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Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action

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ARTICLES

INTERGROUP RIVALRY, ANTI-COMPETITIVE CONDUCT AND AFFIRMATIVE ACTION

MICHELLE ADAMS*

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INTRODUCTION

Our national conversation about the propriety of affirmative action revolves around a central question: is it appropriate to consider race in allocating sought-after benefits and limited resources? The rhetorical positions on each side of this debate are familiar. Opponents of affirmative action argue that race-conscious decision-making undercuts traditional notions of merit and provides less-qualified individuals with access to undeserved benefits.¹ Proponents reply that purportedly neutral notions of merit are socially constructed and entrench an exclusionary system of benefits distribution.² Opponents argue that affirmative action unfairly penalizes "innocent" individuals by requiring them to bear the burdens of redressing harms they did

¹ Lino A. Graglia, *Professor Loewy's "Diversity" Defense of Racial Preference: Defining Discrimination Away*, 77 N.C. L. REV. 1505, 1513 (1999) ("Racial preferences are an attempt to overcome the fact that members of the preferred groups are not, in general, competitive with whites (and Asians) in terms of the ordinary academic admissions criteria.").

² Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 752-57 (describing the social construction of merit); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CALIF. L. REV. 953, 954-56 (1996) (noting that proponents of affirmative action often challenge the "fairness and functionality of existing merit standards" because they rely on "exclusionary criteria").

not cause.³ Proponents view affirmative action as providing limited compensation for age-old injuries caused by a long history of state-mandated segregation.⁴

To a large extent, this debate can be understood as a dispute about the propriety of viewing the Equal Protection Clause from an individualist rather than a group-oriented perspective.⁵ Thus, the broad question at the heart of affirmative action cases, and anti-discrimination law generally, is whether the Equal Protection Clause should protect individuals qua individuals (the "individualist discriminatory" framework) or whether it should protect members of minority groups precisely because they are members of minority groups (the "group rights" or "antisubjugation" position).⁶ It is now abundantly clear that a majority of the current Supreme Court views the Equal Protection Clause as a font of individual rights protection rather than as a safeguard for minority group interests.⁷ Adhering to this individualist

³ See Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 299-308 (1990) (examining the notion of the "innocent white victim" in the context of the affirmative action debate). Professor Ross concludes that the "rhetoric of innocence" diverts society from what he believes is the crucial question: "how do we get to a world where good people, white and of color, no longer suffer because of the accidental circumstances of their race?" *Id.* at 315-16.

⁴ David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 958-97 (1996) (arguing that affirmative action can be justified as a remedy for present day discrimination and racial disparity in areas such as education, employment, housing, health care, economic opportunity, crime and poverty).

⁵ Opponents claim that affirmative action protects group rights at the expense of individual rights, thereby subverting constitutional norms generally, and the Equal Protection Clause specifically. Graglia, *supra* note 1, at 1512 (arguing that the use of affirmative action in college admissions is "inconsistent with the democratic principle of individual worth"). Alternatively, proponents view the Equal Protection Clause as emphasizing racial subjugation and racial equality as guiding themes rather than focusing on colorblindness and individual rights. See, e.g., Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1334-37 (1986) (proposing that the Constitution opposes subjugation, not discrimination, and therefore would prohibit even race-neutral policies that have the effect of subjugating a certain race).

⁶ Kennedy, *supra* note 5, at 1335-36 (maintaining that the interpretation of the Equal Protection Clause as requiring color-blind policies is merely a theory, and summarizing arguments for and against the "antisubjugation" interpretation of the Equal Protection Clause).

⁷ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). In the opinion for the Court in *Adarand*, Justice O'Connor wrote, "[T]he Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*." *Id.* (emphasis in original). This portion of Justice O'Connor's opinion garnered the support of Justices Kennedy, Scalia and Thomas as well as Chief Justice Rehnquist. *Id.* In 1976, with a seven vote majority, the Court held that, absent an "invidious discriminatory purpose," a law is valid under the Fourteenth Amendment even if it has a disparate impact on minority groups. See *Washington v. Davis*, 426 U.S. 229, 242 (1976).

perspective of the Equal Protection Clause, the Court has also limited the type of discrimination that government can redress through an affirmative action program. Briefly stated, particularized instances of identified discrimination are "in,"⁸ and amorphous claims of societal discrimination are "out."⁹

Given the apparent durability of the Court's individualist position, it would seem that there is little use in championing an approach that bears even the slightest relationship to the group rights position. Fidelity to the individualist discriminatory framework in affirmative action cases, on the other hand, usually results in invalidation of affirmative action plans. This might be a positive development if one viewed the purpose of the Equal Protection Clause solely as prohibiting race-based governmental decision-making prospectively. However, the aftershocks and reverberations of prior racial discrimination are still felt powerfully today because of "lock-in" effects,¹⁰ particularly in the areas of housing, education and employment.¹¹ More economically and socially powerful groups may engage in anti-competitive conduct that distorts the market for skills acquisition and enhancement, education, jobs, and contracting opportunities.¹² Such actions lock-in advantages accrued in a prior era, lock-out unwanted competitive pressures, and strengthen and perpetuate a powerful advantage/disadvantage cycle encompassing education, jobs, and housing opportunities. Thus, even if all decision-makers today were to act without regard to race, adherence to the individualist discriminatory framework leaves in place the anti-competitive distribution scheme previously

⁸ See *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 499 (1989). In *Croson*, the Richmond City Council adopted the Minority Business Utilization Plan (the "Plan"). *Id.* at 477. The Plan required contractors to subcontract at least thirty percent of the dollar amount of the contract to a minority-owned sub-contractor. *Id.* The city argued that it intended the Plan to remedy a history of discrimination that had reduced opportunity for minority entrepreneurs. *Id.* at 498-99. The Court deemed the Plan unconstitutional because it was a "rigid racial quota" based only on "an amorphous claim that there has been past discrimination in a particular industry." *Id.* at 499, 511.

⁹ See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986), cited in *Croson*, 488 U.S. at 497. In *Wygant*, the Court invalidated provisions of a collective-bargaining agreement between the Jackson Board of Education and the local teachers' union. *Id.* at 270-71, 273. The agreement provided that, in the event of layoffs, the percentage of laid off employees that were minorities could not exceed the percentage of all employees that were minorities, regardless of seniority. *Id.* at 270. According to the Court, because the city could not show specific instances of prior discrimination by the governmental unit, the provision was invalid. *Id.* at 274.

¹⁰ Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727, 731-36 (2000) (arguing that the overrepresentation of whites in legal education and employment can be explained by the antitrust concept of "lock-in" wherein whites exclude minorities and then use their monopoly power to lock-in standards of competition that favor whites).

¹¹ See *infra* Part II.

¹² See *infra* Part III.

developed—one explicitly based on race.

This Article suggests that we should view equal protection in terms of group status and competition. This view would shift our current approach to affirmative action cases away from the individualist discriminatory framework and toward a framework that principally recognizes that racially and socially defined groups compete for economic and social benefits and resources. This competition takes place within an enduring state-sanctioned discriminatory scheme legitimated by the dominant culture. From this perspective, we may now see affirmative action cases for what they are, namely manifestations of intergroup conflict.

But why should we shift to an approach that emphasizes group status and competition, particularly given the Court's clear rejection of a group rights approach? One rationale is that the assumptions that might have justified the focus on individual discrimination are no longer valid. Significant research in social science describes racial inequality as grounded in notions of group identity and group conflict.¹³ Sociologists and social psychologists who study discrimination and prejudice have moved away from theories that explain prejudice solely as a problem of individual perception, and toward theories that view individual cognitive processes as related to group membership.¹⁴ While present social science yields no consensus view, there is a striking emphasis in the current literature on group identity theories as "powerful determinants of behavior."¹⁵ These theories, which stress the importance of prejudice as a group-based phenomenon¹⁶ and focus on "social-structural theories of group competition,"¹⁷ are particularly resonant for our discussion of affirmative action and competitive process distortion. Thus, social science scholarship has recognized that discriminatory behaviors are not just the result of personal, individual cognitive-process distortions, but are a problem of collective action.

This Article explores this notion of collective action by analyzing the process by which blacks and whites compete for resources and benefits.¹⁸ In

¹³ David O. Sears et al., *Cultural Diversity and Multicultural Politics: Is Ethnic Balkanization Psychologically Inevitable*, in CULTURAL DIVIDES: UNDERSTANDING AND OVERCOMING GROUP CONFLICT 35, 40-42 (Deborah A. Prentice & Dale T. Miller eds., 1999) (providing an overview of group identity and conflict theories); see also RUPERT BROWN, PREJUDICE: ITS SOCIAL PSYCHOLOGY 2-14 (1995) ("[P]rejudice is primarily a phenomenon originating in group process Thus, such intergroup relations as a conflict over scarce resources, or power domination of one group by another, or gross disparities in numerical size or status can all . . . have crucial implications for the direction, level, and intensity of prejudice . . .").

¹⁴ See, e.g., Sears et al., *supra* note 13, at 40-42; BROWN, *supra* note 13, at 10-12.

¹⁵ Sears et al., *supra* note 13, at 40.

¹⁶ BROWN, *supra* note 13, at 10-11.

¹⁷ Sears et al., *supra* note 13, at 41. These theories generally maintain that people naturally form groups and those groups inevitably develop "hierarchies of status and power." *Id.* The theories also claim that intergroup rivalry is inevitable. *Id.*

¹⁸ For the purpose of simplicity, I focus solely on the concept of black-white competitive

certain areas, whites as a group have engaged in conduct that can be seen as anti-competitive, "locking-in" benefits accrued under a prior, explicitly segregated era, and creating barriers to entry that prevent blacks as a group from enjoying those benefits. Accordingly, the current debate about affirmative action has been woefully under-inclusive, because it fails to analyze this underlying competitive framework within which blacks and whites compete for economic and social benefits and resources. Furthermore, by failing to recognize the competitive dynamics underlying affirmative action cases, the courts' decisions have maintained white competitive advantage. Anti-competitive conduct by the dominant white group undercuts the goals of equality and anti-discrimination to which our society purportedly subscribes, and the courts have been complicit in maintaining this structure.

This Article highlights three areas in which this anti-competitive conduct can be seen: employment,¹⁹ housing²⁰ and education.²¹ Through strict scrutiny analysis, recent jurisprudence takes an unduly limited approach to interpreting the demands of equal protection. In these three disparate areas, the courts engage in a similar strict scrutiny analysis reviewing affirmative action programs.²² In each area, the respective court failed to engage in a meaningful compelling governmental interest analysis, allowing it to ignore the competitive dynamics underlying each case. These courts then jumped to a truncated narrow tailoring inquiry, which allowed them to strike down the affirmative action plans presented. This approach short-circuits meaningful judicial review of the affirmative action plans crafted by governmental actors. As a result, the courts leave intact structures that benefit whites at the expense of blacks. By viewing cases in these areas through the lens of competition, we

dynamics. There is a great deal of complexity inherent in any analysis of affirmative action and group dynamics, and other racial and ethnic groups compete for resources and benefits in similar fashions to the concepts that I discuss.

¹⁹ MD/DC/DE Broadcasters Ass'n v. F.C.C., 236 F.3d 13, 15-17 (D.C. Cir. 2001), *cert. denied*, 122 S. Ct. 920 (2002) (invalidating an FCC regulation that required broadcasters to enact recruitment procedures designed to increase minority applications because the regulation was not "narrowly tailored to support a compelling government interest").

²⁰ Walker v. City of Mesquite, 169 F.3d 973, 981-82, 987-88 (5th Cir. 1999), *cert. denied*, 528 U.S. 1131 (2000) (vacating a lower court's order to construct public housing in predominantly white neighborhoods because, while motivated by a compelling government interest, it was not narrowly tailored in light of other possible non-discriminatory remedies).

²¹ Eisenberg v. Montgomery County Public Schools, 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2002) (ordering an injunction requiring school authorities to permit an elementary student to transfer schools after the authorities rejected the transfer application because it would upset the "diversity profile").

²² Any race-conscious measure receives strict scrutiny under either the Equal Protection Clause or the equal protection component of the Fifth Amendment. *E.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995). Under strict scrutiny, all racial classifications must be "narrowly tailored measures that further compelling government interests." *Id.*

see that different outcomes are both possible and advisable.

The Tenth Circuit's most recent decision in the long-running *Adarand* litigation,²³ highlights the approach this Article advocates because the court began to shift toward viewing discrimination as a form of anticompetitive conduct. This approach allowed the court to engage in a meaningful compelling governmental interest inquiry and allowed it to see the ways in which discrimination locked-in benefits for one group over time. In beginning to use the language of competition, the court was on the right track toward a fuller and richer conception of intergroup conflict and anti-competitive conduct. By following *Adarand's* lead and analyzing affirmative action disputes through the lens of competition, courts and policy-makers will develop a more complete understanding of the dynamics of discrimination and will develop more thorough tools with which to evaluate cases and create affirmative action policy.

Part I of this Article discusses the concepts of competition and intergroup rivalry. It surveys recent scholarship in the social sciences and highlights social identity theory and realistic group conflict and group position theories. It focuses on social dominance theory, which analyzes group-based social hierarchies. This scholarship provides a sound theoretical framework from which we can understand blacks and whites as groups that compete for benefits and resources. Part II turns to an examination of the process by which blacks and whites compete. It discusses legal scholarship that applies antitrust concepts to discrimination law, and it explores the interrelated nature of the markets for housing, education, and employment. It then examines the economic concept of barriers to entry and explores how this concept applies to black-white intergroup competition.

Part III analyzes three recent cases in the areas of housing, education, and employment. In each case, a governmental actor attempts to disrupt the system that has locked-in benefits for whites at the expense of blacks. In each case, the courts have failed to recognize this attempt for what it is; instead, they viewed these efforts as simply unconstitutional race-based preferences in favor of minorities. This section of the Article carefully examines the methods the courts used to bypass meaningful compelling governmental interest analysis and jumped to a cursory narrow tailoring analysis. As a result, the courts thwarted the governmental actors' efforts to create even playing fields in each of these markets. Finally, Part IV highlights one court that adopts a more nuanced approach. In the latest installment of the *Adarand* litigation, the Court of Appeals for the Tenth Circuit made a conscientious effort to analyze the competitive dynamics undergirding the market for employment in a particular area. By doing so, the court engaged in a meaningful equal protection analysis which allowed it to come to the correct conclusion.

²³ *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), *cert. denied*, 534 U.S. 103 (2001) (ruling that revisions to a federal affirmative action program for minority subcontractors make the program narrowly tailored and constitutional).

I. COMPETITION: RACE RELATIONS AND SOCIAL STRUCTURAL THEORIES OF INTERGROUP RACIAL CONFLICT

Ideas about competition and fair play are a bedrock of American society and culture and permeate every area of our work and play. America's love affair with competition goes beyond an appreciation of its value as the core of our economic system. Competition and the competitive impulse also stand at the core of our culture, acting as part of our "national DNA."²⁴ In nearly everything we do—from our leisure-time activities, such as sports²⁵ and entertainment,²⁶ to political campaigns²⁷ and business dealings²⁸—competition drives how activities are structured, how winners are compensated, and how losers are consoled. Along with the norm of competition comes at least the formal commitment to "fair play," to an "even playing field," and to the promise that the rules of the game will be determined *ex ante* rather than *post hoc*. Thus, it is in the contestants' best interest to structure fair rules prospectively and to adhere to them (or at least appear to) throughout the contest because the competitor seeks not just the prize, but the prestige that accompanies a triumph fairly achieved.²⁹

²⁴ B.W. Powe, *Why Tocqueville Still Matters*, THE GLOBE AND MAIL (Toronto), Jan. 20, 2001, at D2, Westlaw, ALLNEWS.

