment of affirmative action, realization of the status quo ante, and elimination of racial politics—largely are benefits derived from circumscription. The ability of political bodies to gather, weigh and determine objectively evidence concerning past discrimination is key to obtaining such circumscription. The Court assumed the requirement of evidence, albeit a high quantum of evidence, will cause the legislative and executive arenas to function similarly to the judicial arena. The Court failed to analyze whether and to what extent circumscription and its concomitant benefits can be achieved in light of the attributes or features that distinguish political bodies from courts.

The features that distinguish legislatures and executive agencies from courts are many. The institutional differences between the judicial branch on one hand and the legislative and executive branches on the other simply preclude legislators and agencies from objectively and apolitically considering the need for affirmative action, notwithstanding a Croson-like remedial purpose requirement and high evidentiary standard. Legislators make a political

156. NEIL K. KOMESAR, IMPERFECT ALTERNATIVES 5 (1994).
157. See supra Part II.C.
158. Hence we see the Supreme Court collapsing the differences among executive, legislative and judicial findings and referring generically to "proper findings." Croson, 488 U.S. at 510; see also Bakke, 438 U.S. at 307-08 (equating judicial, legislative and administrative findings of constitutional or statutory violations). Similarly, when Justice O'Connor asserted in Adarand, 515 U.S. 200, 237 (1995), that strict scrutiny of legislative determinations need not be fatal, she cited United States v. Paradise, 480 U.S. 149 (1987), a case involving review of a court-ordered remedy, not review of a politically motivated affirmative action program.
159. Certain of these differences have been the subject of extensive academic comment, but principally from the angle of examining how courts are ill-suited to assume supervisory roles over various state institutions. See, e.g., Choon Yoo, supra note 154, at 1137-41. This Section looks at how state and federal political institutions are ill-suited to perform judicial roles.
160. Ironically, in circumstances involving past race discrimination, even courts cannot administer remedial power well. See, e.g., Choon Yoo, supra note 154, at 1140; Gewirtz, supra note 25, at 783-98.
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decision in choosing whether to address the issue of affirmative action and in choosing whether to spend money to develop evidence to determine the need for affirmative action. Legislators also make a political decision in choosing to respond to evidence that affirmative action is needed and in choosing the nature and extent of any response.\textsuperscript{161}

In contrast, courts are created to be non-political. Courts do not pick their issues,\textsuperscript{162} thus one cannot fault a court for failing to address a particular issue, like affirmative action, if no parties have seen fit to litigate such a case.\textsuperscript{163} Courts also do not gather evidence.\textsuperscript{164} They rely on opposing parties to marshall evidence and on the heat of conflicting interests to crystallize the reliability and relevance of that evidence.\textsuperscript{165} Finally,\textsuperscript{166} courts tend to review issues through the prism of a small number of well-defined parties, hence judicial review and consideration of issues tends to be narrow, focused, and detailed.\textsuperscript{167}
Imposing a remedial purpose requirement on legislative and executive bodies does not eliminate the many choices to be made at many steps, choices that courts do not make. Those choices have real impacts on whether affirmative action can or will be implemented within the remedial purpose framework and inescapably infect with politics the legislative and executive handling of a remedial purpose requirement. A political body may make findings and take “remedial action” just like a court, but that political body is likely to be criticized by some citizens for bowing to political pressure. And a political body that fails to act, even if that failure is founded upon a lack of evidence to support a remedial purpose, is likely to be criticized by some citizens for failing to gather the evidence in the first place, or failing to interpret it correctly. Remedial purpose limits the scope and shapes the direction of political efforts concerning affirmative action, but it does not eliminate the politics.

B. Handicapping the Political Branches with a Remedial Purpose Requirement

A remedial purpose requirement cannot eliminate the political dimensions of a government’s decision to employ affirmative action. Nonetheless, such a requirement, particularly when it is coupled with stringent evidentiary standards, does make a political body less able to form and act upon impressionistic conclusions. And given the adjudicatory framework and stringent evidentiary standards, any decision to employ affirmative action is more vulnerable to judicial challenge. Thus, regardless of whether there has been or is invidious discrimination, the remedial purpose requirement makes successful political rectification of the problem less likely.

A remedial purpose requirement manifests a fundamental distrust of the political process; it greatly constrains the usefulness of petitioning the government, as well as the scope of any possible response. Rather than encouraging free-ranging political debate and evolution of the affirmative action issue, a remedial purpose requirement attempts to take the politics out of the picture by suggesting that political bodies follow a narrow model of corrective ill-suited to adjudication. See Fuller, supra note 161, at 394-98.

168. The susceptibility of political bodies to these charges is made evident in Croson. The City Council of Richmond collected anecdotal and statistical evidence of discrimination to support what it deemed a remedial program. But this evidence was rejected by a plurality and Justice Scalia in part because African Americans accounted for almost one half of the city’s population and a majority of the City Council, and these Justices thought the minority set-asides were possibly an example of self-dealing. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495-96, 524 (1989); see also id. at 541-42 (Marshall, J., dissenting) (protesting the disaggregation of the City Council’s evidence).

169. One of the greatest ironies to arise within the remedial purpose framework is the fact that a political body obtains the power to wield the allegedly fearsome tool of race-based action only if it can virtually prove that it has acted in a biased and discriminatory manner in the past. Normally, one would expect such a showing to disqualify one from being trusted with race-based programs.
justice. That model makes narrow issues of evidence the primary topic for discussion.

Forcing the political branches to focus narrowly on remedial purpose fails to capitalize on the strength of the political branches. The political branches are not bound by precedent and are free to experiment:170

The tradeoff is between a political process that integrates far more information but with a more significant risk of bias and an adjudicative process that suppresses information but decreases distortions in its presentation. The adjudicative process hears and considers less, but is more evenhanded in what it hears and considers. The price of evenhandedness is most dramatically revealed in that important range of social issues where the adjudicative process hears nothing—a significant disability traceable to the high cost of participation.171

The political branches have the power to affect quickly great numbers of people in a direct manner and to assimilate the feelings of the public. They can gauge effectiveness and change course as needed.172 This responsiveness and flexibility of the political branches, however, has little room to maneuver within the strict evidentiary requirements of a narrow remedial purpose requirement.

The remedial purpose requirement is likely also to diminish minority citizens' participation in politics. If minority citizens indeed are self-interested and will participate only to enact affirmative action programs, then constraining affirmative action likely would discourage their political participation, especially because alternative, colorblind measures that use benchmarks like economic disadvantage may not reach minority citizens.173 Thus, the political...

170. Compare Wittmer v. Peters, 87 F.3d 916, 920 (7th Cir. 1996), in which the Seventh Circuit rejected a remedial purpose requirement in order to uphold a race-based promotion in an experimental prison camp. Judge Posner gave a great deal of latitude to the defendants' experts because "[i]f academic research is required to validate any departure from strict race neutrality, social experimentation in the area of race will be impossible despite its urgency." Id.

171. KOMESAR, supra note 156, at 141 (citation omitted).

172. The Fifth Circuit recently noted in upholding the Religious Freedom Restoration Act's imposition of strict scrutiny on facially neutral laws burdening the free exercise of religion: "[I]t is one thing to apply the compelling interest test drawn from a statute where Congress can amend the underlying law if it disagrees with the resulting balance; it is another when the only response to the judiciary's application of the compelling interest test is a constitutional amendment." Flores v. City of Boerne, 73 F.3d 1352, 1363 (5th Cir. 1996), rev'd, 117 S. Ct. 2157 (1997).

173. Minority citizens could organize to petition for assistance along race-blind bases such as economic disadvantage, but the efficacy of such measures, and hence the incentive to seek them, is questionable. For example, it appears that economically deprived minorities have little hope of achieving the academic standards for admission to many schools; in other words, race-blind admissions that give a preference for economic disadvantage would admit predominantly low-income white students. See Peter Passell, Economic Scene: Surprises for Everyone in a New Analysis of Affirmative Action, N.Y. Times, Feb. 27, 1997, at C2 (reporting on a forthcoming study by Thomas Kane, an economist at the John F. Kennedy School of Government, that finds affirmative action based on economic class would achieve at universities and colleges the same levels of diversity as affirmative action based on race only by drastically lowering standards, because programs based on race currently draw largely from a minority middle class). More importantly, alternative, colorblind measures may not motivate minority...
branches may lose information from, and contact with, minority citizens.

Encouraging minority citizens to participate in the political process and take responsibility for political outcomes is itself a value. Political participation, even if one cannot achieve all one's desired goals, legitimates the resulting system for the participants.\textsuperscript{174} If the Supreme Court places fewer restrictions on the implementation of affirmative action and such programs continue to be voted down, then minorities still will have participated and, more importantly, will have the opportunity and incentive to participate again in the future.\textsuperscript{175}

To the extent minority citizens do participate in politics and engage in "racial politics," the risk of harm is not great. First, legislative and executive branches are not monolithic structures running over minority or majority citizens' rights unchecked.\textsuperscript{176} Second, politicking about affirmative action, or racial politics generally, can be nothing more than a particular instance of politics as usual.\textsuperscript{177} Individuals may group together along racial lines for the simple reason that discrimination on the basis of race has caused them to have a common experience and common concerns. They may demand a response along racial lines simply to ensure that their common experiences and concerns are addressed, and not out of animosity against another racial group.\textsuperscript{178}

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\textsuperscript{175} For example, California recently passed by referendum Proposition 209, which prohibits affirmative action by state and local government agencies. While passage of Proposition 209 is an unfortunate development in this author's view, it remains possible for minority citizens to organize, join with each other and sympathetic majority citizens, and put forth a competing proposition for consideration that would allow some form of affirmative action. Moreover, in formulating that successive proposition, its proponents could consider the concerns motivating passage of Proposition 209 and attempt to tailor an affirmative action program that would be acceptable to more people. Following the passage of Proposition 209, Houston voted on a similar proposition. However, looking at the California experience, hard lobbying occurred about the language and merits of the proposition. In the end, voters rejected the proposition, leaving affirmative action programs in place. See Sam Howe Verhovek, Houston Vote Underlines Complexity of Rights Issue, N.Y. TIMES, Nov. 6, 1997, at A1.

\textsuperscript{176} Professor Komesar summarizes some of the self-policing features of the political branches as follows:

Underlying all these divisions of responsibility are significant variations in the rules of election, assuring that the various parts of the political process are elected by different constituencies, by different methods, and for different terms. This complex structure of government can only be understood as an attempt to have the political process police itself. Various parts, variously elected and beholden to different constituencies, form the avenues of self-policing—the checks and balances. No constitution can depend solely on so fragile an institution as the judiciary to successfully insure that the rules of the game are followed. The great threats to violation of the rules come from forces that judges cannot control.

\textsuperscript{177} See supra note 156, at 202 (citation omitted).

\textsuperscript{178} In Why Voting Is Different, 84 CAL. L. REV. 1201 (1996), Professors Pamela S. Karla and Daryl J. Levinson point out, correctly in this author's view, the ways in which groups coalescing around race are "ordinary, contingent factions in a pluralist political system," and they argue, in the context
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Justice Scalia argued in *Croson* that regardless of actual outcomes, simply engaging in politics along racial lines is harmful because it reinforces the notion of categorizing by race.\(^7\) Such an argument ignores that American society already imposes on minority citizens, as well as majority citizens, a well-embedded categorization process.\(^8\) To the extent racial categorization remains a fact of life in America, prohibiting government from taking account of and responding to that categorization process in ways minority citizens would choose unfairly handicaps minorities.\(^8\) Such an approach forces minorities to bear the harms of racial categorization and discrimination with no means of effecting a direct response.\(^2\)

Fear of racial politics embodies a patronizing notion that the political role of minority citizens cannot evolve,\(^3\) that minority citizens have sought of voting districts, that exclusion of such groups sacrifices legitimacy and distorts the pluralist process. *Id.* at 1218-19. However, to the extent Professors Karlan and Levinson accept that such grouping is appropriate only in the voting rights context and not in other equal protection areas such as affirmative action, this author disagrees. *See also* Jennifer Roback, *The Separation of Race and State*, 14 Harv. J.L. & Pub. Pol'y 58, 64 (1991) ("African-Americans did not invent the game of American politics, with all of its transfer seeking and creation. African-Americans are simply playing by the rules that were created long before their active participation in American political life."); Daniel B. Rodriguez, *Introduction: Civil Rights Politics As Interest-Group Politics*, 14 Harv. J.L. & Pub. Pol’y 1 (1991) (noting that civil rights politics is one type of interest-group politics that in one regard is just politics as usual).

79. *See* *Croson*, 488 U.S. at 527-28 ("[T]hose who believe that racial preferences can help ‘to even the score’ display, and reinforce, a manner of thinking by race that was the source of the injustice and that will, if it endures within our society, be the source of more injustice still.") (Scalia, J., concurring in judgment).