²⁵ See *After the Tragedy, Sports Will be There for America*, L.A. TIMES, Sept. 15, 2001, at 2, LEXIS, News & Business, LAT File (quoting a letter from Alvin M. Okamura):

Sports is our drug. It fills our need for competition, battle—some even call it war. It's an arena where the rules are set, the competitors are determined, and even the boundaries or playing field become part of our culture. We love it because it's 'fair.'

²⁶ See Ray Mark Rinaldi & Ellen Futterman, *The Trends, The Surprises—and the Disses*, ST. LOUIS POST-DISPATCH, Feb. 13, 2002, at E1 (Everyday Magazine), LEXIS, News & Business, SLPD File:

Americans love the Academy Awards because they're all about competition. All that talk about fashion and box office and who's escorting whom to the awards is just a showcase for a big showdown. The Oscars take whatever art may be found in a year of films and reduce it to a clumsy contest held on one glam night—the perfect transformation for our dog-eat-dog dispositions.

²⁷ A recent article drew an interesting analogy between the current Oscar race and the competitive nature of American political campaigns:

You might liken the current phase of the Oscar campaign to political primary seasons All campaigns must operate within a set of guidelines intended to promote a level playing field. Yet, as in politics, campaigners are always probing for loopholes and pushing the envelope to see how far they can go before running afoul of the regulators.

Pat Nason, *Hollywood Analysis: What Price, Oscar?*, UPI HOLLYWOOD REP., Feb. 4, 2002, LEXIS, News & Business, UPI File.

²⁸ Peter Burrows, *Carly's Last Stand?: The Inside Story of the Infighting at Hewlett-Packard*, BUS. WK., Dec. 24, 2001, at 63, 64 ("[T]hese players will wage one of the biggest proxy fights in corporate history—one that could turn especially nasty.").

²⁹ The controversy surrounding the pairs figure skating event at the 2002 Winter Olympic Games in Salt Lake City is illustrative. After allegations that one of the judges of

The goal of procedural fairness coexists, however, with the desire to triumph over rivals. In business, a voluminous literature provides information and guidance to companies eager to develop and maintain competitive advantages.³⁰ Companies seeking success in a competitive environment are advised to reshape the game's context and to change marketplace rules in order to trump over competitors.³¹ Companies attempt to shape the game's context in several ways. First, they create alliances and merge operations to "reduce . . . the number of existing rivals."³² They also use the "courts, legislatures, [and] governmental agencies . . . to shape competitive conditions to [their] advantage."³³ Additionally, they acquire new knowledge, premised on superior informational and educational access.³⁴ Changing the game's context thus allows competitors to outmaneuver other players, preempt rivals, perform tasks more skillfully, and cooperate with other entities.³⁵ Firms also exploit the ownership of superior resources,³⁶ use entry barriers to limit the number of potential competitors,³⁷ and exploit market position to undercut rivals.³⁸

In a competitive world, winners want to keep on winning, and they want to keep the prizes or resources accumulated over the course of many games. As winners accumulate resources, they can use those resources to change the structure of the game to favor their side. Over time, winners may compete only with members of favored groups, create barriers to joining the

the event was pressured to vote in a certain manner, the International Skating Union awarded a second set of gold medals to the silver medallists. The core of the controversy revolved around the perception that the result of the competition was predetermined, that the "rules of the game" had been violated. Selena Roberts, *Canadian Skaters Awarded Share of Olympic Gold; French Judge Suspended, Her Scoring Thrown Out*, N.Y. TIMES, Feb. 16, 2002, A1 (quoting one of the newly-named gold medallists: "We're happy that justice was done . . . [t]hat doesn't take anything away from [the other gold medallists]. This was not something against them; it was something against the system").

³⁰ See, e.g., RICHARD A. D'AVENI & ROBERT GUNTHER, *HYPERCOMPETITION: MANAGING THE DYNAMICS OF STRATEGIC MANEUVERING* (1994); LIAM FAHEY, *OUTWITTING, OUTMANEUVERING, AND OUTPERFORMING COMPETITORS* (1999); BENJAMIN GOMES-CASSERES, *THE ALLIANCE REVOLUTION: THE NEW SHAPE OF BUSINESS RIVALRY* (1996); CURTIS M. GRIMM & KEN G. SMITH, *STRATEGY AS ACTION: INDUSTRY RIVALRY AND COORDINATION* (1997); LEE TOM PERRY, *OFFENSIVE STRATEGY: FORGING A NEW COMPETITIVENESS IN THE FIRES OF HEAD-TO-HEAD COMPETITION* (1990); KEN G. SMITH, CURTIS M. GRIMM & MARTIN J. GANNON, *DYNAMICS OF COMPETITIVE STRATEGY* (1992).

³¹ FAHEY, *supra* note 30, at 13.

³² *Id.*

³³ *Id.* at 14.

³⁴ *Id.* at 14-15.

³⁵ *Id.* at 19-20.

³⁶ GRIMM & SMITH, *supra* note 30, at 103-28.

³⁷ D'AVENI & GUNTHER, *supra* note 30, 114-51.

³⁸ GRIMM & SMITH, *supra* note 30, at 131-57.

game, and collude with others to undercut the ability of other players to compete against them. Winners can invest resources to restructure the rules of the game and enhance their chances of winning future contests. At the same time, winners maintain that the rules of the game are fair, because to believe otherwise would undermine the prestige associated with winning the prize fairly.

Similarly, in American culture, blacks and whites have historically acted, and continue to act, as competitor groups. The focus of this competition is access to resources, power, and prestige. Historically, whites as a group have been the winners of this competition, allowing them to build upon and lock-in the advantages of previous successes. Affirmative action programs can be seen as a government attempt to assist blacks, as a group, in securing some of these benefits. However, in analyzing challenges to affirmative action programs, the courts generally fail to recognize this group rivalry between blacks and whites.

Historically, we have seen racial discrimination as the fruit of animus, as an individual's irrational action driven by a cognitive process distortion called "prejudice."³⁹ The Supreme Court's approach to the Equal Protection Clause has been consistent with this idea by requiring "invidious discriminatory purpose"⁴⁰ or "discriminatory motivation"⁴¹ as key to a finding of a violation of equal protection. At the same time, the Court has focused largely on the need to protect the rights of individuals in disputes involving equal protection claims rather than concerning itself with the harms experienced by groups as groups.⁴² This approach has reached its apex in the Court's affirmative action

³⁹ See generally GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 9 (1954) (defining ethnic prejudice as "an antipathy based upon a faulty and inflexible generalization . . ."); GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 40-42 (20th ann. ed., 1962).

⁴⁰ See, e.g., *Washington v. Davis*, 426 U.S. 229, 236-37, 242 (1976) (upholding the constitutionality of a police department's entrance exam because there was a lack of discriminatory intent even though four times as many black applicants failed the test than did white applicants).

⁴¹ See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (holding that plaintiffs stated a viable cause of action by alleging that the Alabama legislature intentionally redrew a municipality's boundaries to exclude all but four or five out of 400 blacks from voting in an election). The majority in *Gomillion* principally reviewed the state's action in light of the Fifteenth Amendment. Justice Whittaker's concurring opinion, however, argued that the state action violated the Equal Protection Clause. *Id.* at 349 (Whittaker, J., concurring).

⁴² See, e.g., *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938) ("It is the individual who is entitled to the equal protection of the laws."). In *Gaines*, the School of Law at the State University of Missouri refused to admit the plaintiff, a black applicant. *Id.* at 342. The school instead arranged for the student to attend law school in an adjacent state, but would not provide in-state education. *Id.* at 343. The court rejected an argument that limited demand relieved the state's duty to provide separate but equal facilities because "the petitioner's right is a personal one." *Id.* at 351.

doctrine, which protects the rights of individuals in a way that "trumps" the interests of blacks and other minority group members.⁴³ This focus on individualism has masked intergroup competition and conflict, and disguised the complex interactions that undergird disputes. Unfortunately, the Court has not ordinarily viewed racial discrimination as a function of the process of rivals interacting to develop and preserve gains.

Recent work in the social sciences provides a solid theoretical framework for analyzing competition between blacks and whites as intergroup conflict. Many social science researchers have viewed intergroup relations and discrimination as behavior that assists in enhancing a particular group's position. This research suggests that the actions of individual whites can be seen, in the aggregate, as behaviors intended to protect the interests of the group to which the individuals belong. Many sociologists and social psychologists have moved toward normative theories of prejudice and discrimination that focus on "group categories as powerful determinants of behavior."⁴⁴ While there is no consensus view among social scientists about the causes of prejudice and discrimination,⁴⁵ several theories have developed which emphasize social structure and group interests as keys to understanding how and why discrimination occurs. For instance, social-psychological theories of intergroup relations and conflict generally place great emphasis on "the individual's connection to and embeddedness in the larger social context . . ."⁴⁶ Social structural theories focus on the "structural relationships among groups" as vital to understanding the roots of prejudice and discrimination.⁴⁷ Both approaches, however, are grounded in the notion that groups, and individuals' identification with them, are vital to our understanding of the causes of prejudice and discrimination.

We begin our discussion of recent social psychological and social structural approaches to intergroup conflict, by asking two questions. First, why might an individual identify herself as a member of one group or another? That is, what does an individual gain from a group-based or category-based identity? Second, do individuals within groups think that it is important to allocate resources to those within their group and to deny resources to outgroup members? If so, why? Recent developments in social psychology offer some tantalizing responses to these questions.

⁴³ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (stressing that any governmental attempt to aid a racial group will be "subjected to detailed judicial inquiry to ensure that the *personal* right of equal protection of the laws has not been infringed" (emphasis in original)).

⁴⁴ Sears et al., *supra* note 13, at 40.

⁴⁵ See JIM SIDANIUS & FELICIA PRATTO, *SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL HIERARCHY AND OPPRESSION* 3-30 (1999) (analyzing various intergroup relations theories).

⁴⁶ *Id.* at 15.

⁴⁷ *Id.* at 20.

A. *Social Identity Theory: The Importance of Group Membership*

Social identity theory, first developed by social psychologist Henri Tajfel in an effort to understand the origins of intergroup conflict, is reflective of the post-World War II European approach to social psychology.⁴⁸ This approach emphasized people's interactions not as unique individuals but as members of social groups.⁴⁹ Social identity theory has had a tremendous impact on the way in which social psychologists evaluate intergroup relations, and it has strongly influenced the recent resurgence of interest and research in group processes in a variety of areas.⁵⁰

Social identity theory posits that an individual's membership in a social group or groups is a defining aspect of her self-concept.⁵¹ Tajfel defined "social identity" as an individual's "knowledge that he belongs to certain social groups together with some emotional and value significance to him of his membership."⁵² Thus, social identity is an individual's understanding of oneself as a group member.⁵³ Social identity theory is also premised on the notion that individuals want to view themselves with a positive, rather than a negative, self-image.⁵⁴ Thus, according to Tajfel, social identity has two components: belief that one belongs to a group (e.g., "I am an American") and the importance of that group membership to one's self (e.g., "and I am damn proud to be a citizen of the greatest country on earth").⁵⁵

Tajfel did not argue that an individual's social identity forms the totality of a person's self-conception; rather, an individual's self-conception is complex and multifaceted.⁵⁶ Instead, social identity theory posits that an individual's self-conception should be viewed along a continuum.⁵⁷ At one end of the

⁴⁸ Michael A. Hogg & Dominic Abrams, *Social Identity and Social Cognition: Historical Background and Current Trends*, in *SOCIAL IDENTITY AND SOCIAL COGNITION* 7, 9 (Dominic Abrams & Michael A. Hogg eds., 1999) [hereinafter Hogg & Abrams, *Social Identity and Social Cognition*].

⁴⁹ *Id.* at 9-10.

⁵⁰ *Id.* at 10-11.

⁵¹ HENRI TAJFEL, *HUMAN GROUPS AND SOCIAL CATEGORIES* 255 (1981).

⁵² *Id.* at 258.

⁵³ Dominic Abrams & Michael A. Hogg, *An Introduction to the Social Identity Approach*, in *SOCIAL IDENTITY THEORY: CONSTRUCTIVE AND CRITICAL ADVANCES* 2 (Dominic Abrams & Michael A. Hogg eds., 1990).

⁵⁴ TAJFEL, *supra* note 51, at 45.

⁵⁵ Lee Jussim, Richard D. Ashmore & David Wilder, *Introduction: Social Identity and Intergroup Conflict*, in *SOCIAL IDENTITY, INTERGROUP CONFLICT AND CONFLICT REDUCTION* 6 (Richard D. Ashmore et al. eds., 2001).

⁵⁶ TAJFEL, *supra* note 51, at 255.

⁵⁷ *Id.* ("There is no doubt that the image or concept that an individual has of himself or herself is infinitely more complex, both in its contents and its derivations . . ."); see also MICHAEL A. HOGG, *THE SOCIAL PSYCHOLOGY OF GROUP COHESIVENESS: FROM ATTRACTION TO SOCIAL IDENTITY* 90 (1992) [hereinafter HOGG, *PSYCHOLOGY OF GROUP COHESIVENESS*] ("Social behaviour and relations among people vary along a continuum . . .").

spectrum is the individual's "personal identity," an understanding of one's self as a "unique and distinct" individual.⁵⁸ At the other end of the continuum lies the individual's "social identity," a conception of the self as "'interchangeable' with other ingroup members and stereotypically distinct from outgroup members."⁵⁹ This end of the spectrum is important because "self-inclusive social categories," such as "I am an American," were simultaneously descriptive, normative and evaluative.⁶⁰

The cognitive processes of social categorization and social comparison are key to social identity theory. Social identity theory posits that social categorization and social comparison translate into social behaviors.⁶¹ As a general matter, social categorizations are the cognitive processes by which an individual breaks down socially important information into discrete units—the "discontinuous divisions of the social world into distinct classes or categories."⁶² More important to social identity theory, however, social categorizations were the cognitive processes by which individuals assigned both the self and other people to a "contextually relevant category."⁶³ The normative and evaluative function of this process was important, such that outgroup members were homogenized, distanced and stereotyped.⁶⁴

Social comparison was the ability to discern among groups differences that are grounded in social reality (e.g., differences in status, economic attainment or skin color).⁶⁵ Thus, if an important part of an individual's self-conception revolved around group membership, individuals placed significance on their group's position vis-à-vis that of other groups.⁶⁶ As Tajfel explained, "the definition of a group (national, racial or any other) makes no sense unless there are other groups around."⁶⁷ From the perspective of social identity theory, then, an individual's social identity was only really significant when it was possible to compare the standing of the individual's group in a positive manner

⁵⁸ HOGG, *PSYCHOLOGY OF GROUP COHESIVENESS*, *supra* note 57, at 90.

⁵⁹ *Id.*

⁶⁰ Michael A. Hogg, *Intragroup Processes, Group Structure and Social Identity*, in *SOCIAL GROUPS AND IDENTITIES: DEVELOPING THE LEGACY OF HENRI TAJFEL* 67 (W. Peter Robinson ed., 1996) [hereinafter Hogg, *Intragroup Processes*] (noting that self-evaluation of a social group's standing forms a relative basis for the evaluation of other social groups).