80. *See, e.g.*, BARBARA R. BERGMAN, *IN DEFENSE OF AFFIRMATIVE ACTION* 42-45, 50-52, 72-75 (1996) (pointing out segregation by sex and race in jobs; degree to which an employer, choosing between two candidates presented in study as equally qualified, chose the nonminority; and degree to which people reviewing artificially created employment records would not pick out patterns of discrimination against the women or minorities placed in the records, but instead sought to justify their treatment); Paul Finkelman, *The Color of Law*, 87 NW. U. L. REV. 937, 985-87 (1992) (tracing the ways in which we have never had a color-blind Constitution and have always taken race into account in distributing public benefits); Lise Funderburg, *Boxed In*, N.Y. Times, July 10, 1996, at A15 (reporting on the federal government’s consideration of which racial and ethnic categories to utilize for the 2000 census and the fact that racial categories have been noted since the original census in 1790).

181. *Cf.* Romer v. Evans, 116 S. Ct. 1620 (1996) (holding unconstitutional an amendment to Colorado’s constitution, adopted by referendum, that precluded all legislative, executive, and judicial action at any level of state or local government designed to protect the status of persons based on their homosexual, lesbian, or bisexual orientation). The majority of Supreme Court Justices could not accept the view that the amendment’s “prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint.” *Id.* at 1626-27.

82. Professor Gotanda argues that “consideration of race does not automatically corrupt a fair social decision-making process,” in part because “race is in fact considered,” so “the question of whether nonrecognition is superior to race-based decisionmaking reduces to a quantitative measure of the weight accorded race in the decision, rather than a choice between two qualitatively different approaches.” Gotanda, *supra* note 133, at 18.

83. Indeed, unless minority citizens form coalitions among themselves and with majority citizens, they may well remain powerless token participants in the political process. *See* Guinier, *supra* note 174,
affirmative action along color lines and that they will always be political along self-interested color lines. Proponents of a remedial purpose requirement do not acknowledge that affirmative action may have been sought only because circumstances of discrimination demanded such action, and that political demands of minority citizens will change when, and if, discrimination is eroded to the point where the need for affirmative action has largely passed, or perhaps when minority citizens determine the harms of affirmative action outweigh the benefits and they do not want such programs. Indeed, experience shows that minority citizens do not blindly vote along color lines.

Moreover, racial politics is simply and incorrectly viewed as a zero-sum game. Remedial purpose advocates perceive no benefit to majority citizens excluded from government contracts or positions; majority citizens have simply lost positions to minority citizens. Perhaps the strongest reason to have affirmative action programs, however, is to educate, enhance and improve all

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184. Thus, for example, the Croson plurality and Justice Scalia disavowed the evidence gathered by the Richmond City Council in part because the Council was majority African American, and the population as a whole was approximately fifty percent African-American. These Justices suggested Richmond's African Americans were essentially self-dealing through use of the set-asides. See Croson, 488 U.S. at 495-96, 524.

185. For example, the National Association for the Advancement of Colored People (NAACP) has staunchly supported school integration as a way to improve opportunities for Black students. But for the first time ever, the NAACP expects to have a formal debate at its convention about dropping support for integration because of strong opposition from Black parents and community leaders who feel their children always get bused and the Black community needs to get its fair share of educational money to run their own schools. See At N.A.A.C.P., Talk of a Shift on Integration, N.Y. TIMES, June 23, 1997, at A1; see also Dinesh D'Souza, Rethinking Racism, ATLANTA J. & CONST., Sept. 17, 1995, at B1 (arguing for a public policy strictly indifferent to race and a program of "cultural reconstruction" to be carried out by African Americans for themselves); Steven A. Holmes, Look Who's Saying Separate Is Equal, N.Y. TIMES, Oct. 1, 1995, at 1 (reporting on various African-American leaders who support separate black schools).

186. Recently, several African-American politicians have been voted out of office or put under great pressure by African-American constituents who felt they had not performed. See Richard L. Bake, For Baltimore Mayor, A Shaky Incumbency, N.Y. TIMES, Sept. 7, 1995, at A8 (reporting on the threat to black mayor's third term from dissatisfied black constituents); Wayne Washington, A Test for Black Leaders, STAR-TRIBUNE NEWSPAPER OF THE TWIN CITIES, May 6, 1996 WL 6911800 (reporting on black mayors losing elections in Indiana and New York City in favor of white mayors, and threats to other black leaders); see also Stephen F. Smith, On Justice Clarence Thomas, THE PUB. INTEREST, June 1, 1996, at 72 (reporting on the rise of black conservatism, including opposition to affirmative action).

187. Cf. Kevin Brown, Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?, 78 CORNELL L. REV. 1 (1992) (arguing the Court's ideological framework in context of remediying de jure segregation of schools is not improving the overall socializing process of public schools or all public school students, but is based on the assumption that African-American students have retarded intellectual and psychological development due to segregation, which can be rectified by bringing them into contact with white students). But see Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) (upholding the standing of a white male living in a discriminatory apartment complex to sue under Civil Rights Act of 1968 for harm caused by stigmatization of living in a "white ghetto" and missed business and professional advantages accruing from living with minority citizens).
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of society. By giving minority citizens access and a chance to compete, we give all majority and minority citizens the opportunity to learn that all citizens, majority or minority, can lead, can follow, can perform, can fail, can be Republicans, can be Democrats, can be conservatives, can be liberals, can be everything. Affirmative action just might be of value because it will expand every citizen's mind and world view, leading to improved relationships among all citizens.

Exploring this possibility of societal benefits is a task to which political branches are better suited than the courts, but it is a task that the remedial purpose requirement greatly hampers. The remedial purpose requirement not only strips much of the flexibility and inventiveness that the political processes offer, but it also likely causes less respectful and increasing judicial intervention into whatever affirmative action programs may still be implemented. The remedial purpose framework fits the affirmative action enterprise into a corrective justice model and presents for judicial review questions that appear to involve mere evidentiary considerations. Courts will be lulled into believing they are making mere determinations about the sufficiency of evidence and thus be less sensitive to impinging on political spheres. Accordingly, courts will more readily intervene and substitute their judgment for that of the political branches.

188. Conversely, without affirmative action, we will relegate ourselves to de facto segregated lives and de facto perpetuation of racial divides. After dismantling its challenged affirmative action program, the University of Texas Law School expected to have only three African-American and 20 Hispanic first-year students in 1997, whereas it graduated a class in 1996 that had 31 African-American and 42 Hispanic students. Similarly, the University of California at Berkeley Law School, which eliminated its affirmative action program as a result of political edicts, expected 1 African-American and 18 Hispanic students in the class of 2000. In contrast, 10 African-American and 28 Hispanic students are in the class of 1999. Both schools also reported admitted minority and majority students declining to attend because of the lack of diversity. See Peter Applebome, Minority Law School Enrollment Plunges in California and Texas, N.Y. TIMES, June 28, 1997, at A1; see also Ethan Bronner, Colleges Look for Answers to Racial Gaps in Testing, N.Y. TIMES, Nov. 8, 1997, at A1 (reporting on colleges' struggle to find alternatives to standardized testing, which will virtually guarantee a return to racial segregation in the absence of affirmative action).

189. See Aleinikoff, supra note 19, at 1078-91; Sturm & Guinier, supra note 119, at 1022-34 (discussing the ways in which affirmative action programs produce beneficial results for all citizens).

190. A similar distrust of the political process and the impulse to impose a judicial model can be traced in the administrative law area. In the context of an infamous case involving local agency actions and federal highway funding, one commentator noted that the D.C. Circuit Court revealed a "preference for highway planning which [was] nonpolitical, rational, exhaustive and federal." Jerry L. Mashaw, The Legal Structure of Frustration: Alternative Strategies for Public Choice Concerning Federally Aided Highway Construction, 122 U. PA. L. Rev. 1, 49 (1973). Professor Mashaw also noted that "[t]he court's mandate to reform the [highway planning] process in its own image [was] uncertain at best." Id. As the administrative processes became more akin to judicial proceedings, judicial review of those administrative processes became decreasingly deferential. This development in administrative law is traced by Professor Peter L. Strauss in Revisiting Overton Park: Political and Judicial Controls over Administrative Actions Affecting the Community, 39 U.C.L.A. L. Rev. 1251 (1992). See also Nathaniel L. Nathanson, Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes, 75 COLUM. L. Rev. 721 (1975).
The net effect of a remedial purpose requirement then is a two-pronged attack on the political branches. The requirement strips political branches of their strength at the front end, requiring them to find a high quantum of evidence of discrimination and to fit any responses to that evidence, much the way courts do. Moreover, the evidentiary requirement is likely to deter minority citizens' involvement, and certainly will make less relevant minority citizens' views that cannot be supported by hard evidence.\textsuperscript{9} What little the political branches may effect in the area of affirmative action\textsuperscript{9} will be subject to increased attack at the rear end, because courts are more likely to intervene in the judicial-like determination required by a remedial purpose framework. Thus, within a remedial purpose paradigm, the political branches are made rigid and narrow and much less useful a social tool in the area of race relations.

C. Exacerbating Racial Tensions with a Remedial Purpose Requirement

Even as a remedial purpose requirement renders the political branches less flexible and inventive in addressing problematic race relations, the narrow remedial purpose framework may increase the need for political intervention by exacerbating racial tensions. By establishing that government has the power to enact affirmative action and act in race-based ways if there is discrimination, the remedial purpose framework may cause expectations of majority and minority citizens to diverge, causing troublesome dynamics.

If the Supreme Court pronounces a remedial purpose requirement for affirmative action, that pronouncement undoubtedly will affect public actions and perceptions.\textsuperscript{193} Supreme Court decisions not only establish the law but

\textsuperscript{91} Thus, in \textit{Croson}, a number of Justices dismissed the evidence gathered by the City Council in part because it was anecdotal.

\textsuperscript{92} The burdens imposed by \textit{Croson} have caused a significant drop in affirmative action. \textit{See} George LaNoue & John Sullivan, "\textit{But For}" Discrimination: How Many Minority Businesses Would There Be?, 24 COLUM. HUM. RTS. L. REV. 130 (1993) (noting that in Atlanta, Georgia, MBE programs were temporarily halted, causing minority participation to go from 36% to less than 15%; that in Tampa, Florida, the MBE program was enjoined, causing MBE participation to drop from 15% to 5%; and that in Columbus, Ohio, MBE participation went from 47% to 11% when the program was suspended); Nickolai, supra note 132, at 500 n.17 (observing that in Richmond, after \textit{Croson}, minority firm participation in state contracts fell from 32% to 11%; and that in Illinois, minority participation in state contracts declined by 50%).

\textsuperscript{193} In the months immediately following the \textit{Croson} decision, numerous states abandoned affirmative action efforts and legal challenges were launched against other local affirmative action programs. \textit{See} Linda S. Greene, \textit{Race in the 21st Century: Equality Through Law?}, 64 TUL. L. REV. 1515, 1531 n.83 (1990); \textit{see also supra} note 192. Some commentators might argue these responses to \textit{Croson} demonstrate that the remedial purpose requirement has already been digested by society, so the risks this Article identifies should have already come to pass. However, the Supreme Court has not spoken with a clear voice on this matter, as evidenced at the very least by the \textit{Hopwood} and \textit{Wittmer} decisions interpreting Supreme Court precedent. That society has not accepted or understood there to be any final word on remedial purpose is also evidenced by the disputes between the United States Department of Education and the University of Texas after the \textit{Hopwood} decision. \textit{See, e.g.}, \textit{The Great
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affect what people perceive to be moral or right; the decisions often affect the fabric of society. 194

A remedial purpose requirement for affirmative action would likely shape the perceptions of majority and minority citizens differently. An absence of race-based affirmative action would likely be interpreted by majority citizens to mean there is no discrimination problem. Lack of affirmative action programs might augment in majority citizens a sense of complacency about and an acceptance of skewed distributions of wealth and opportunity in society. 195

As a consequence, majority citizens would be less supportive of the political decision to invest in collecting evidence to determine the extent of any discrimination. Political bodies, already reluctant to gather incriminating evidence, 196 simply would not engage in the costly exercise of evidence gathering. 197

The remedial purpose framework also reinforces in majority citizens the notion that one should be called upon to sacrifice due to affirmative action only if one has discriminated:

Admissions Debate, ABA Journal, June 1997, at 28 (reporting on the Department of Education's directive, which eventually was revoked, to other schools in the Fifth Circuit not to dismantle their affirmative action programs on the basis of the Hopwood decision); Peter Applebome, In Shift, U.S. Tells Texas it Can't Ignore Court Ruling Barring Bias in College Admissions, N.Y. Times, Apr. 15, 1997, at A20 (noting that mixed signals concerning the University of Texas Law School reflect national uncertainty about the future of affirmative action and the need for the Supreme Court to clarify its position).

194. See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (declining to overrule precedent regarding abortion rights in part because such rights had been relied upon and had become integrated into the fabric of society); see also Alan Freeman, Antidiscrimination Law: The View from 1989, 64 Tul. L. Rev. 1407, 1409 (1990) (noting that the Supreme Court is a storytelling institution whose decisions serve as instructive moral parables).