⁶¹ HOGG, *PSYCHOLOGY OF GROUP COHESIVENESS*, *supra* note 57, at 91 (arguing that group self-assessments translate into not just attitudinal perceptions but ways of behaving toward members of other groups).

⁶² John C. Turner, *Towards a Cognitive Redefinition of the Social Group*, in *SOCIAL IDENTITY AND INTERGROUP RELATIONS* 17 (Henri Tajfel ed., 1982).

⁶³ Hogg, *Intragroup Processes*, *supra* note 60, at 67 (describing the process of categorization of people, including oneself, into social groups).

⁶⁴ HOGG, *PSYCHOLOGY OF GROUP COHESIVENESS*, *supra* note 57, at 91.

⁶⁵ TAJFEL, *supra* note 51, at 258.

⁶⁶ *Id.* at 257-58.

⁶⁷ *Id.* at 258.

relative to that of other groups in a particular milieu.⁶⁸

Social identity theory, answering the first question posed above, tells us what individuals gain by identifying with certain groups. Ingroup identification can powerfully enhance an individual's self-evaluation and self-conception.⁶⁹ Social categories are related to self-concept, and social identity theory suggests that it is not meaningful to speak of the "individual" as a socially autonomous creature. It is important, however, to note exactly how the individual benefits from ingroup identification. Social identity theory suggests that the individual's enhanced concept of self, gained from ingroup identification, derives from viewing the ingroup favorably.⁷⁰ As Michael Hogg has explained:

Because social categories contribute to the self-concept and thus serve to define and *evaluate* self, we continually try to make intergroup comparisons on dimensions that already favor the ingroup. We strive for evaluatively positive social identity through positive ingroup distinctiveness. Social identity theory argues that this reflects a basic human motivation for positive self-esteem through self-enhancement.⁷¹

Thus, ingroup favoritism can be seen as the sine qua non of a person's "social identity" because "positive connotations of ingroup membership become positive connotations of self."⁷²

In the same way, social identity theory begins to offer a possible answer to our second question, which moves from a descriptive inquiry about individual self-conception, to a more normative question about how self-conception affects behavior. Once again, do individuals within groups think that it is important to allocate resources to those within their group and to discriminate against outgroup members? Social identity theory suggests that the answer is "yes."

The classic exposition of the effects of social identity is a series of experiments conducted by Henri Tajfel (and others) in the early 1970's. In the "minimal intergroup" experiments, Tajfel attempted to discover the minimum conditions under which an individual would discriminate in favor of her ingroup.⁷³ The experiments demonstrated that social categorization in and of itself was all that was necessary to trigger intergroup discrimination.⁷⁴ This

⁶⁸ *Id.*

⁶⁹ HOGG, *PSYCHOLOGY OF GROUP COHESIVENESS*, *supra* note 57, at 92 (explaining how individuals, motivated by their need for positive self-esteem, fulfill this need through group distinctiveness).

⁷⁰ *Id.* at 91.

⁷¹ *Id.* at 91-92 (emphasis in original).

⁷² Hogg & Abrams, *Social Identity and Social Cognition*, *supra* note 48, at 10.

⁷³ TAJFEL, *supra* note 51, at 268.

⁷⁴ Turner, *supra* note 62, at 22-23. In his experiment, Professor Tajfel instructed participants to divide money between two other participants. TAJFEL, *supra* note 51, at 268-69. The participant knew their group membership and the memberships of those between

means that the "mere perception of belonging to a social category is sufficient for group behavior."⁷⁵ The importance of this is the suggestion that an individual might engage in ingroup discrimination even where the individual does not stand to gain directly from the discriminatory behavior. As John Turner has explained in describing the minimal intergroup experiments:

Group membership was anonymous and there was no goal interdependence, social interaction or other basis for cohesive relations between members. Nevertheless, subjects discriminated against anonymous outgroup and in favour of anonymous ingroup members in the distribution of monetary rewards—under conditions where they could not benefit from this strategy. They demonstrated group behaviour in the form of uniformities in their reactions to others which were consistently related to their own and the others' group memberships. These results have been extensively replicated at the level of both behavioural discrimination and social evaluation.⁷⁶

Later studies suggested that similarity of ingroup members is not necessary for either group formation or intergroup discrimination to occur.⁷⁷ In the context of an important social categorization such as a racial grouping, ingroup members tend to exaggerate ingroup similarities and outgroup dissimilarities.⁷⁸ Moreover, ingroup members are attracted to other members simply because they belong to the same group.⁷⁹ Thus, according to the minimal intergroup experiments, awareness of a common membership was the overriding factor for individuals to feel and to act as group members.⁸⁰

Guided by social identity theory, we would assert that individuals within groups think that it is important to allocate resources to those within their group and to discriminate against outgroup members because it contributes to their own individual self-conception. Thus, where some social category, such as a racial grouping, plays a role in "defining the self, the need for positive self-esteem should motivate a desire to evaluate [the ingroup] more positively."⁸¹ From the social identity perspective, the ingroup may

whom they were dividing the money. *Id.* Beyond group membership, the participants knew nothing about the other players. *Id.* Commenting on the results, Professor Tajfel wrote, "The results were highly significant in the direction of awarding more money to members of the 'in-group.'" *Id.*

⁷⁵ Turner, *supra* note 62, at 22-23.

⁷⁶ *Id.* at 22.

⁷⁷ *Id.* at 22-27.

⁷⁸ *Id.* at 28.

⁷⁹ *Id.* at 22-27 ("We may not form a group with individuals we like so much as like people because they belong to our group.").

⁸⁰ *Id.* at 27.

⁸¹ See *id.* at 33-34 (stating generally that "favourable comparisons between the ingroup and an outgroup provide ingroup members with highly subjective status or prestige and thus positive social identity . . .").

discriminate against the outgroup not necessarily because there is a realistic conflict, but "simply to differentiate themselves and maintain a positive social identity for their members."⁸²

This observation, however, raises an important and related question about the nature of the bias. Are outgroup members harmed or discriminated against *because* they are outgroup members or instead as a byproduct of the actor's desire to help ingroup members? Several studies suggest that the need to assist ingroup members motivates actors more than the desire to harm outgroup members.⁸³ This is consistent with the notion, central to social identity theory, that group identification enhances an individual's self-concept. Thus, "[a] desire for positive distinctiveness can account for preferential hiring of ingroup members over outgroup members and for selective investment in projects that benefit one's own group over others."⁸⁴

B. *Related Theories of Intergroup Relations: The Realistic-Group-Conflict and Group Position Theories*

Other social psychological theories also suggest that group members' perception of group status and position can explain prejudice and intergroup discrimination. For instance, in 1965, Donald T. Campbell identified a theory of intergroup relations common to a variety of disciplines within the social sciences including anthropology, social psychology, and sociology.⁸⁵ Dubbing this approach "realistic-group-conflict theory," Campbell asserted that "group conflicts are rational in the sense that groups do have incompatible goals and are in competition for scarce resources."⁸⁶ Thus, according to this theory, prejudice and discriminatory behaviors are inexorably tied to group interests.⁸⁷ Competition over limited resources explained problematic attitudes and behaviors; rivalry for prizes determined the presence and intensity of intergroup discrimination.⁸⁸

⁸² *Id.* at 34.

⁸³ See Marilynn B. Brewer, *Ingroup Identification and Intergroup Conflict: When Does Ingroup Love Become Outgroup Hate?*, in *SOCIAL IDENTITY, INTERGROUP CONFLICT AND CONFLICT REDUCTION* 17, 26 (Richard D. Ashmore et al. eds., 2001) ("[T]he experimental literature on intergroup discrimination provides evidence that the primary motivation is to benefit the ingroup rather than harm the outgroup.").

⁸⁴ *Id.* at 27 (relating the study of intergroup relationships to real world examples of self-justified harm to others).

⁸⁵ Donald T. Campbell, *Ethnocentric and Other Altruistic Motives*, in *NEBRASKA SYMPOSIUM ON MOTIVATION* 283, 283-87 (David Levine ed., 1965); see also BROWN, *supra* note 13, at 163.

⁸⁶ Campbell, *supra* note 85, at 287 (noting that this rational basis for group conflict is a central assumption of the realistic-group-conflict theory).

⁸⁷ BROWN, *supra* note 13, at 163.

⁸⁸ David O. Sears, *Race in American Politics: Framing the Debates*, in *RACIALIZED POLITICS: THE DEBATE ABOUT RACISM IN AMERICA* 1, 22 (David O. Sears et al. eds., 2000). Sidanius and Pratto have summarized the realistic-group-conflict approach in the following

Closely related to the realistic-group-conflict theory, the group position theory also emphasizes power imbalances between groups as a basis for prejudice and intergroup discrimination.⁸⁹ The origins of the group position theory can be traced back to the work of Herbert Blumer.⁹⁰ Blumer postulated that racial prejudice is a function of one group's position vis à vis the position of another group, rather than a function of antipathetic feelings directed at specific individuals.⁹¹ For Blumer, this shifted the focus from a "preoccupation with feelings as lodged in individuals to a concern with the relationship of racial groups."⁹² Racial groups form images of themselves and others, he claims, through a collective process.⁹³ Hostility may emerge as a defensive reaction when one's sense of group position is challenged.⁹⁴ Blumer maintains that this challenge may come in many forms such as economic competition or encroachment into areas previously thought to belong solely to one's own group.⁹⁵

More recently, some scholars have used the realistic-group-conflict and group position theories to explain contradictions in white Americans' racial attitudes. For instance, Lawrence Bobo applied realistic-group-conflict theory

manner:

[T]he perception that one group's gain is another's loss translates into perceptions of group threat, which in turn cause prejudice against the outgroup, negative stereotyping of the outgroup, ingroup solidarity, awareness of ingroup identity, and internal cohesion, including intolerance of ingroup deviants, ethnocentrism, use of group boundary markers, and discriminatory behavior.

SIDANIUS & PRATTO, *supra* note 45, at 17 (citing Campbell, *supra* note 85).

⁸⁹ Sears, *supra* note 88, at 20-21. The sense of group position theory has been referred to as a "social structural" theory of intergroup relations—that is, as a theory that emphasizes the "structural relationships among groups" over the individual-level cognitive process of individuals. *Id.* at 20. From this perspective, the group position theory can be viewed as the "sociological version of realistic group conflict theory." *Id.*

⁹⁰ See Herbert Blumer, *Race Prejudice as a Sense of Group Position*, in NEW TRIBALISMS: THE RESURGENCE OF RACE & ETHNICITY 31, 31-40 (Michael W. Hughey ed., 1998).

⁹¹ *Id.* at 31-32.

⁹² *Id.* at 31 (arguing that such a shift would "yield a more realistic and penetrating understanding of race prejudice").

⁹³ *Id.* In summarizing Blumer's thesis, editor Michael W. Hughey writes:

Blumer points out that race (and ethnic) prejudice emerges out of the ongoing relations between groups, and especially from shifts in a group's sense of its social position relative to that of other groups. In particular, the real or imagined social ascent of the subordinate group is perceived by dominant group members as an indication of their own decline, or as a diminution of their group's honor, resulting in an intensification of prejudicial attitudes toward the offending group, often combined with actions designed to restore it to its rightful "place."

Michael W. Hughey, *Introduction*, in NEW TRIBALISMS: THE RESURGENCE OF RACE & ETHNICITY 1, 2 (Michael W. Hughey ed., 1998).

⁹⁴ *Id.* at 35-36.

⁹⁵ *Id.*

to whites' attitudes toward busing.⁹⁶ Bobo argued that white opposition to busing was a reflection of structural relationships between blacks and whites, as opposed to "a new manifestation of prejudice."⁹⁷ Bobo emphasized members' sense of belonging and status rather than any direct threat posed to a particular individual's welfare as keys to understanding the negative predisposition of whites toward busing. From this perspective, Bobo wrote:

As group membership and status play a role in the calculation of individual interests, it seems inappropriate to view self-interest or group conflict as based solely on objective, immediate threats to an individual's private well-being; challenges to *group* status or position are equally important.⁹⁸

Bobo's approach correlated white opposition to busing to a diminution to the group's long-term interests.⁹⁹ Thus, Bobo shifted from a conception of prejudice as a product of "preadult socialization,"¹⁰⁰ toward an examination of how a particular public policy initiative threatened to redistribute group resources, thereby posing significant threats to the economic and social status of the group.¹⁰¹

Similarly, Bobo, together with James R. Kluegel and Ryan A. Smith, argued that group position theory can explain the apparent contradiction between whites' increasing comfort with blacks, but more negative attitude toward social policies intending to improve blacks' status.¹⁰² Applying the group position theory to the changed circumstances and differing needs of modern racism illustrates the theory's dynamism and adaptability.¹⁰³ Thus, whites generally discard old style "Jim Crow" racism and embrace "laissez-faire" racism (stereotyping, blaming, and resistance to policies aimed at assisting blacks) so that the "dominant racial group [can] maintain a privileged status relative to members of a subordinate racial group."¹⁰⁴ According to these approaches, whites' policy preferences are rooted in a belief that their race ought to be dominant, rather than on irrational animus toward blacks.¹⁰⁵

⁹⁶ Lawrence Bobo, *Whites' Opposition to Busing: Symbolic Racism or Realistic Group Conflict?*, 45 J. PERSONALITY & SOC. PSYCHOL. 1196, 1197 (1983).

⁹⁷ *Id.* at 1196.

⁹⁸ *Id.* at 1200.

⁹⁹ *Id.* at 1201.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Lawrence Bobo, James R. Kluegel & Ryan A. Smith, *Laissez-Faire Racism: The Crystallization of a Kinder, Gentler, Antiblack Ideology*, in RACIAL ATTITUDES IN THE 1990's 15, 22 (Steven A. Tuch & Jack K. Martin eds., 1997) (relating modern racist attitudes to Blumer's group position theory by characterizing these attitudes as a defensive reaction to a perceived threat from blacks).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 22.

¹⁰⁵ *Id.* at 38 (asserting that attitudes on race are "statements about preferred social

C. *Striving for Synthesis: Social Dominance Theory*

Social dominance theory, a relatively new concept, also views prejudice and discrimination through the lens of group conflict and social hierarchy. Although both the realistic-group-conflict and the group position theories focus almost exclusively on contests for power or status among dominant and subordinate groups, social dominance theory focuses on the individual's cognitive function within the context of group rivalries.¹⁰⁶ Associated with the work of Professors Jim Sidanius and Felicia Pratto, social dominance theory is an attempt to synthesize a variety of theories concerning prejudice and discrimination including social identity, realistic-group-conflict and group position.¹⁰⁷ Social dominance theory posits a more thoroughly integrated theory of prejudice, intergroup relations, and discrimination to explain social inequality.¹⁰⁸

Social dominance theory begins with the notion that "all human societies tend to be structured as systems of group-based social hierarchies."¹⁰⁹ Membership in certain socially constructed groups, such as racial or ethnic groups or groups organized along economic lines, provides group members with access to prestige, social power and privilege.¹¹⁰ According to Sidanius and Pratto, group-based social hierarchy refers to the amount of prestige, social power and privilege provided to individual group members that cannot be understood to flow from any individual's particular merit, talent, achievement or ability.¹¹¹ Therefore, a group-based social hierarchy is a vehicle for ensuring the provision of prestige, social power and privilege, irrespective of individual merit.