195. These skewed distributions of wealth and opportunity may or may not have a direct correlation to discrimination, but they unquestionably break down along racial lines. See, e.g., U.S. DEPT OF LABOR, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL, FACT-FINDING REP. OF THE GLASS CEILING COMM'N, at S2-3 (1995) (concluding that women and people of color rarely reach the highest levels of business and that, even if they do, they are compensated less than whites in comparable positions); Jeffrey Abramson, Making the Law Colorblind, N.Y. Times, Oct. 16, 1995, at A15 (recounting report issued by the Sentencing Project that showed one in three black men in their 20s are either in prison, on probation, or on parole); Freeman, supra note 194, at 1516 n.9 (outlining breakdown of income and occupational status differences along racial lines); George Judson, Imbalance in the Schools Barred by Connecticut Court, N.Y. Times, July 10, 1996, at A1 (discussing the Connecticut Supreme Court's ruling that the racial segregation found in Hartford's public school was unconstitutional, where 94% of the students were from minority groups and placed last on standardized tests).

196. The requirement of particularized proof approaching a prima facie case presents grave political problems, "since city councils might be loathe to put together a record of racism that tars influential members of the community . . . ." See Aleinikoff, supra note 19, at 1096.

197. The expenditure necessary to collect evidence of discrimination sufficient to meet the Croson standard is not insignificant. By March 1992, 29 state and local jurisdictions had completed some sort of post-Croson study at a total cost of over $5,491,162. The Minority Business Enterprises Legal Defense And Education Fund, Inc. also reported that another 37 studies were underway at costs totaling over $7,029,929. See LaNoue and Sullivan, supra note 192, at 99 n.108. In addition, a locality might not be able to present sufficient evidence because it may be anecdotal or statistical, both forms of which the Court gave little weight in Croson.
Central to the perpetrator perspective is the principle of individual (or sometimes institutional) fault. All we need to do is to identify and catch the villains; having done so, we can, with confidence, place responsibility where it belongs. A corollary of this fault principle is that those who are not labeled perpetrators under applicable legal doctrines have every reason to believe in their own innocence and noninvolvement in the problem. This emphasis on fault provides the psychic structure of the “reverse discrimination” issue.

Most citizens probably believe they are innocent of discriminating. These citizens are likely to experience anger and resentment when they perceive themselves as losing to an affirmative action candidate even though they are “innocent.” The remedial purpose framework thus makes majority citizens less tolerant of affirmative action programs, even if there is sufficient evidence to support the need for such a program.

The remedial purpose framework makes majority citizens less amenable to affirmative action but simultaneously exacerbates for minority citizens certain societal pressures, thus making enactment of affirmative action all the more important for minority citizens. Minority citizens experience discrimination, and the remedial framework may enhance their sense that they

198. See Freeman, supra note 194, at 1412; see also Kathleen M. Sullivan, The Sins of Discrimination: Last Term’s Affirmative Action Cases, 100 HARV. L. Rev. 78, 92, 95-96 (1986) (noting that a remedial framework invites claims that nonsinners should not pay).

199. This belief may well be justified, as discrimination often is not a conscious act. Professor Roback has observed with respect to queues of people that form to obtain what economists call “rents”: The very existence of the queue often allows those with responsibility for allocating the rents the opportunity to indulge their private preferences. That is, regulators who allocate scarce political resources are probably more likely to allocate them to their friends, relatives, or neighbors—or, more generally, simply to people with whom they are familiar and comfortable. It would not be surprising if many of these people proved to be of the same ethnic background as the regulator. This type of bias could exist quite independently of anyone’s conscious intention. Roback, supra note 178, at 61-62. Indeed, one hopes unconscious discrimination is what accounts for the skewed selection of law clerks by the Supreme Court Justices over the years. See Mark R. Brown, Gender Discrimination in the Supreme Court’s Clerkship Selection Process, 75 Or. L. Rev. 359 (1996) (reporting on evidence of de facto discrimination by certain Supreme Court Justices in hiring female law clerks); see also Charles R. Lawrence, The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. Rev. 317 (1987).

200. Affirmative action causes the strange phenomena whereby majority citizens greatly exaggerate their sense of being wronged, because they do not acknowledge their real chances of being selected, attributing every loss to affirmative action. As Professor Greensward points out, this sense of loss is likely to be disproportionate because each majority citizen will attribute his loss to the minority candidate, even though only one candidate, majority or not, could have been given the position in the first place. GREENAWALT, supra note 103, at 65-66.

201. The sense of loss will also be disproportionate because a majority citizen is likely to experience any loss to a minority citizen as attributable to affirmative action, even if the loss is attributable only to the majority citizen’s lack of qualifications.

202. For examples of discriminatory actions by government bodies or officials, see Black Plainclothes Officer Says the Police Beat Her, N.Y. TIMES, Jan. 13, 1995, at A14 (discussing a situation in which a black plainclothes police officer investigating a complaint was beaten by 20 white uniformed officers who arrived after a call for assistance, and they did not stop the beating until another black officer intervened); Eric Schmitt, Asian-American Proves Marine Bias, N.Y. TIMES, Jan. 2, 1994, at A10 (noting that a Japanese-American, who was on the brink of earning commission in Marine Corps,
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therefore are entitled to redress:

[A] judicial decision may not effectively redistribute any resources or influence but it will in all likelihood cue expectations of redistribution. The connotations of entitlement may also be reasonably seen as a contribution to self-esteem: deprivations that formerly might have been viewed as symptoms of personal inadequacy can henceforth be seen as unpaid governmental debts.\(^\text{203}\)

The remedial purpose framework may actually strengthen collective racial and ethnic identities since “entitlements provide a joint stake and the deprivations a mutual cause.”\(^\text{204}\) Ironically, by trying to remove the politics, a remedial purpose requirement downplays the importance of minority citizens’ political participation to actively inform, demand and lobby for government action. Minority citizens may feel it is simple for the political bodies to gather evidence and respond. The failure of such political bodies to implement affirmative action and deal with the facts of discrimination may not be perceived as a failure of minority citizens to participate but a failure of government representation, fostering resentment and alienation in minority citizens.\(^\text{205}\)

At the same time, but at a different level of consciousness, minority citizens...
may internalize failure as a result of a dynamic that to some degree may affect all unsuccessful participants in the United States' capitalistic system.  

Professor Sturm and Guinier recently noted:

Access to work and education is rapidly becoming a fundamental attribute of modern citizenship at the turn of the century. Work provides an identity that is valued by others. Work organizes and shapes the citizen's sense of self. Work legitimates. Virtually every aspect of citizenship is channeled through participation in the workplace.

This risk of internalized failure may be exacerbated by a remedial purpose framework, because the framework masks the political choices being made and implicitly suggests that if discrimination exists, it will be addressed. Thus, minority citizens who are not represented in business or politics or housing or some other walk of life may subconsciously absorb the message that affirmative action is not present because it really is not necessary—that minority citizens are absent not as a result of discrimination, but rather because of their own faults or shortcomings. However, within a remedial purpose framework, discrimination and its impacts may exist as a matter of fact, yet not be reducible to particularized proof of cause-and-effect relationships. Also, evidentiary hurdles raise to an unacceptably high level the transaction costs of already unpopular measures.

The divergent perceptions of majority and minority citizens may become especially problematic because a remedial purpose requirement, by purporting to make affirmative action turn on the objective requirement of evidence, squelches debate and politics on the issue of disparities and the need for

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206. "[W]hat may be the single most important myth that rationalizes American social, cultural, and economic reality [is] formal individualistic equality of opportunity. ... It serves not only to rationalize inequality but to celebrate it, while compelling those who fail to "make it" to internalize a despiring lack of self-worth." Freeman, supra note 194, at 1435; see also Greenawalt, supra note 103, at 60; Sunstein, supra note 102, at 188.

207. Sturm & Guinier, supra note 119, at 1031.

208. In a slightly different context, Justice O'Connor has acknowledged the existence and real impacts of discrimination. In the process of finding gender-based peremptory strikes violative of the Equal Protection Clause, Justice O'Connor wrote:

We know that like race, gender matters. A plethora of studies make clear that in rape cases, for example, female jurors are somewhat more likely to vote to convict than male jurors. ... Moreover, though there have been no similarly definitive studies regarding, for example, sexual harassment, child custody, or spousal or child abuse, one need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case .... Today's decision severely limits a litigant's ability to act on this intuition, for the import of our holding is that any correlation between a juror's gender and attitudes is irrelevant as a matter of constitutional law. But to say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact.


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affirmative action. Rallying people to find prima facie evidence of discrimination is likely to be a more daunting task than rallying people with similar experiences and feelings to lobby for a government response. Racial and ethnic tensions would be cosmetically acknowledged and discussed primarily in terms of evidence of past discrimination, with lack of evidence providing a handy excuse for society's (including minority citizens') failure to act. Faced with an issue as important and potentially divisive as race relations, we should be reluctant to close prematurely the political channels of communication.

IV. A Proposal for Structural Constraints and Free-Wheeling Politics

Rather than adopting a remedial purpose requirement that will eliminate almost all consideration of race in government programs, the Supreme Court should make room for racial politics by defining more broadly what is a compelling interest and outlining discrete criteria by which to evaluate what are narrowly tailored responses. The promise of case-by-case judicial review to check wrongful impulses and rectify actual abuses is an important safeguard for all citizens, but it should not come at the expense of political institutions' flexibility and inventiveness. Strict scrutiny is a standard we can live with, so long as it truly can be non-fatal.

A. Political Flexibility

In contexts other than race relations, the Supreme Court has appreciated

210. All but barring race-conscious action by government effectively targets and operates as an impingement on one category of political speech. See SUNSTEIN, supra note 102, at 238 ("Restrictions on political speech have the distinctive feature of impairing the ordinary channels for political change. Because they make democratic corrections less effective, such restrictions are especially dangerous. If there are controls on commercial advertising, for example, it always remains possible to argue that such controls should be lifted. Any damage to democratic processes is minimal; democracy can correct the situation. If the government bans violent pornography, citizens can continue to argue against the ban. But if some political argument is foreclosed, the democratic corrective is severely impaired. A ban on speech critical of a war, or a prohibition on libel of public officials, will undermine an ordinary political response to possible government failure.").

211. See KING, supra note 151, at 19 (I had hoped that the white moderate would understand that law and order exist for the purpose of establishing justice, and that when they fail to do this they become dangerously structured dams that block the flow of social progress. . . . Actually, we who engage in nonviolent direct action are not the creators of tension. We merely bring to the surface the hidden tension that is already alive. We bring it out in the open where it can be seen and dealt with. Like a boil that can never be cured as long as it is covered up but must be opened with all its pus-flowing ugliness to the natural medicines of air and light, injustice must likewise be exposed, with all of the tension its exposing creates, to the light of human conscience and the air of national opinion before it can be cured.).

212. For a criticism of strict scrutiny as an imprecise standard that impermissibly and unwisely intrudes upon congressional power, see K.G. Jan Pillai, Phantom of the Strict Scrutiny, 31 NEW ENG. L. REV. 397 (1997).
Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.213

In early affirmative action cases a number of Justices acknowledged the importance of the political branches.214 Indeed, the executive and legislative branches have power to act as they see fit in furtherance of the Constitution and contribute to the dynamic and enduring character of our Constitution. Once the Supreme Court interprets the Constitution, however, the political branches have little power to contravene the decision.215 Thus, the Supreme Court should avoid declaring a narrow remedial purpose requirement for affirmative action.216

Affirmative action based on race or ethnicity may still present one of our best hopes for accelerating the elimination of racism,217 so we should allow

213. Department of Human Resources Employment Div. v. Smith, 494 U.S. 872, 890 (1990) (holding that the Free Exercise Clause does not bar the application of a facially neutral, generally applicable law to religiously motivated conduct); see also Lewis v. Casey, 116 S. Ct. 2174, 2179 (1996) (noting with respect to prison conditions litigation: "It is for the courts to remedy past or imminent official interference with [plaintiff's rights]; it is for the political branches of the state and Federal governments to manage prisons in such fashion that official interference with [plaintiff's rights] will not occur.").

214. See supra notes 34, 39-41, and 44, and accompanying text.

215. In City of Boerne v. Flores, 117 S. Ct. 2157 (1997), the Court overturned the Religious Freedom Restoration Act enacted by Congress, because it attempted to re-cast the balance that the Court had struck between a free exercise challenge to a state law of general applicability. The Court observed: "When Congress acts within its sphere of power and responsibility, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution." See id. at 2171. However, the Court went on, when the Court has interpreted the Constitution, which is the province of the Judicial Branch, then political action must conform to the background of that interpretation or be disregarded by the Court. Id. at 2172.

216. Whether America has already overcome or ever can overcome its racial problems is a subject of rigorous dispute. See, e.g., Richard Bernstein, Racism Is (a) Entrenched? or (b) Fading? N.Y. TIMES, Nov. 8, 1997, at A11 (reporting on the opposite conclusions drawn about America and race by the optimistic versus the pessimistic schools of thought and their respective studies). Accordingly, we need to allow debate to continue.