How are group-based social hierarchies maintained? Three intertwined processes support and maintain group-based social hierarchies: aggregated institutional discrimination, aggregated individual discrimination and

positional relations among racial groups . . . not simply or even mainly emotional reactions to groups, group symbols, or situations"); Sears, *supra* note 88, at 24-25; see also Lawrence Bobo & Vincent L. Hutchings, *Perceptions of Racial Group Competition: Extending Blumer's Theory of Group Position to a Multiracial Context*, 61 AMER. SOC. REV. 951 (1996) (examining the effect of perceived threats on race relations).

¹⁰⁶ See Sears, *supra* note 88, at 25-27.

¹⁰⁷ SIDANIUS & PRATTO, *supra* note 45, at 3-31 (surveying major theories of intragroup and intergroup relations).

¹⁰⁸ *Id.* at 3-4; Jim Sidanius & Felicia Pratto, *The Inevitability of Oppression and the Dynamics of Social Dominance*, in PREJUDICE, POLITICS AND THE AMERICAN DILEMMA 173, 173-74 (Paul M. Sniderman et al. eds., 1993).

¹⁰⁹ SIDANIUS & PRATTO, *supra* note 45, at 31 (emphasis omitted).

¹¹⁰ *Id.* at 32 (contrasting group-based social hierarchy to individual-based social hierarchy where individual characteristics, like athletic ability, lead to social power, prestige, and privilege, rather than one's ascribed membership in a particular group).

¹¹¹ *Id.*

behavioral asymmetry.¹¹² Aggregated individual discrimination includes the “simple, daily and sometimes quite inconspicuous individual acts of discrimination by one individual against another,” which in the aggregate eventually construct unequal power relations between social groups.¹¹³ Similarly, aggregated institutional discrimination refers to the discriminatory practices—either intended or unconscious—of important social institutions such as the courts and schools, which “result in the disproportionate allocation of positive and negative social value across the social status hierarchy.”¹¹⁴ Behavioral asymmetry is the observation that both dominant and subordinate groups collude and cooperate to sustain present arrangements.¹¹⁵ Thus, “within relatively stable group-based hierarchies, most of the activities of subordinates can be characterized as cooperative of, rather than subversive to, the system of group-based domination.”¹¹⁶

Social dominance theory’s key insight is its emphasis on the individual-level forces that contribute to the perpetuation of group-based social hierarchies. Sidanius and Pratto propounded the concept of “social dominance orientation” (“SDO”) or the “value that people place on nonegalitarian and hierarchically structured relationships among social groups.”¹¹⁷ SDO is an individual-level process that measures a particular individual’s support for intergroup inequality and subordination.¹¹⁸ As was the case in social identity theory, SDO hinges on the importance of self-esteem to the individual’s self-concept. Thus, Sidanius and Pratto argue that dominant group members can be expected to exhibit high levels of SDO because “people’s general desire for positive self-esteem is compatible with hierarchy-legitimizing myths . . . making group superiority seem appropriate to them.”¹¹⁹

Focusing on individuals with a high-level of SDO is important because it indicates who is likely to discriminate against particular groups.¹²⁰ But this view is not wholly psychological, and it does not suggest that individuals with a propensity for a high-level SDO are somehow aberrant or abnormal.¹²¹

¹¹² *Id.* at 39.

¹¹³ *Id.* at 39-41.

¹¹⁴ *Id.* at 41.

¹¹⁵ *Id.* at 43-44 (differentiating behavioral asymmetry from earlier structural models that failed to recognize “the manner in which subordinates actively participate in and contribute to their own subordination”).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 61.

¹¹⁸ SIDANIUS & PRATTO, *supra* note 45, at 77.

¹¹⁹ *Id.* Other factors suggesting high levels of SDO include an individual’s background and socialization, personality, and gender. *See id.* at 49; *see also* Sears, *supra* note 88, at 26 (“[A]n important individual-level force[] is *social dominance orientation*, the desire to establish and maintain such social inequalities.”).

¹²⁰ SIDANIUS & PRATTO, *supra* note 45, at 95.

¹²¹ *Id.* at 302.

Social dominance theory differs from the purely psychological view espoused by Gordon Allport, for instance, which saw racial prejudice as fundamentally irrational in nature.¹²²

Instead, social dominance theory, while predicated on individuals' psychological bias, understands psychological bias or SDO from the perspective of the human desire to produce group-based social hierarchies. At the same time, such psychological biases and group-based social hierarchies are seen as mutually self-enforcing. Intergroup discrimination results because "individual psychological biases and social context not only [lead] individuals to discriminate, but also [facilitate] institutional discrimination."¹²³ Consequently, social dominance theory provides an integrated theory that describes how individual-level psychological processes are related to group-based hierarchies (i.e., inequality among social groups).¹²⁴ As we will see, an understanding of these social psychological approaches to intergroup relations informs our analysis of affirmative action law.

II. THE COMPETITIVE PROCESS: INTERGROUP RIVALRY IN ACTION

Social science research provided us with a basis for looking at whites and blacks as rival groups competing for resources. However, we need to go further to analyze the *process* by which those groups compete. This Article posits that blacks and whites, competing as groups, seek to attain competitive advantage in areas such as housing, education, and employment. Furthermore, economically and socially dominant groups may engage in anti-competitive conduct to "lock-in" the benefits they have historically enjoyed. Over time,

¹²² See ALLPORT, *supra* note 39, at 27:

This propensity lies in his normal and natural tendency to form generalizations, concepts, categories, whose content represents an oversimplification of his world of experience. His rational categories keep close to first-hand experience, but he is able to form irrational categories just as readily. In these even a kernel of truth may be lacking, for they can be composed wholly of hearsay evidence, emotional protections, and fantasy.

See also THOMAS F. PETTIGREW ET AL., PREJUDICE 2 (1980) ("*Prejudice*, then, can be thought of as *irrationally based, negative attitudes against certain ethnic groups and their members.*" (emphasis in original)).

¹²³ SIDANIUS & PRATTO, *supra* note 45, at 304.

¹²⁴ Sidanius and Pratto have described the interlocking nature of social dominance theory in the following manner:

Once such hierarchically organized systems emerge, the experiences of living in group dominance societies . . . and having experiences associated with membership in dominant or subordinate groups . . . affect people's levels of [SDO] The cultural ideologies that are part of group dominance societies are so thoroughly learned and so widely recognized that it is easy for one person to evoke the ideology in another person and so influence that person's behavior to enact that ideology. The discrimination that can result helps to re-create the social conditions that are likely to trigger the ideology in the future.

Id.

this has resulted in a social structure that perpetuates benefits unfairly gained. By attempting to disrupt those structures, affirmative action programs intend to restore a level playing field to the extent possible.

Several legal scholars have made connections between the anticompetitive conduct that is largely condemned in the law of antitrust and social group conduct that stifles competition and maintains certain social and economic benefits.¹²⁵ For example, Robert Cooter has argued that social groups "collude to obtain the advantages of monopoly control over markets."¹²⁶ This critique analogized the behavior of discriminating social groups to that of cartels.¹²⁷ A cartel is an "agreement among otherwise competing firms to reduce their output to agreed upon levels, or sell at an agreed upon price."¹²⁸ A classic example of a cartel is the Organization of Petroleum Exporting Countries ("OPEC"), which is comprised of a small group of oil producing countries that have agreed to limit the amount of petroleum exported, thus maintaining high demand and ensuring excess profits.¹²⁹ Thus, cartelization is attractive because it facilitates the ability of member-firms to earn monopoly profits.¹³⁰ The cartel model thus demonstrates that discriminatory social groups have an incentive to exclude members of other social groups.¹³¹

The cartel approach reinforces the argument that individuals must be viewed as members of groups who desire to further the interests of their communities.¹³² Like classic business cartels, social group cartels were inherently unstable, requiring that ingroup members be sanctioned for transgressing group norms and the presence of some formal system of approval to prevent collapse.¹³³ The cartel analogy is an extremely useful foundation for directing our thinking about how socially and racially defined groups can

¹²⁵ See, e.g., Robert Cooter, *Market Affirmative Action*, 31 SAN DIEGO L. REV. 133 (1994); Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003 (1995); Roithmayr, *supra* note 10, at 734.

¹²⁶ Cooter, *supra* note 125, at 150.

¹²⁷ *Id.* at 153-54.

¹²⁸ HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 144 (2d ed. 1999).

¹²⁹ RICHARD G. LIPSEY ET AL., *ECONOMICS* 287 (1984).

¹³⁰ HOVENKAMP, *supra* note 128, at 144.

¹³¹ Cooter, *supra* note 125, at 153 ("[A] group with the power to reduce competition from others can benefit itself, whether the group is defined by race, religion, gender, or industry.").

¹³² See Kennedy, *supra* note 2, at 722 ("Groups exist in a sense that goes beyond individuals having similar traits. People act together, in the strong sense of working out common goals and then engaging in a cooperative process of trying to achieve them."); see also McAdams, *supra* note 125, at 1007-08 (explaining that discrimination requires sacrifice from its members that is often motivated by a member's desire for status within the group).

¹³³ Cooter, *supra* note 125, at 153-54.

operate to impede competition.¹³⁴

Similarly, Daria Roithmayr showed how an early monopoly of sorts has produced a law school admissions scheme that “favors white cultural performances and disproportionately excludes people of color.”¹³⁵ Her powerful article elucidates how law school admissions standards—largely developed in a segregated and non-competitive era—locked-in gains for white students.¹³⁶ Furthermore, law school admissions standards and their influence on the school’s prestige operate as a “positive feedback loop,” reinforcing and strengthening the dominant group’s advantage.¹³⁷ Roithmayr provides a rigorous analysis of this anti-competitive process, and correctly views affirmative action as a kind of antitrust remedy.¹³⁸

The works of scholars such as Cooter and Roithmayr lay a solid foundation for importing economic concepts to discrimination law, and are important additions to our discussion of intergroup competition.¹³⁹ As these scholars demonstrate, the law of antitrust (and economic concepts more generally) provides a rich vocabulary with which to describe anti-competitive actions and to analyze the effects of these behaviors. In an effort to create the state of “perfect competition,” antitrust seeks to prevent firms in a marketplace from distorting the competitive process.¹⁴⁰ To prevent distortion, antitrust law has

¹³⁴ See also McAdams, *supra* note 125, at 1007 (“[S]olidarity and loyalty within groups lead[s] predictably, if not inevitably, to competition and conflict between groups.”).

¹³⁵ Roithmayr, *supra* note 10, at 734. Roithmayr argued that “white cartels excluded nonwhites from legal education” as follows:

First, law schools adopted admissions standards using criteria that excluded people of color. Second, legal professionals campaigned to move legal education from apprenticeships to the university . . . Third, leaders of the profession drove out night, part-time, and private programs that catered to people of color and immigrants.

Id. at 758. Roithmayr argues also that law school rankings and standardized admissions tests perpetuate this lock-in effect. *Id.* at 764-66. Roithmayr maintains that the performance of minorities does not conform to the standards included in the tests. *Id.* at 734. National rankings, however, award those schools that accept only those students who perform well on the standardized tests. *Id.* at 765.

¹³⁶ *Id.* at 729.

¹³⁷ *Id.* at 732.

¹³⁸ *Id.* at 793-96.

¹³⁹ Professor Ian Ayres and Frederic E. Vars have also imported economic theories into an analysis of affirmative action. See Ian Ayres & Frederic E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 COLUM. L. REV. 1577, 1614 (1998). Ayres and Vars contend that private discrimination against minorities in business can take two forms: upstream or downstream discrimination. *Id.* Upstream discrimination occurs when suppliers charge higher prices or refuse to deal with minority firms. *Id.* Conversely, downstream discrimination exists when buyers offer lower prices or refuse to deal with minority firms. *Id.* Ayres and Vars state that “[e]ither upstream or downstream discrimination can reduce the private sales of minority firms and upstream discrimination can reduce the sales of minority firms to the government.” *Id.*

¹⁴⁰ JOSEPH E. STIGLITZ, *ECONOMICS* A16 (2d ed. 1997) (defining “perfect competition” as

recognized that a variety of techniques can be used to further an oppressive use of market power. Antitrust law is primarily concerned with promoting allocative efficiency (consumer welfare) and dynamic efficiency (innovation and technological change) rather than with ensuring that the interests of all market participants are adequately protected at any given time.¹⁴¹ Antitrust law and policy have also recognized that the actions of a particular competitor or group of competitors can distort the competitive process, thereby undercutting important antitrust goals.¹⁴² A central aim of antitrust law is to "prevent economic oppression by maintaining competition."¹⁴³ This aim is important enough to occasionally restrict a firm's liberty to engage in particular behavior.¹⁴⁴

The goal of antitrust law is to "maintain public confidence in the market mechanism by deterring and punishing instances of economic oppression."¹⁴⁵ Thus, competition among players in those markets must be maintained in order to achieve this aim.¹⁴⁶ The goal is to allow market forces to operate freely so as to "allocate resources among Americans,"¹⁴⁷ but this can only be achieved in a regime that values and affirms free competition.

The emphasis on fair competition is equally important to our analysis of black/white intergroup relations. I do not argue that antitrust law should be applied to affirmative action cases, nor do I argue that antitrust law is a perfect analogy for discrimination cases. What I do argue is that antitrust is explicitly concerned with establishing the "rules of the game" in competitive markets, and its jurisprudence focuses on analyzing the dynamics of those markets.

occurring in instances where "each firm is a price taker—it cannot influence the market price; at the market price, the firm can sell as much as it wishes, but if it raises its price, it loses all sales").

¹⁴¹ LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 12-13 (2000); see also *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) ("It is competition, not competitors, which the [Clayton] Act protects."). In *Brown Shoe*, the Court enjoined a merger between the third and eighth largest sellers of shoes in the United States. *Id.* at 297, 346. The Court concluded that the merger violated § 7 of the Clayton Act because it would "lessen competition substantially." *Id.* at 346.

¹⁴² See SULLIVAN & GRIMES, *supra* note 141, at 14. This is consistent with at least one explanation of the origins of the Sherman Antitrust Act of 1890, that is, that it was passed to protect small firms against anti-competitive behavior on the part of "large vertically integrated firms." HOVENKAMP, *supra* note 128, at 50. See generally Thomas J. DiLorenzo, *The Origins of Antitrust: An Interest Group Perspective*, 5 *INTER. REV. L. & ECON.* 73 (1985).

¹⁴³ SULLIVAN & GRIMES, *supra* note 141, at 10.

¹⁴⁴ See *id.* at 644-45 (describing remedies in vertical merger enforcement including prohibiting mergers and requiring a divestiture); HOVENKAMP, *supra* note 128, at 638 (describing the potential for equitable relief in numerous antitrust contexts).

¹⁴⁵ SULLIVAN & GRIMES, *supra* note 141, at 9-10.

¹⁴⁶ *Id.* at 10.

¹⁴⁷ *Id.*

This Article is primarily concerned with the ways in which anticompetitive conduct can create and perpetuate unfair advantage in the ongoing competitive market. The concept of anticompetitive conduct in economics, as shown by the scholars mentioned earlier, provides important insights into a discussion of affirmative action. Building upon those insights, we can go even further in exploring the ways in which blacks and whites engage as groups in a competitive process. In particular, blacks and whites compete on a variety of different levels and in an interrelated manner.

A. *The Red Group and the Blue Group*

Let us begin our discussion of the process by which groups compete by examining a hypothetical game. Suppose that a dominant group (the “red group”) and a non-dominant group (the “blue group”) are competing for the same outcome. Success, in this game, is measured by the ability of players to secure large financial assets, obtain particular employment opportunities, maintain positions of influence in corporate, media and governmental sectors, wield political power, and safeguard their homes and environs.

How would red group members succeed? At a minimum, red group members would need to secure access to superior opportunities in at least three key areas: neighborhoods, schools, and jobs. Thus, housing, education, and employment form an interlocking web of sources of social and economic power.¹⁴⁸ For red group members to succeed over time, they need access to this trinity of “inputs.” Because these three are so inextricably linked, it is difficult to discuss each individually. It is useful to explore the linkages among them, and to identify the ways in which they mutually reinforce one another as sources of competitive advantage.

Initially, the ability to succeed in our game would require access to neighborhoods with low crime rates, good schools, and good jobs. Access to such neighborhoods, in turn, would lead to a myriad advantages paying ever-increasing dividends over time.¹⁴⁹ Neighborhoods with low crime rates allow players to concentrate on developing intellectual, cultural, and pecuniary capital, instead of dispersing energies on securing personal safety and protecting personal property. Such neighborhoods provide access to superior educational training, as school enrollment is usually dictated by neighborhood

¹⁴⁸ See John A. Powell, *Living and Learning: Linking Housing and Education*, 80 MINN. L. REV. 749, 758 (1996) (describing the impact of residential segregation which concentrates race and poverty and which leads to isolation from the “opportunity structure, including education, health care, and jobs, all of which are necessary to succeed in our society”).

¹⁴⁹ See generally Xavier de Souza Briggs, *Social Capital and Segregation: Race, Connections, and Inequality in America*, Harvard University, John F. Kennedy School of Government, Working Paper Series RWP02-011 (February 2002) (examining the “power of place to shape lives and life chances”).

residence.¹⁵⁰ Thus, the “raw material” of education is supplied through access to good neighborhoods.¹⁵¹ Moreover, neighborhood school funding is often tied to the value of the homes in the particular school district, and many players are attracted to neighborhoods because of the presence of good schools.¹⁵²

Thus, there is a dynamic relationship between school and neighborhood quality. Consequently, red group members may lock-in educational benefits in one of two ways. They may block blue group members from their neighborhoods by employing a “stand and fight” approach, which slows any attempt at entry by blue group members. In the alternative, they may relocate to other neighborhoods already populated by other red group members, leaving blue group members behind. By employing either of these techniques, red group members protect property values and ensure wealth accumulation.¹⁵³ The relationship between good schools and good neighborhoods is symbiotic, with each enhancing and simultaneously reinforcing the value of the other.

Education itself is another key component of the interrelated web of social and economic well-being. There is a strong correlation between education and

¹⁵⁰ See Molly S. McUsic, *The Law's Role in the Distribution of Education: The Promise and Pitfalls of School Finance Litigation*, in *LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY* 88, 97-99 (Jay P. Heubert ed., 1999). McUsic discusses the disadvantages faced by public schools in low-income residential areas. *Id.* Since most public schools receive a great deal of funding from a local property tax, schools in poorer areas are unable to collect as much as schools in wealthy areas. *Id.* Additionally, public schools in low-income areas tend to have more students. *Id.* Zoning and development restrictions in wealthy areas tends to discourage large amounts of residential development and, as a result, keep the number of school-aged children down. *Id.*

¹⁵¹ See John A. Powell, *Segregation and Educational Inadequacy in Twin Cities Public Schools*, 17 *HAMLIN J. PUB. L. & POL'Y* 337, 339 (1995) (“Public schools in the cities quickly became majority-minority and poor; and have been characterized by inferior facilities, overcrowded classes, high dropout rates, weak educational outcomes, and diminished life opportunities for students.”); see also Douglas S. Massey & Nancy A. Denton, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 141-42 (1993).

¹⁵² Ingrid Gould Ellen, *Race-based Neighbourhood Projection: A Proposed Framework for Understanding New Data on Racial Integration*, 37 *URB. STUD.* 1513, 1513-14 (2000) (arguing that neighborhood entry decisions are based upon expectations about neighborhood conditions, including school quality, and that “race is still relevant . . . because rightly or wrongly, white households (and some black households as well) tend to associate an increasing minority presence in a neighborhood with structural decline”).

¹⁵³ Melvin Oliver & Thomas M. Shapiro, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 147-51 (1995) (indicating that housing in white neighborhoods is valued higher and appreciates at a more enhanced rate than housing in black neighborhoods); Nancy Denton, *The Role of Residential Segregation in Promoting and Maintaining Inequality in Wealth and Property*, 34 *IND. L. REV.* 1199, 1205 (2001) (“Residential segregation limits individual accumulation of human capital via education and the job market.”).

enhanced economic and social outcomes.¹⁵⁴ Superior educational training allows players to gain entrance to selective colleges and universities, and to obtain employment requiring high levels of skill, which in turn generates higher incomes.¹⁵⁵ The importance of education cannot be overstated, particularly in a twenty-first century economy where the best opportunities belong to knowledge workers.¹⁵⁶ In such an economy, a strong educational background is required for workers seeking to remain competitive for highly-compensated positions.¹⁵⁷ Indeed, “most of the fastest growing jobs will require a college degree.”¹⁵⁸ Skills, which are a direct by-product of education, are the centerpiece of the new knowledge-based economy.¹⁵⁹ Access to superior educational opportunities both increases the ability to access informational and social networks through which sought-after employment opportunities are often advertised, and assures that particular candidates will be well-qualified for superior employment positions.¹⁶⁰

¹⁵⁴ Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation*, The Civil Rights Project (July, 2001), at <http://www.law.harvard.edu/civilrights/resegregation01/schoolsseparate.pdf>. (accessed October 11, 2002) (“[T]he consequences of unequal education have become more severe because employment and income are [more] sharply linked to education than in the past.”); CHRISTOPHER JENCKS, *WHO GETS AHEAD?: THE DETERMINANTS OF ECONOMIC SUCCESS IN AMERICA 187-90* (1977).

¹⁵⁵ See Paul William Kingston & John C. Smart, *The Economic Pay-Off of Prestigious Colleges*, in *THE HIGH STATUS TRACK: STUDIES OF ELITE SCHOOLS AND STRATIFICATION* 147, 147-74 (Paul William Kingston & Lionel S. Lewis eds., 1990) (“Let us be clear about our key finding: graduation from a relatively small set of institutions at the top of the academic hierarchy has been distinctly rewarded”); see also Irene Browne, Cynthia Hewitt, Leann Tigges & Gary Green, *Why Does Job Segregation Lead to Wage Inequality Among African Americans? Person, Place, Sector, or Skills?*, 30 *SOC. SCI. RES.* 473, 492 (2001) (articulating the “skills mismatch thesis,” and finding that “skills at both the individual and the job level . . . underlie the relation between job segregation by race and wages among African Americans”).

¹⁵⁶ See U.S. Dept. of Labor, *Futurework: Trends and Challenges for Work in the 21st Century*, 44 *OCCUPATIONAL OUTLOOK Q.* 31, 36 (Summer, 2000), at <http://www.bls.gov/opub/ooq/2000/summer/art04.htm> (accessed October 11, 2002) (“[O]btaining education, skills training, and occupational information for career planning . . . is the key to succeeding in the workforce of the future.”).

¹⁵⁷ *Id.* at 35.

¹⁵⁸ *Id.*

¹⁵⁹ LESTER C. THUROW, *BUILDING WEALTH: THE NEW RULES FOR INDIVIDUALS, COMPANIES, AND NATIONS IN A KNOWLEDGE-BASED ECONOMY* 130-31 (1999) (asserting that, in the future, knowledge will replace natural resources “as the key ingredient in the third industrial revolution”).

¹⁶⁰ Jomills Henry Braddock II & James M. McPartland, *How Minorities Continue to be Excluded From Equal Employment Opportunity: Research on Labor Market and Institutional Barriers*, 43 *J. SOC. ISSUES* 5, 7 (1987) (reporting that, according to a national survey of employers, informal recruiting through social contacts is among the most widely-used method of recruiting employees at all job levels); see Luis M. Falcón & Edwin

Access to superior neighborhoods continues to shape future outcomes because of the interrelationship among good neighborhoods, good schools, and desirable employment. Access to superior neighborhoods grants access to good schools, and also grants access to superior employment opportunities that might not be available to those living in more distant areas.¹⁶¹ Access to superior neighborhoods also allows for heightened capital accumulation because the residential property value in such neighborhoods appreciates.¹⁶² Access to superior employment opportunities allows red group members to accumulate financial resources, engage in intergenerational wealth transfers that benefit other red group members, influence the political process, and otherwise direct the cultural, financial, governmental, and media entities and organizations that shape and control society.

The social psychological and social structural theories described earlier add an important layer to this discussion. Red group members may not perceive their actions to preserve and protect their advantages as discriminatory. To be sure, some red group members may engage in "protective" activities explicitly for race-based reasons. But other red group members may not be motivated by animus or the desire to harm or discriminate against blue group members. Rather, they may simply intend to maintain superior access to social and economic opportunities. Whether motivated by animus or not, those actions clearly have the effect of locking-out blue group members from the competitive process over both the short and long-term. This issue of motivation is key to the way we analyze the results.

Melendez, *Racial and Ethnic Differences in Job Searching in Urban Centers*, in URBAN INEQUALITY: EVIDENCE FROM FOUR CITIES 341, 346-66 (Alice O'Connor et al. eds., 2001) (describing differences in the use of personal networks for job searches across racial and ethnic lines).

¹⁶¹ Here, I allude to the "spatial mismatch hypothesis," which is essentially the notion that "involuntary residential segregation of blacks to the inner city, coupled with the movement of jobs from central cities to suburbs, has disadvantaged blacks both absolutely and relative to whites in metropolitan labor markets." Michael A. Stoll & Steven Raphael, *Racial Differences in Spatial Job Search Patterns: Exploring the Causes and Consequences*, 76 ECON. GEO. 201, 201 (2000). Recent social science research has supported this hypothesis, finding that high levels of residential segregation ensure both that whites and minority group members will search for work in different parts of a metropolitan area and that minority group members will search for jobs where employment growth is low. *Id.* at 202-03; see also SUSAN TURNER MEIKLEJOHN, WAGES, RACE, SKILLS AND SPACE: LESSONS FROM EMPLOYERS IN DETROIT'S AUTO INDUSTRY 51-92 (2000) (arguing that place of residence strongly influences work search and employment outcomes); Joleen Kirschenman & Kathryn M. Neckerman, "We'd Love to Hire Them, But . . .": *The Meaning of Race for Employers*, in RACE AND ETHNIC CONFLICT: CONTENDING VIEWS ON PREJUDICE, DISCRIMINATION, AND ETHNOVIOLENCE 115, 115-23 (Fred L. Pincus & Howard J. Ehrlich eds., 1994) (asserting that race and inner-city residence are highly correlated and that employers often view inner-city residents as undesirable workers).

¹⁶² OLIVER & SHAPIRO, *supra* note 153, at 147-51; Denton, *supra* note 153, at 1206-08.

B. *The Impact of "Barriers to Entry"*

Let us now transition from our hypothetical red and blue groups and move toward an examination of intergroup relations in the real world. When considering the real world, we need to be aware of the structural mechanisms group members use to preserve and protect advantages. If we consider the areas of housing, education, and employment as analogous to markets, what mechanisms would prevent one group from accessing those markets? The economic concept of "barriers to entry" provides interesting insights for intergroup competition.

"Conditions of entry," from an economic perspective, are the structural conditions under which competitors enter a given market.¹⁶³ They are the passageways through which competition between new entrants and incumbents occurs.¹⁶⁴ According to economic theory, without entry barriers, a seller's potential profits are typically low because other players freely enter the market, offer competitive prices, and thus drive prices and profits down for all players.¹⁶⁵ From this perspective, a barrier to entry is "some factor in a market that permits firms already in the market to earn monopoly profits, while deterring outsiders from coming in."¹⁶⁶ Thus, a barrier to entry disrupts what would be expected to occur if conditions to entry were "free," and allows firms to "elevate price above a long-run competitive level."¹⁶⁷ Barriers to entry can take a variety of forms including high entry costs, imperfect access to information, and government regulation.¹⁶⁸ This Article will argue that intergroup discrimination also belongs among the list of barriers to entry.

The risk and size of the investment needed to enter a particular market is one kind of barrier to entry. Prospective market entrants assess the level of financial risk required to enter that market. This assessment differs from one that solely looks at the expense of entering in a new market—which, in itself, may or may not act as a barrier to entry. Rather, markets that require large entry costs that cannot be recouped pose significant risk and, therefore, can act as barriers to entry for new market participants. For example, if a prospective market entrant must spend a high fixed amount on a generic warehouse and

¹⁶³ JOE S. BAIN, *BARRIERS TO NEW COMPETITION: THEIR CHARACTER AND CONSEQUENCES IN MANUFACTURING INDUSTRIES* 3 (1956).

¹⁶⁴ *Id.* ("Let us understand the term 'condition of entry' to an industry to mean something equivalent to the 'state of potential competition' from possible new sellers.").

¹⁶⁵ *Id.* (explaining, alternatively, that barriers to entry permit firms to elevate prices over time and that entry will hinder prices only when prices exceed a "super-competitive level").

¹⁶⁶ HOVENKAMP, *supra* note 128, at 39.

¹⁶⁷ BAIN, *supra* note 163, at 17. Throughout this discussion, I use the more liberal "Bainian" definition of entry barriers which "treats as a barrier any factor that as a realistic matter discouraged entry," as opposed to the more narrow definition favored by G.J. Stigler. SULLIVAN & GRIMES, *supra* note 141, at 65 (limiting barriers to entry to just those costs forced upon new entrants that were not forced upon incumbent firms).

¹⁶⁸ STIGLITZ, *supra* note 140, at 349-53.

delivery trucks to enter a particular market, the financial risk is not that significant.¹⁶⁹ If the business fails, the player can probably liquidate these common and salable assets readily and make back most of her investment.¹⁷⁰ However, if the prospective market entrant must build a highly specialized processing plant that can be used only for one purpose, the financial risk is significant.¹⁷¹ If the business fails, the cost of building this plant is a "sunk cost," which the player will not be able to recover.¹⁷² Thus, the prospect of losing a sunk cost makes this market less attractive for new entrants.

There are interesting analogies that can be explored when viewing discrimination as a barrier to entry into the markets for education, housing and employment. Assume that a law school education at an exclusive private school currently costs approximately \$90,000.¹⁷³ Consider, then, a black student assessing her prospects in the legal job market. If our student believes that she can get a job and perhaps become a partner at a high-paying firm, there is no significant barrier to entry because she will earn enough money to recoup her initial investment. However, employment discrimination, whether real or perceived, may act as a barrier to entry. Our student might look at the legal market and understand that there is a possibility that her investment in education will be a sunk cost. Because of discrimination, there is less of a chance that our student will get a well-paying, big-firm job, and discrimination may reduce her chances of advancing within firms and being as financially successful as her white male counterparts.¹⁷⁴ Thus, employment discrimination, or the perception of employment discrimination, may act as a barrier to entry in some fields in which the cost of entering the market, and the risk inherent in that cost, are high.¹⁷⁵

¹⁶⁹ HOVENKAMP, *supra* note 128, at 528 (explaining that if, in order to enter a market, a firm must invest in things that are generally useful, the costs of which would be recoupable upon failure of the business, the prospective market entrant's risk is low and entry into the market is likely).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ See Jerry Jastrab, *Tuition Here is Still a Bargain*, N.J. LAW., Aug. 20, 2001, at 1, LEXIS, News & Business, NJLAWR File (comparing New Jersey state law school tuition with top tier law school tuition at Columbia, Harvard, and Yale).