217. The consequences of affirmative action and proposed alternatives are poorly understood. A forthcoming study by Thomas Kane, an economist at the John F. Kennedy School of Government, apparently is one of few substantive analyses. That study shows that affirmative action has only had a significant effect on the nation's elite universities and colleges and that it has produced some clear payoffs in the job market. The study also shows that affirmative action based on race would achieve current levels of diversity only by drastically lowering admission standards because affirmative action based on race has brought about diversity by drawing largely on a minority middle class. See Passell, supra note 173, (reporting on Thomas Kane's forthcoming study); see also Orlando Patterson, Affirmative Action, on the Merit System, N.Y. TIMES, Aug. 7, 1995, at A13 (reporting on low incidence of reverse discrimination, favorable accomplishments of affirmative action, and less sweeping ways of rectifying small abuses); Carla Seaquist, Pete Wilson's Gorgeous Mosaic, N.Y. TIMES, Aug. 15, 1995,
the political process more latitude for evaluating and implementing affirmative action programs. Increasing the number of minorities in all walks of life may be necessary to break down unconscious barriers and exclusionary practices. Ensuring minority participation may at a certain level make their presence familiar and acceptable, and, concomitantly, make their exclusion less acceptable.

Social scientists have recently applied the concept of epidemics to crime, and discrimination may operate similarly. The theory is that crime may function like an epidemic: Once the crime rate surpasses a tipping point, that is, a certain level of crime, there is a rapid expansion of crime because of geometric increase in exposure to and tolerance of crime. The “tipping point” for the elimination of racism may have little to do with the number of “victims” that can be identified within the remedial purpose framework. Exploring the existence and parameters of such a possible tipping point in race relations requires flexibility, testing, and room for error—qualities not found in a narrow corrective justice model.

The remedial framework forces society to deal with problems of discrimination at a tertiary level, that is, alleviating the harms after discrimination has occurred. More importantly, treatment of discrimination at the tertiary level means many people have likely been exposed to discriminatory patterns of thinking and behavior, and that chances of eliminating discrimination are at A17 (recounting the success and unexpected benefits of affirmative action in California).

218. “The origins of an epidemic can be primarily behavioral rather than infectious or chemical. Like infectious agents, ideas and behavioral patterns can be transmitted from person to person.” JUDITH S. MAUSNER & ANITA K. BAHN, EPIDEMIOLOGY 276 (1974). Thus, in New York City, where for the last several years the police department has followed a zero tolerance approach to all crime, no matter how petty, the violent crime rate has fallen dramatically. See Malcolm Gladwell, The Tipping Point, NEW YORKER, June 3, 1996, at 32.

219. Actively reaching out for and utilizing minority citizens does more than just integrate government activities; such programs send a message. Professor Aleinikoff notes that social science studies suggest simply putting white and black together will increase prejudice unless “there are superordinate goals or institutional support in the form of superordinate norms and sanctions.” Aleinikoff, supra note 19, at 1071 n.54.

220. An epidemiological orientation may generally be helpful in the area of race relations. Epidemiology is population medicine. In other words: “the community replaces the individual patient as the primary focus of concern. The problem here is to evaluate the health of a defined community, including those members who would benefit from, but do not seek, medical care.” MAUSNER & BAHN, supra note 218, at 2. Epidemiology focuses on “the extent and types of illnesses and injuries in groups of people and with the factors which influence their distribution.” Id. at 4. Epidemiology also emphasizes preventive rather than curative medicine, recognizing three primary stages of prevention: primary prevention, which alters susceptibility or reduces exposure for susceptible individuals; secondary prevention, which is the early detection and treatment of disease; and tertiary prevention, which is the alleviation of disability resulting from disease and attempts to restore functioning. See id. at 9.
exponentially reduced. If political bodies can establish harms in particular groups and possible discriminatory factors causing those harms, then we should allow political bodies to deal with prevention of discrimination at the primary and secondary levels.

B. Re-Defining Compelling Interest

Rather than making remedial purpose the only compelling interest, the Supreme Court should recognize as a compelling interest any serious, race-related societal problem that can be evidenced by "convincing evidence," meaning evidence used in a broader, non-legal sense. For example, if a jurisdiction has a number of racial riots or uprisings, that might be convincing evidence of a serious problem, even though it likely would not be legal evidence of any discrimination that could be remedied. The political branches should be free to address societal problems involving race so long as the problems rise to a sufficient level of seriousness and are identified as a consequence of studies, anecdotal evidence, statistics and other indicia deliberately collected and considered by the political branches.

Of course, what is a "serious, race-related problem" arguably leaves the courts second guessing the political branches. However, second guessing should be constrained by emphasizing review of the political process22 and by issuing specific guidelines about types and relative weights of evidence that are likely to be considered.222

The quantum of evidence required of a political body to prove a compelling interest should adjust depending on what type of affirmative action program and subsequent monitoring are implemented.223 Where a government body adduces less voluminous and concrete evidence, as in Croson, a compelling interest might nonetheless be demonstrated by the degree of publicity, level of resources, and commitment to follow-through analysis of the program that the

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221. In Metro Broadcasting, the Court undertook a comprehensive review of the amount and types of evidence considered and the consideration processes used by the federal government in reaching its conclusion that affirmative action should be used to promote broadcasting diversity. The Court expressly did not opine on the substantive conclusions reached by the government.

222. Professor Neal Devins has argued that legislatures should be given a fact-finding defense where they are reacting to perceived disparate impacts on racial minorities and attempting to rectify unconscious racism. He urges co-existence of a separation of functions value with an antidiscrimination value. See Neal Devins, The Rhetoric of Equality, 44 VAND. L. REV. 15 (1991).

223. In City of Boerne v. Flores, 117 S. Ct. 2157 (1997), the Court wrestled with, but found no clear test for determining, when Congress is engaged in substantive change of constitutional law versus legitimate interpretation and enforcement of the Constitution. The Court observed: While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the means adopted to that end. Id. at 2164. That idea of congruence and proportionality should be imported into the affirmative action context when analyzing compelling interests.
Remedial Purpose

government devotes. Funding and benefits are scarce, and a political body is not likely to devote substantial resources in a public way to a problem that citizens do not view as serious. Thus, evidence of extreme tensions or unacceptably skewed distributions of opportunities and wealth between groups of citizens may be an acceptable predicate for implementing affirmative action if the plan includes monitoring to determine whether there is a causal connection between race or ethnicity and the differences and whether the affirmative action plan closes the differences. Alternatively, political bodies might be required to state the equivalent of a market survey, to state intended goals, to implement procedures for tracking the results and measuring success or failure, and to provide mechanisms for adjusting or reevaluating programs. Only by determining what works at what cost and sharing that information with the public can we make informed choices about affirmative action.