¹⁷⁴ Alan Jenkins, *Losing the Race*, AM. LAW., Oct. 4, 2001, at 90-92 (reporting a "virtual 100 percent turnover of African-American associates" at a major law firm that had once employed black lawyers in relatively high numbers). Jenkins indicates that the reasons for the slow progress of African Americans in law firms included "race-related barriers to obtaining challenging work," lack of direct client contact, and inadequate mentoring. *Id.* at 92.

¹⁷⁵ The Supreme Court has recognized the pernicious effect of barriers to entry in the context of disparate impact theory. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) ("[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups

The housing market provides a similar example of the effects of discrimination. A prospective black homebuyer sizes up the housing market, and sees that he must spend \$300,000 to purchase a home in a nice neighborhood with good schools and low crime rates. Under normal circumstances, our homebuyer could assume that the value of his house would appreciate over time.¹⁷⁶ Thus, assuming he could get a home loan, there would be no particular barrier to his entry to his preferred neighborhood. Assume, however, that our homebuyer's move to the area might begin a cycle of neighborhood transition, and white families deserted the area as more black families moved in.¹⁷⁷ As a result, the value of our homebuyer's home might fail to appreciate—or might even depreciate—in value.¹⁷⁸ Here, the mere potential for race-based results injects risk into the prospective homebuyer's investment and might deter the family's entry into the market.

Next, advertising and promotion can also act as a barrier to entry in a marketplace.¹⁷⁹ The effects of advertising can be cumulative, resulting in high levels of customer loyalty to brands over time. Thus, "established firms may have a distinct advantage over new entrants."¹⁸⁰ Furthermore, advertising may create brand loyalty, thus increasing barriers to entry.¹⁸¹ When brand loyalty

and are unrelated to measuring job capability."). However, the term "barrier" in disparate impact theory is typically used to describe static, easily identifiable and eradicable structures rather than to describe the role of anti-competitive conduct in erecting and maintaining a variety of barriers to entry. The antitrust thematic vocabulary thus takes us beyond the disparate impact conception of barriers by helping us to understand the underlying group conduct driving the erection and maintenance of ongoing barriers to entry in the market.

¹⁷⁶ OLIVER & SHAPIRO, *supra* note 153, at 108-09 (noting that value of an average residential property tripled from 1970 to 1980, providing homeowners a significant opportunity to accumulate wealth through home equity).

¹⁷⁷ Abraham Bell & Gideon Parchomovsky, *The Integration Game*, 100 COLUM. L. REV. 1965, 1985-88 (2000). Bell and Parchomovsky describe "Schelling's tipping model." *Id.* at 1985 (crediting the model to Thomas C. Schelling). Schelling's tipping model presumes that white residents have varying levels of racial tolerance. *Id.* Thus, when the first black person enters a neighborhood, only the most intolerant whites depart. *Id.* Then, those vacancies are filled by more blacks causing those whites that are only marginally tolerant to leave. *Id.* at 1985-86. This phenomenon repeats creating a tipping effect that drives more and more whites out of the neighborhood. *Id.*

¹⁷⁸ OLIVER & SHAPIRO, *supra* note 153, at 147 ("[W]hites pay a premium to live in homogeneous neighborhoods, but their property appreciates at an enhanced rate. While this may mean that blacks find relative housing 'bargains' in segregated communities, their property does not appreciate as much.").

¹⁷⁹ HOVENKAMP, *supra* note 128, at 529.

¹⁸⁰ *Id.* Hovenkamp explains that if marketing has a "cumulative effect," then the firm that has been advertising in the market for a long period will have a distinct advantage over the newcomer. *Id.* Furthermore, advertising is an example of sunk cost because it is not recoverable if the firm fails. *Id.*

¹⁸¹ ROBERT E. MCAULIFFE, ADVERTISING, COMPETITION & PUBLIC POLICY: THEORIES AND NEW EVIDENCE 7 (1987).

exists, "an entering firm must overcome the preference consumers have for established brands."¹⁸² For example, Disney has become synonymous in consumers' minds with good, clean family entertainment.¹⁸³ Over time, consumers have developed brand loyalty to Disney products and services, because Disney has consistently promoted and delivered a certain image.¹⁸⁴ This brand loyalty saves consumers from expending energy and resources in researching a new brand, because they know they can safely choose a product from Disney.¹⁸⁵ This strong brand loyalty can act as a barrier to entry for a newer entrant into the market. For example, if a new competitor wanted to launch a product competitive to a Disney product, it would have to spend significant resources in marketing and promoting that product.¹⁸⁶

Now let us imagine a top university or professional school as a similar "brand," such as the "brand" of Harvard, Yale, or Brown. Over time, these universities have consistently promoted and delivered a certain product: highly-educated, desirable entrants into the work force.¹⁸⁷ If we consider employers as the consumers of this "product," we begin to see how brand loyalty acts in this context. Top employers know they can safely choose an employee from a brand-name university. Over time, employers develop strong brand loyalty, so that they favor recruits from a select number of universities and graduate schools.¹⁸⁸ Similarly, decision-makers in corporations can be seen as exhibiting brand loyalty when they purchase other knowledge-based products and services. If a CEO of a corporation requires the services of a

¹⁸² McAuliffe explains that overcoming a competitor's brand loyalty may require a new entrant to advertise more than incumbent firms or offer lower prices, both of which reduce potential profits. *Id.*

¹⁸³ Chiranjeev Kohli & Lance Leuthesser, *Brand Equity: Capitalizing on Intellectual Capital*, IVEY BUS. J., Mar.-Apr. 2001, at 75, 79 ("Powerful brands, like Coca-cola and Disney, have developed countless opportunities to extend the brand to products and places that fit the family, fun, wholesome and nostalgic values these brands symbolize."); see Kevin Lane Keller, *Building Consumer-Based Brand Equity*, MARKETING MGMT., July-Aug. 2001, at 15.

¹⁸⁴ See, e.g., *Disney Interactive, Into Networks to Launch Disney Interactive Channel Over Broadband*, BUS. WIRE, June 19, 2000, LEXIS, News & Business, BWIRE File; Dave McNary, *Embattled Disney Finds Core Strength*, DAILY NEWS L.A., Oct. 18, 1999, LEXIS, News & Business, LAD File (reporting on Walt Disney Co.'s poor stock performance despite the considerable strength of Disney's brand loyalty).

¹⁸⁵ See Jaishankar Ganesh, Mark J. Arnold, & Kristy E. Reynolds, *Understanding the Customer Base of Service Providers: An Examination of the Differences Between Switchers and Stayers*, 64 J. MARKETING 65, 69 (2000).

¹⁸⁶ See HOVENKAMP, *supra* note 128, at 529-30; MCAULIFFE, *supra* note 181, at 7.

¹⁸⁷ See Della Bradshaw, *Survey—Business Education 2000*, FIN. TIMES (London), Jan. 24, 2000, at 1.

¹⁸⁸ Paul William Kingston & James G. Clawson, *Getting on the Fast Track: Recruitment at an Elite Business School*, in THE HIGH STATUS TRACK: STUDIES OF ELITE SCHOOLS AND STRATIFICATION 231, 244-49 (Paul William Kingston & Lionel S. Lewis eds., 1990).

management consulting firm, he may exhibit brand loyalty to McKinsey, because the "brand" of McKinsey stands for a particular level of quality and attributes.¹⁸⁹

At this point, one might ask what is wrong with brand loyalty, if the product or service delivers what it stands for. The aim is not to show that there is something necessarily wrong with this shorthand decision-making process. This analogy merely shows how brand loyalty can establish barriers to entry for minority group members. If well-established brands through which important business, governmental, and legal transactions take place are controlled by white individuals, whiteness itself becomes synonymous with the strength of those brands, further serving to enhance the prestige associated with being white. The simultaneous power-strengthening nature of this relationship is similar to the "positive feedback loop" identified by Daria Roithmayr in the context of law school admissions.¹⁹⁰ This does not mean as a theoretical matter that black individuals cannot break into these elite schools or employers; in fact, many have done just that.¹⁹¹ It does mean, however, that as a structural issue, brand loyalty to these elite institutions can act as a systematic bar to minority advancement.

Finally, government regulations and licensing requirements can also create barriers to entry.¹⁹² The classic example is a regulatory monopoly, in which the government licenses a limited number of players to provide a good or service, such as electricity or gas. Such regulation creates a barrier to entry because it would be difficult—if not impossible—for a new player to enter this market.¹⁹³ Extensive regulation and licensing requirements short of monopoly creation can also create barriers to entry by raising the cost of doing business, particularly for small firms.¹⁹⁴ The paradigmatic example, of course, is the prior system of state-mandated segregation, which functioned to create a clear barrier to entry to minority competitors and still has ramifications for competition in employment today. I argue that this barrier to entry, which can be seen in many areas, has functioned overtime to allow whites to secure unfair advantages which they still enjoy today. Affirmative action programs can be understood in many cases as an attempt to disrupt that cycle, allowing for fair competition for access to benefits. The next part will examine these dynamics in three different markets—housing, education, and employment.

¹⁸⁹ See David Haigh, *Making Your Mark*, ACCOUNTANCY, May 3, 2000, at 30; John A. Byrne, *The McKinsey Mystique*, BUS. WK., Sept. 20, 1993, at 66, LEXIS, News & Business, MWP File (analyzing brand marketing of the "Big Five" accounting firms).

¹⁹⁰ Roithmayr, *supra* note 10, at 754.

¹⁹¹ See, e.g., Jenkins, *supra* note 174, at 90 (discussing one major firm's effort to hire black attorneys).

¹⁹² HOVENKAMP, *supra* note 128, at 530.

¹⁹³ *Id.* at 530-31.

¹⁹⁴ *Id.*

III. COMPETITIVE DYNAMICS UNDERLYING AFFIRMATIVE ACTION CASES: EMPLOYMENT, EDUCATION, AND HOUSING

We now examine three recent cases that illustrate the competitive dynamics discussed above. These three cases are important on a deeper level because they represent an effort on the part of government to ameliorate or guard against discrimination in three vitally important areas of our society: employment, education and housing. That government has intervened (or has been forced to intervene) in these cases is no accident. Employment, education and housing form an interlocking web of sources of social and economic power.

If we look closely at the nature and history of the dispute in each case, we see a core struggle among socially and racially defined groups for economic resources, educational advantages, and beneficial employment opportunities. Each translates into status and power. These cases can also be viewed as demonstrations of intergroup conflict, and of government's attempt to mediate contests for social and economic benefits among groups with conflicting, often incompatible, agendas. Thus, these cases also illustrate the ways in which groups compete in the real world for social and economic benefits. Furthermore, the cases demonstrate some of the techniques used by group members to secure and maintain competitive advantage in particular contests.

Unfortunately, the courts evaluating these cases have ignored these underlying realities. This is consistent with the notion that courts as adjudicative bodies are ill-equipped to deal with societal discrimination; thus, the courts' focus on specific instances of identified discrimination and insistence on particularized proof in affirmative action cases.¹⁹⁵ The difficulty, however, is that these determinations have prevented other governmental actors from implementing affirmative action plans which seek to level the playing field so that members of these racially and socially defined groups can compete on a more equal footing.

¹⁹⁵See Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 320 (1997):

It is an axiom of modern constitutional scholarship that, when reviewing the actions of the democratically selected branches, the courts are better suited to evaluation of the means by which governments accomplish their purposes than the ends they choose to pursue. Gerald Gunther articulated this position twenty-five years ago, and other scholars have made similar arguments. Indeed, this impulse appears to underlie much of the modern criticism of judicial "balancing." The reasoning underlying this conclusion is quite simple, and is tied to Alexander Bickel's concept of the "counter-majoritarian difficulty." Simply put, the idea is that in a democracy, the choice of what ends government should pursue, and the evaluation of the importance of those ends, should be exercised by elected representatives.

(internal citations omitted); see also ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1-9 (1980); David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice*, 78 VA. L. REV. 1521, 1525-28 (1992).

This conundrum brings into stark relief an underlying problem presented by the current direction of affirmative action doctrine: courts' institutional constraints should not be made to constrain other governmental actors. That is, just because courts may be ill-equipped to deal with more wide-spread discrimination occurring between socially and racially defined groups within our society, it does not follow that Congress or some other governmental actor should be foreclosed from formulating a policy that promotes fair competition among rival groups.

Each of these cases illustrates the Court's traditional approach to equal protection, in which it adheres to the individualist discriminatory framework as key to finding a violation. As noted earlier, this approach has reached its apex in the Court's affirmative action doctrine, which protects the rights of individuals in a way that trumps the interests of blacks and other minority group members.¹⁹⁶ Our current equal protection doctrine treats all racial classifications, whether benign or invidious, as equally suspect.¹⁹⁷ Thus, strict scrutiny will be applied to affirmative action programs challenged under equal protection principles.¹⁹⁸

Strict scrutiny, when applied in the affirmative action context, requires that the governmental actor demonstrate that its affirmative action program is justified by a compelling governmental interest, and that the program is narrowly tailored to achieve that interest.¹⁹⁹ There are two potential compelling interests to which governments can point in justifying affirmative action programs. The first is diversity. Diversity was first offered as a "substantial" state interest in *Regents of the University of California v. Bakke*.²⁰⁰ In *Bakke*, the plurality of the Court invalidated an affirmative action program at the Medical School of the University of California at Davis.²⁰¹ Justice Powell provided the swing vote and in his opinion noted that fostering diversity in academia was "clearly a constitutionally permissible goal."²⁰² Nevertheless, Powell concluded that the strict quota system employed in the program at issue, was an impermissible means in attaining this goal.²⁰³ This portion of

¹⁹⁶ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) [hereinafter *Adarand III*] (stressing that the Equal Protection Clause protects groups and any governmental action that uses race classifications will be "subjected to detailed judicial scrutiny" to ensure that the action does not harm individuals).

¹⁹⁷ See *id.* at 226 (rejecting "the surface appeal of holding 'benign' classifications to a lower standard [of scrutiny]").

¹⁹⁸ See *id.* at 227 (holding that all racial classifications, however benign, must be judged with strict scrutiny); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (asserting that strict scrutiny is necessary to "'smoke out' illegitimate uses of race").

¹⁹⁹ See *Adarand III*, 515 U.S. at 227.

²⁰⁰ 438 U.S. 265, 311-15 (1978).

²⁰¹ *Id.* at 319-20.

²⁰² *Id.* at 311-12.

²⁰³ *Id.* at 314-15.

Powell's opinion, however, garnered no support from the other members of the Court,²⁰⁴ and since *Bakke* it is not at all clear that diversity still forms the basis of a compelling government interest.²⁰⁵

The second and more promising candidate is the government's desire to alleviate the present effects of either present or past discriminatory conduct.²⁰⁶ The problem is that while the "present effects" interest is still technically valid, the government will usually encounter significant proof hurdles in its effort to make such a showing because the governmental actor usually cannot show that *it* is responsible for whatever yawning chasm it seeks to rectify by virtue of the affirmative action plan.²⁰⁷ Similarly, notwithstanding the fact that the government may attempt to justify its affirmative action plan by pointing to private discriminatory conduct that it has aided and abetted and which continues to disable minority group members, again the proof problems remain significant (although perhaps not insurmountable).²⁰⁸

Moreover, even if the government can convince the court that its affirmative action plan ameliorates the present effects of past discriminatory conduct, it

²⁰⁴ *Id.* at 269-72 (describing the disposition of the Court).

²⁰⁵ The Sixth Circuit recently confronted the constitutionality of an affirmative action program at the University of Michigan Law School. See *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002). The plan conformed to Justice Powell's suggestion in *Bakke* by considering race as a "plus" factor in determining admission to the law school. *Id.* at 746. Citing *Bakke*, the court held that student body diversity is a compelling state interest. *Id.* at 744 (finding also that the plan, as designed, was narrowly-tailored to achieve that purpose). Even bolstered by the Sixth Circuit's opinion, however, diversity is unlikely to achieve much support from the Court outside the area of education.

²⁰⁶ See, e.g., *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 499, 511 (1989) (invalidating a plan designed to aid minority-owned contractors because it was not designed to remedy specific instances of discrimination in the industry); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-76 (1986) (striking down a union contract that limited minority layoffs because the city could show no instances of prior discrimination by the governmental unit involved); see also *Hopwood v. Texas*, 236 F.3d 256, 273-74 (5th Cir. 2000) [hereinafter "*Hopwood III*"] (stating that the government may "use racial preferences under particular circumstances to remedy the effects of past discrimination").

²⁰⁷ See, e.g., *Hopwood v. Texas*, 78 F.3d 932, 953-54 (5th Cir. 1996) [hereinafter *Hopwood II*]. The panel in *Hopwood II* invalidated an affirmative action program at the University of Texas because there was no specific evidence that the university had engaged in past discrimination. *Id.* at 954. The court held that evidence of discrimination in Texas schools dating back to the parents and grandparents of today's students was insufficient. *Id.* at 953-54.

²⁰⁸ See *Ayres & Vars*, *supra* note 139, at 1611-12. Ayres and Vars suggest that the Supreme Court has recognized a valid state interest in remedying private discrimination. *Id.* at 1611. In *Croson*, Justice O'Connor wrote, "It would seem equally clear, however, that [a state] has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction." 488 U.S. at 491-92. Accordingly, Ayres and Vars read *Croson* as requiring that affirmative action merely be limited to the market—public or private—in which past discrimination occurred. See *Ayres & Vars*, *supra* note 139, at 1612-13.

will likely falter at the second step of the strict scrutiny test, narrow tailoring. The government will often be required to show that there is no less restrictive alternative than the one used.²⁰⁹ The determination to apply strict scrutiny to affirmative action programs, Justice O'Connor's admonitions notwithstanding,²¹⁰ usually ends in the predictable determination that such programs are unconstitutional as a matter of equal protection law.

Given this, "classic" affirmative action programs, such as where minority students are admitted to a state school using a separate and arguably lower admission standard, have recently been struck down in the federal courts.²¹¹ Less visible, however, is the fact that courts are also deciding cases that do not involve the kind of preferences normally associated with affirmative action programs in the classic sense. Nevertheless, these courts are striking the challenged programs down as analogous to disfavored affirmative action plans and therefore violative of the Equal Protection Clause. Indeed, of four recent federal appellate cases dealing with affirmative action and affirmative action-like programs, in only one did the court uphold the program at issue—and, ironically, that was the one case that involved a "true" affirmative action program. The other cases, as I will discuss in some detail, did not involve the kind of preference we normally associate with a classic affirmative action program, but the courts in those cases struck down the programs anyway.

The following is an outline of the courts' approaches in the three affirmative action-like cases, *MD/DC/DE Broadcasters Association v. Federal Communications Commission*,²¹² *Eisenberg v. Montgomery County Public Schools*,²¹³ and *Walker v. City of Mesquite*.²¹⁴ The fundamental problem with the courts' analysis in those cases was the failure to fully and adequately consider the nature and scope of the compelling governmental interest that the government had advanced to justify the "affirmative action-like" program at issue. As a result, the government faces the added difficulty of demonstrating that it (or a private entity that it has aided or abetted) is responsible for the disparity which the affirmative action program seeks to rectify. The courts' failure to adequately consider the nature of the compelling interest at stake magnifies the proof problem that the government will encounter as it attempts to justify why it has taken race-conscious action in a particular circumstance.

²⁰⁹ See *Adarand III*, 515 U.S. at 229, 237-38.

²¹⁰ See *id.* at 237 (attempting to dispel the belief that strict scrutiny is "strict in theory, fatal in fact").

²¹¹ See, e.g., *Hopwood II*, 78 F.3d at 953-54 (invalidating an affirmative action program at the University of Texas). But see *Grutter v. Bollinger*, 288 F.3d 732, 752 (6th Cir. 2002) (upholding the constitutionality of a University of Michigan affirmative action program).

²¹² 236 F.3d 13 (D.C. Cir. 2001).

²¹³ 197 F.3d 123 (4th Cir. 1999).

²¹⁴ 169 F.3d 973 (5th Cir. 1999).

A. *Competition in Employment: MD/DC/DE Broadcasters Association v. Federal Communications Commission*

Because the case concerns access to employment, competitive dynamics are at the heart of *MD/DC/DE Broadcasters* in a very fundamental way. Broadcast licensees, who are regulated by the Federal Communications Commission ("FCC"), historically hired primarily white candidates for employment. Insiders, who were white (and generally, men), controlled access to these jobs by controlling the flow of information about job openings. Over time, this control resulted in a structure that favored white applicants at the expense of black applicants (and other minority group members). The FCC's attempt to disrupt this system, and the courts' shortsighted analysis of the FCC's attempts, are the focus of my discussion.

In *MD/DC/DE Broadcasters*, fifty broadcasters argued that an FCC Equal Employment Opportunity ("EEO") rule requiring licensees to engage in "broad outreach" in employment recruiting efforts violated equal protection principles because it granted a preference to women and minorities.²¹⁵ The D.C. Circuit held the FCC's EEO rule unconstitutional because it "put official pressure upon broadcasters to recruit minority candidates."²¹⁶ In order to place this decision in its proper context, some background on the origin of the EEO rule and the prior challenges to it is necessary.

1. Origins of the FCC's EEO "Broad Outreach" Rules

The FCC licenses broadcasters, and regulates certain aspects of its licensees' businesses.²¹⁷ Since broadcasters benefit from a license to use the broadcast spectrum—considered to be owned by the public—the FCC requires broadcasters to further the public interest.²¹⁸ Dating back to the late 1960's, the FCC determined that "discriminatory employment practices by a broadcast licensee are incompatible with operation of the public interest."²¹⁹ Yet, at the same time, the FCC expressed concern that simply prohibiting overt discrimination was not sufficient to ensure equal employment opportunity at broadcast stations.²²⁰ Thus, there was a need for a regulatory solution that recognized that "schools, training institutions, recruitment and referral sources

²¹⁵ 236 F.3d at 15.

²¹⁶ *Id.*

²¹⁷ See generally 47 U.S.C. § 151 (2000) (establishing the FCC and charging it with regulating interstate and foreign commerce in communications by wire and radio).

²¹⁸ Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 13 F.C.C.2d 766, 768-69 (¶¶ 7-9) (1968) (memorandum opinion and order) (asserting that the FCC may only grant broadcast authorization if it serves the public's best interests).

²¹⁹ Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 18 F.C.C.2d 240, 240 (¶ 1) (1969) (report and order) (adopting a nondiscrimination rule).

²²⁰ *Id.* at 242-43 (¶ 5).

follow[ed] the pattern set by industry," and that such sources did "not normally supply job applicants regardless of race, color, religion or national origin unless asked to do so by employers."²²¹ Consequently, in 1970, the FCC promulgated equal opportunity regulations that prohibited broadcast licensees from engaging in invidious discrimination and required licensees to adopt affirmative action programs intended to ensure equal employment opportunities for women and minorities within each licensee's labor hierarchy.²²² Over time, the FCC enhanced the importance of recruitment to licensees' affirmative action programs, and required "broad outreach" to attract qualified women and minorities.²²³ The FCC then promulgated regulations that required licensees to "seek out sources likely to refer female and minority applicants for employment, to track the source of each referral, and to record the race and sex of each applicant and of each person hired."²²⁴ The FCC would then take into account data revealing an under-representation of women and minorities in the licensee's labor hierarchy (as compared to the local workforce) when considering whether to renew the broadcaster's license.²²⁵

2. Challenging the FCC's "Broad Outreach" Rules: *Lutheran Church Missouri Synod v. Federal Communications Commission*

In 1998, an FCC licensee challenged these regulations in *Lutheran Church-Missouri Synod v. F.C.C.*²²⁶ In *Lutheran Church*, the Court of Appeals for the District of Columbia ruled that the FCC's EEO rules violated equal protection principles.²²⁷ This was because, although the EEO rules required race-conscious outreach and reporting as opposed to race-conscious hiring, an "underrepresentation" of minority group members within a licensee's labor hierarchy could trigger "intense EEO review."²²⁸ Consequently, the D.C.

²²¹ *Id.* at 243 (¶ 5) (quoting COMM. FOR GOV'T CONTRACTS, PATTERN FOR PROGRESS 14 (1960)).

²²² Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices, 23 F.C.C.2d 430, 430-31 (¶¶ 1-2) (1970) (report and order).

²²³ Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services, 4 F.C.C.R. 1715, 1715-16 (¶¶ 5-14) (1989) (memorandum opinion and order); Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, 15 F.C.C.R. 2329, 2377 (¶ 115) (2000) [hereinafter *Report & Order*] (describing the EEO's goal of attaining "broad outreach" to all segments of society).

²²⁴ MD/DC/DE Broadcasters Ass'n v. F.C.C., 236 F.3d 13, 16 (D.C. Cir. 2001).

²²⁵ *Id.*

²²⁶ 141 F.3d 344, 346 (D.C. Cir. 1998).

²²⁷ *Id.* at 349-55. *But see* Michelle Adams, *The Last Wave of Affirmative Action*, 1998 WIS. L. REV. 1395, 1447-50 (arguing that *Lutheran Church* was wrongly decided because the EEO rule at issue was not a "preference" for the purpose of triggering strict scrutiny review).

²²⁸ *Lutheran Church*, 141 F.3d at 353. The FCC's EEO rules with respect to women were not challenged in the case. *Id.* at 351 n.9.

Circuit ruled that the EEO rules requiring broad outreach in recruitment pressured licensees to hire minorities so as to avoid the specter of a "governmental audit."²²⁹ The problem from the court's perspective was that the EEO regulations "certainly influence ultimate hiring decisions."²³⁰ Thus, the court characterized the EEO rule as a racial classification and applied strict scrutiny review.²³¹ Ultimately, the D.C. Circuit ruled that the FCC's interest in fostering diverse programming was not sufficiently compelling to support the EEO rules, and that the rules were not narrowly tailored to achieve that interest.²³²

3. The FCC's Revised Outreach Efforts

In 2000, as a consequence of the *Lutheran Church* ruling, the FCC adopted a new EEO rule that attempted to balance the desire for effective and meaningful recruitment of minorities and women with the constraints imposed by the court in *Lutheran Church*.²³³ In adopting this new rule, the FCC concluded that "the record before us confirms our view that broad outreach efforts to ensure that all segments of the population, including minorities and women, are aware of broadcast employment opportunities are of crucial importance to the goals established by Congress of deterring unlawful discrimination and fostering diversity of programming."²³⁴ The new rule required licensees to widely disseminate information about employment opportunities.²³⁵ Licensees were provided with two options; selection of either would satisfy the licensees' obligations under the new rule.²³⁶ Option A was titled the "Supplemental Recruitment Program."²³⁷ Under Option A, a licensee employing more than ten employees was required to engage in at least four approved recruitment initiatives over a two-year period, including participation in a job fair, co-sponsoring a job fair with women and minority groups in the business and professional community, participation in a broadcast scholarship program, or creating a broadcast internship program.²³⁸ Option A did not require the licensee to report the race and sex of job applicants or interviewees to the FCC.²³⁹

Option B, the "Alternative Recruitment Program," provided the licensee

²²⁹ *Id.* at 353-54.

²³⁰ *Id.* at 351.

²³¹ *Id.* at 354.

²³² *Id.* at 354-56.

²³³ *Report & Order, supra* note 223, at 2330-31 (¶ 1)

²³⁴ *Id.* at 2366 (¶ 79).

²³⁵ *Id.* at 2332-33 (¶ 7).

²³⁶ *Id.* at 2354-65 (¶ 78).

²³⁷ *Id.*

²³⁸ *Id.*; see *MD/DC/DE Broadcasters Ass'n v. F.C.C.*, 236 F.3d 13, 17 (D.C. Cir. 2000) (providing complete list of qualifying recruitment initiatives).

²³⁹ See *MD/DC/DE Broadcasters*, 236 F.3d at 17.

with discretion to design its own outreach program.²⁴⁰ Such discretion was conditioned on the licensee's ability to "demonstrate that it is widely disseminating information concerning job vacancies by analyzing the recruitment sources, race, ethnicity and gender of the applicants by its recruitment efforts."²⁴¹ Licensees selecting Option B were required to report annually the recruitment source, race, and gender of each job applicant.²⁴² A licensee could be required to modify its outreach program to enhance its inclusiveness where the "data collected does not confirm that notifications are reaching the entire community."²⁴³ The FCC emphasized that, in monitoring the applicant pool data, there would be no requirement of proportionality.²⁴⁴

Finally, all licensees were also required to file an Annual Employment Report that disclosed the race and sex of each of its employees.²⁴⁵ In contrast to the EEO rule challenged in *Lutheran Church*, however, information about the race and gender of licensees' employees would be used "only to monitor industry trends and not to screen renewal applications or to assess compliance with its EEO obligations."²⁴⁶

4. Another Challenge to "Broad Outreach": *MD/DC/DE Broadcasters v. FCC*

In 2001, in *MD/DC/DE Broadcasters*, for the second time in less than three years, the D.C. Circuit held the FCC's EEO rule unconstitutional.²⁴⁷ But where the constitutional infirmity in *Lutheran Church* centered on the rule's pressure on broadcasters "to grant some degree of preference to minorities in hiring,"²⁴⁸ in *MD/DC/DE Broadcasters*, the rule impermissibly pressured stations to *recruit* minorities and women.²⁴⁹

In reaching its conclusion, the court viewed Option A and Option B very differently. Option A, standing alone, was constitutionally sound because licensees were free to choose outreach and recruitment measures that did not

²⁴⁰ *Report & Order*, *supra* note 233, at 2375 (¶ 104) (purportedly addressing broadcasters that requested more flexibility in designing outreach programs).

²⁴¹ *Id.* at 2365 (¶ 78).

²⁴² *Id.*

²⁴³ *Id.* at 2375 (¶ 104).

²⁴⁴ *Id.* at 2378-79 (¶ 120) (maintaining that, although the numbers of minorities and women in the applicant pools need not be proportionate to the that of the work force, "few or no females or minorities in a broadcaster's applicant pools may be one indication (and only one indication) that the station's outreach efforts are not reaching the entire community").

²⁴⁵ *MD/DC/DE Broadcasters Ass'n v. F.C.C.*, 236 F.3d 13, 17 (D.C. Cir. 2000).