These studies or business plans would not impose the same restrictions that Croson's framework imposes. Disparities or other possible side effects of discrimination would have to be documented to justify government action in the first place, but the documentation would be group-based and thus broad, general, and impressionistic. The required studies or business plans would then provide a framework and time-frame for the collection and analysis of data concerning the discrepancies and the impact of affirmative action on those discrepancies. Based on directions indicated by the data, or perhaps just by new questions, the affirmative action program could be adjusted. In other words, there would be no requirement for particularized evidence beforehand and no limitation on the program to fit itself only to that particularized evidence. Rather, the program would operate more like an experiment: there would have to be a reasonable hypothesis concerning a pressing problem and then collection of data to confirm or deny the hypothesis.

C. Narrow Tailoring

The political branches should be required to implement direct, defined limits rather than relying upon remedial purpose to achieve limit and

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224. Cf. MAUSNER & BAHN, supra note 218, at 95 (declaring that the steps to determine causation are: 1) determining the statistically significant difference between groups, 2) eliminating through analysis and neutralization characteristics other than the one of concern, and 3) analyzing to determine whether statistical association with the characteristic under consideration is artifactual (spurious), indirect or causal).

225. The evidence adduced in Croson might not have been sufficient to prove past discrimination by government in the highway construction industry, but it surely demonstrated a striking lack of participation by minority citizens, which the Richmond government reasonably could have decided to address. Nonetheless, the program challenged in Croson perhaps should not have passed scrutiny because it had no time limit and no waiver procedure when minority contractors were unavailable at a competitive price.
accountability. For example, affirmative action programs could be deemed invalid if they do not limit benefits to minority citizens within the jurisdiction. Requiring affirmative action programs to reflect one's constituencies guards against a group in power enacting a program to benefit itself and surreptitiously "padding" the program by including other unexpected groups. Requiring targeted beneficiaries to be in the jurisdiction also ensures review and evaluation of any program by its purported beneficiaries. Feedback from beneficiaries is crucial to determine if the programs actually are perceived as good, whether the programs are working, and whether they are still desired.

Affirmative action programs also could be deemed prima facie invalid unless they have a built-in time limit keyed to the time needed to achieve and measure results, or perhaps just a time limit keyed to elections. A time limit on affirmative action programs, much like the regular review and enactment of budgets, would make the programs subject to regular political review and support (or dismantling) and would prevent the adoption and perpetuation of unexamined set-asides.

Emphasis should be placed on experimentation. Thus, cookie-cutter programs that are implemented without careful consideration of the particular problems, circumstances, and resources facing a political body should be viewed skeptically. The political bodies should be encouraged to develop unique and targeted programs that take full advantage of all forms of affirmative action, including educational programs, mentoring programs, and outreach programs, as well as flexible set-asides in the form of targets or goals and incentives for inclusion.

Finally, the burdens on non-minority citizens can be recognized and eased by mandating waiver provisions and creating options for participation. Waivers should be given where qualified minority candidates are not available or where particular hardship can be shown by the majority candidate. Options can include conditioning the award of a municipal contract on mentoring a minority participant in the execution of the contract, or on participating in an educational training program aimed at minority citizens, or on agreeing to participate in

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226. "Padding" was one of the plurality's concerns in *Croson*, 488 U.S. at 495-96. They felt African Americans were in power in Richmond and had created an affirmative action program to benefit themselves, throwing in other minorities, including Aleuts and Eskimos, to mitigate the appearance of self-dealing.

227. Professor Ely's well known process-oriented approach stated in *Democracy and Distrust* (1980) deems affirmative action acceptable if implemented by a majority disadvantaging itself in favor of a minority. But this view leaves out a crucial component. Majority disadvantage may be a necessary condition, but it alone is not sufficient. One must also find that the supposed beneficiaries endorse and desire the program being implemented. One could conceive of situations where programs disadvantageous to the majority in one respect are beneficial in another respect, and the programs are imposed on unwilling or unsuspecting minority participants, perhaps to placate them. A political process that fails to engage and take account of minority citizens' views is unacceptable.
a hiring program designed to reach out to minorities. Options not only ease the
burden on majority citizens by providing flexibility but also recognize a role
for majority citizens’ personal preferences.

Of course, affirmative action simply may not work. If the results of an
aggressive affirmative action program are not sufficiently significant and
positive, however, then the political process is likely to eliminate such a
program, especially if an active and open debate is ongoing. Majority citizens
certainly will not be clamoring for its continuation, and minority citizens will
likely want a program that promises more success. Given the flexibility of
the political sphere, a new and different approach could then be adopted.

If we admit that the political branches will remain political, and indeed
should be political, a remedial purpose requirement should not be adopted. We
nonetheless can demand certain structural protections and rely on judicial
review to check gross abuses. Without the innovative and flexible power of the
political branches, however, we truly will be condemned to repeat our past,
remediating discrimination that has gone before and allowing more discrimina-
tion to go on today until we can prove, after the fact, that it has occurred
again.

V. CONCLUSION

This Article has argued against the imposition of a remedial purpose
requirement for affirmative action. The Article explored the likely detrimental
impacts of such a requirement and contrasted those impacts with the weak
constitutional and instrumental reasons underlying imposition of a remedial
purpose requirement. Rather than risking exacerbated racial tensions and
hamstrung political bodies that result from a remedial purpose requirement, this
Article urges adopting discrete measures to control the risks associated with
affirmative action. Such discrete measures will allow political bodies to be
flexible, inventive, and responsive with respect to one of the greatest
challenges facing American society today: ensuring a just and non-discriminato-
ry society to which all America’s citizens feel committed.

228. Cf. Cynthia Brent Bowman, We Don’t Want Anybody Sent: The Death of Patronage Hiring
in Chicago, 86 NW. U. L. Rev. 57 (1991) (arguing that machine politics enabled politicians to ignore
minority interests and actually kept favored groups in low-paying jobs, which were the only jobs
available for handout); Bill Johnson, Political Path to Progress is Paved with Bad Results, DETROIT
NEWS, June 21, 1996, at A10 (reporting that Black citizens have been very active politically at the
expense of entrepreneurship, with the result that their standard of living has remained low, whereas
Hispanic citizens have low political participation, high entrepreneurship, and rising standards of living).