²⁴⁶ *Report & Order*, *supra* note 233, at 2332 (¶ 6).

²⁴⁷ 236 F.3d at 15-16.

²⁴⁸ *Lutheran Church-Missouri Synod v. F.C.C.*, 141 F.3d 344, 351 (D.C. Cir. 1998) (emphasis added).

²⁴⁹ *MD/DC/DE Broadcasters*, 236 F.3d at 18-19.

“place a special emphasis upon the presence of women and minorities in the target audience.”²⁵⁰ Thus, under Option A, there was no “pressure” on broadcasters to recruit women or minorities.²⁵¹ However, the court held that Option B “create[d] pressure to focus recruiting efforts upon women and minorities in order to induce more applications from those groups.”²⁵² The court said that Option B created “pressure” because the FCC investigated Option B licensees who reported receiving few applications from women or minority group members.²⁵³ From the court’s perspective, the credible threat of agency investigation formed a powerful inducement to conform to FCC commands.²⁵⁴ Indeed, the court went one step further, suggesting that the real reason for the agency’s focus on the race and gender of job applicants was the FCC’s interest in particular employment outcomes, rather than in ensuring that the appropriate recruitment and outreach efforts were undertaken.²⁵⁵

The D.C. Circuit interpreted Supreme Court precedent as requiring courts to apply strict scrutiny to any “racial classification” (e.g., racially-targeted recruitment) that could be understood as treating the races unequally.²⁵⁶ Did Option B subject the races to “unequal treatment?” The D.C. Circuit held that it did because the FCC rule required licensees to use limited recruiting resources to attract additional minority candidates.²⁵⁷ This requirement created an inequality because white male candidates—who, presumably, would have otherwise learned of employment opportunities—would be precluded from learning of those opportunities as a result of the EEO rule.²⁵⁸ Thus, the Commission’s directive would deprive white male candidates of an “opportunity to compete simply because of their race.”²⁵⁹ Consequently, the

²⁵⁰ *Id.* at 19.

²⁵¹ *Id.* at 18-19.

²⁵² *Id.* at 19.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* (“Were [‘broad outreach’] the Commission’s only goal, then it would scrutinize the licensee’s outreach efforts, not the job applications those efforts generate.”).

²⁵⁶ *Id.* at 20. While the broadcasters did argue that the FCC’s EEO rule violated the equal protection component of the Fifth Amendment’s Due Process Clause because it granted a preference to women, the court did not rule conclusively on the question of the rule’s constitutionality as applied to gender preferences. Instead, the court stated that while the EEO rule granted a “preference” to women candidates, the application of intermediate scrutiny in this instance might allow the rule to “survive where the same regulation fails with respect to minorities.” *Id.* at 23. The court struck down the rule in its entirety, however, on the theory that removing all references to minorities, while leaving the regulation intact with respect to women would “severely distort the Commission’s program and produce a rule strikingly different from any the Commission has ever considered.” *Id.*

²⁵⁷ *Id.* at 20-21

²⁵⁸ *Id.* at 21.

²⁵⁹ *Id.*

court applied strict scrutiny just as it had in *Lutheran Church*.²⁶⁰

As discussed below in more detail,²⁶¹ the court did not perform a full-blown compelling governmental interest analysis. The FCC had argued that the EEO rule was supported by its interest in remedying the effects of past discrimination and in preventing discrimination from occurring in the future.²⁶² The court gave short-shift to that argument, first stating that “the Government’s remedial interest is compelling only with respect to ‘identified discrimination,’” then noting that it need not reach the issue at all because the EEO rule was not narrowly tailored to achieve the interests asserted.²⁶³

The Court replayed this “identified discrimination” theme in its narrow tailoring analysis. The difficulty was that the EEO rule was not premised on a “predicate finding” that any specific broadcaster had discriminated in the past or would do so in the future.²⁶⁴ At any rate, the court also found fault with Option B’s requirement that licensees report the race of all job applicants.²⁶⁵ From the court’s perspective, such a requirement simply was not narrowly tailored “to further the Commission’s stated goal of non-discrimination in the broadcast industry.”²⁶⁶

5. *MD/DC/DE Broadcasters Revisited: Through the Lens of Intergroup Competition for Employment Opportunities*

In *MD/DC/DE Broadcasters*, the D.C. Circuit failed to appreciate that group competition for access to employment opportunities formed the essential backdrop of the dispute in the case. Reframed from this perspective, the case presented two central questions: should dominant players continue to enjoy privileged access to information about employment opportunities, and should those dominant players be permitted to lock-out other competitors? If the D.C. Circuit had analyzed the case from this competition perspective, the outcome

²⁶⁰ *Id.*; *Lutheran Church-Missouri Synod v. F.C.C.*, 141 F.3d 344, 354 (D.C. Cir. 1998).

²⁶¹ See *infra* notes 281-87 and accompanying text.

²⁶² *MD/DC/DE Broadcasters*, 236 F.3d at 21.

²⁶³ *Id.* (citing *Shaw v. Hunt*, 517 U.S. 899, 909 (1996)).

²⁶⁴ *MD/DC/DE Broadcasters*, 235 F.3d at 21 (“Option B places pressure upon each broadcaster to recruit minorities without a predicate finding that the particular broadcaster discriminated in the past or reasonably could be expected to do so in the future.”).

²⁶⁵ *Id.* at 22.

²⁶⁶ *Id.* The D.C. Circuit’s determination was inconsistent with the Eleventh Circuit’s view on the standard of review for outreach programs. See *Allen v. Alabama State Bd. of Educ.*, 164 F.3d 1347, 1352 (11th Cir. 1999) (stating that strict scrutiny is generally inapplicable to outreach efforts), *vacated*, 216 F.3d 1263 (11th Cir. 2000); see also *Sussman v. Tanoue*, 39 F. Supp. 2d 13, 27 (D.D.C. 1999) (holding that FDIC’s affirmative action program was “conscious of race but devoid of ultimate preferences,” and therefore not subject to strict scrutiny). However, other courts have been more circumspect in their treatment of outreach programs. See, e.g., *Safeco Ins. Co. of Am. v. City of White House*, 191 F.3d 675, 692 (6th Cir. 1999) (“Outreach efforts may or may not require strict scrutiny.”).

could have been completely different. This approach would have allowed the court to perceive more accurately the nature of the underlying problem—specifically, how best to mediate the conflicting goals of members of racially and socially defined groups that are competing in the market for employment opportunities.

Let us now retrace the court's analysis, using these two central questions as our guideposts. The court ruled that Option B created "pressure" to recruit minorities thereby according them a preference over white male candidates; thus, it embodied a "racial classification" that must be subject to strict scrutiny review.²⁶⁷ One response to that argument, however, is that strict scrutiny should not even have been applied in the case because the rational basis test was the more appropriate standard of review.²⁶⁸ Indeed, the FCC argued that the EEO rule should not be subjected to heightened judicial scrutiny because "affirmative outreach," rather than creating a racial or gender preference for the job, simply expanded the applicant pool.²⁶⁹ An individual, the FCC maintained, has no constitutional right "to compete against fewer rivals for a job."²⁷⁰ From this perspective, the EEO rule was pro-competitive and intended to disrupt entrenched, exclusive informational networks. Thus, the FCC correctly, although unsuccessfully, argued that equal protection principles were not implicated.²⁷¹

First, the court was incorrect in viewing Option B as applying "pressure" on licensees such that strict scrutiny must necessarily apply. In fact, licensees were always free to select Option A, which did not pressure licensees to recruit women and minorities.²⁷² Option B was instituted at the broadcasters' behest, in an effort to provide licensees with "discretion to design an outreach program that is responsive to the needs of the broadcaster's organization and the local community."²⁷³ The "price" of discretion was a requirement that licensees demonstrate the inclusiveness of their program.²⁷⁴ Option A was always available to licensees who did not wish to design their own outreach programs

²⁶⁷ *MD/DC/DE Broadcasters*, 236 F.3d at 18-21.

²⁶⁸ Under a rational basis test, the court decides only whether a challenged measure is rationally related to some legitimate government interest. *See, e.g., Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955).

²⁶⁹ *MD/DC/DE Broadcasters*, 236 F.3d at 20.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.* at 18-19 ("[W]e do not believe that the Broadcasters are meaningfully pressured under Option A to recruit women and minorities.").

²⁷³ *See Report & Order, supra* note 233, 2374 (¶ 104) (acknowledging that a "number of broadcasters" had pushed the FCC for the flexibility to individually design outreach programs).

²⁷⁴ *Id.* (requiring broadcasters electing Option B to collect data on their recruiting sources and subsequent pool of applicants).

or report on the race and gender compositions of their applicant pools.²⁷⁵

Second, the D.C. Circuit was incorrect in ruling that licensees were pressured because the "Commission *promises* to investigate any licensee that reports 'few or no' applications from women or minorities."²⁷⁶ In so ruling, the D.C. Circuit also expressed skepticism that recruitment and outreach truly animated the EEO rule, suggesting instead that the rule was actually intended to guarantee proportional representation of minorities and women at broadcast stations.²⁷⁷ While it is true that the lack of minority or women in a licensee's applicant pool could trigger a Commission investigation, the Commission described the potential investigation in much different, and far more equivocal, terms:

[I]n the case of those broadcasters who utilize applicant pool data, there is no requirement that the composition of applicant pools be proportionate to the composition of the local work force. However, few or no females or minorities in a broadcaster's applicant pools may be one indication (and only one indication) that the station's outreach efforts are not reaching the entire community. The representation of females and minorities in applicant pools is only one factor that we will look at in determining whether a broadcaster's outreach program is inclusive. We may ultimately determine that outreach efforts are reasonably designed to reach the entire community, even if few females or minorities actually apply for openings. Conversely, the fact that a sizeable number of females or minorities have applied for openings will not necessarily establish the inclusiveness of the station's efforts. Also, we recognize that an employer cannot control who applies for jobs. The only purpose of the data collection is to give the broadcaster, the public, and the Commission more information by which to monitor the effectiveness of a station's outreach efforts so that the broadcaster can take appropriate action to modify its outreach efforts should the information indicate that they are not reaching the entire community.²⁷⁸

The FCC's statement suggests that applicant pool data was only one factor to be examined in determining whether the outreach program was inclusive and that its true concern centered on the effectiveness of the licensee's outreach and recruitment program rather than on proportional representation. Yet

²⁷⁵ *MD/DC/DE Broadcasters*, 236 F.3d at 17. Broadcast licensees electing Option A were not required to report the race, gender, and referral source of applicants. *Report & Order*, *supra* note 233, 2374 (¶ 104). Notwithstanding the Commission's request to sever Option A from Option B, the court refused and vacated the rule in its entirety on the theory that severing the options would "undercut the whole structure of the rule." *MD/DC/DE Broadcasters*, 236 F.3d at 22.

²⁷⁶ *MD/DC/DE Broadcasters*, 236 F.3d at 19 (emphasis added).

²⁷⁷ *Id.* (stating that the "agency with life and death power over the license is interested in result, not process").

²⁷⁸ *Report & Order*, *supra* note 233, at 2378-79 (¶ 120).

potential sanctions for failing to enact an affirmative outreach program raises a much larger question: to what extent, if any, is requiring "affirmative outreach" discriminatory?

The D.C. Circuit ruled that, because licensees were required under Option B to engage in inclusive outreach, strict scrutiny must apply.²⁷⁹ Such a conclusion, however, is clearly premised on the notion that nonminority applicants are disadvantaged by the EEO rule because they would receive less information about employment opportunities. Conversely, minorities and women would receive more opportunities because of it.²⁸⁰ The difficulty is that this is *exactly* the state of affairs the FCC sought to rectify with its EEO rule but on *behalf of women and minorities*. The concern, from the FCC's perspective, was that the status quo maintained a system where minorities and women were being *deprived of an opportunity to compete simply because of their race*. The problem from the D.C. Circuit's perspective, was *exactly* the opposite. In this sense, the D.C. Circuit's ruling revealed how hard it is to tell the difference between affirmative action and nondiscrimination, and implicitly raised the question of which governmental body is best-suited to make that determination.

Even assuming that strict scrutiny should have been applied in the case, the D.C. Circuit court still erred in its application of it. In *MD/DC/DE Broadcasters*, the court never resolved the question of whether the FCC's EEO rule was supported by a compelling governmental interest.²⁸¹ Instead, the court ruled that it need not resolve that question because "the Broadcasters argue convincingly that the new EEO rule is not narrowly tailored to further that interest."²⁸² This sealed the fate of the EEO rule. A firm determination that the rule was animated by a compelling governmental interest would have changed the court's narrow tailoring analysis by forcing the court to articulate more clearly why Option B was not narrowly tailored either to remedy the effects of past discrimination or to prevent future discrimination from occurring. As it stood, the court's nonexistent compelling governmental interest analysis dictated the outcome of the narrow tailoring inquiry because the court was unable to appreciate the nature and extent of the problem the FCC was attempting to ameliorate.²⁸³ If we take a step back and look at the compelling governmental interest question through the lens of intergroup

²⁷⁹ *MD/DC/DE Broadcasters*, 236 F.3d at 18-20.

²⁸⁰ As the D.C. Circuit put it, "some prospective nonminority applicants who would have learned of job opportunities but for the Commission's directive now will be deprived of an opportunity to compete simply because of their race." *Id.* at 21.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ The D.C. Circuit had condemned the EEO on the narrowly tailored analysis because, "[q]uite apart from the question of a compelling governmental interest, such a sweeping requirement is the antithesis of [a] rule narrowly tailored to meet a *real problem*." *Id.* (emphasis added).

competition, we see quite clearly how the analysis might have changed.

Considering the underlying intergroup competition, the FCC's EEO rule was clearly justified by a compelling interest. Even if we assume that all broadcast licensees are private entities,²⁸⁴ when barriers to obtaining employment information exist, the government is not foreclosed from directing its licensees to attempt to remove those barriers. The FCC's EEO rule was an effort to reduce the discriminatory impact of word-of-mouth recruitment practices that had functioned as a barrier to entry to the market for employment at broadcast licensees.²⁸⁵ These barriers had worked to the advantage of a particular race and gender in that market, and they had tended to allow for the perpetuation of a nondiverse workforce.²⁸⁶ The FCC concluded that "word-of-mouth recruitment practices may be inherently discriminatory when minorities and women are poorly represented on an employer's staff—particularly when they are scarce in the management ranks where hiring decisions are made."²⁸⁷ Thus, such word-of-mouth recruitment practices were barriers to entry that operated to lock-out non-dominant market players.

Because word-of-mouth recruitment both perpetuates the effects of past discriminatory activity and creates present discrimination by strengthening exclusionary labor hierarchies, the FCC has a strong interest in clearing these barriers to entry and creating open competition for employment at federally-licensed broadcast stations. As Professors Ian Ayres and Frederic E. Vars have persuasively argued, "[w]hen inaction ('passive,' color-blind behavior) would tend to maintain racially segregated markets, the government has a compelling interest to counteract this effect."²⁸⁸

Judged against this background, Option B was also narrowly tailored to achieve the objective of enhancing outreach to prospective minority candidates. The difficulty with the D.C. Circuit's approach to the narrow

²⁸⁴ See *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 114-21 (1973) (plurality opinion) (holding that broadcast licensees were private entities for the purposes of the First Amendment).

²⁸⁵ *Report & Order*, *supra* note 233, at 2345 (¶ 40).

²⁸⁶ *Id.* (stating that outreach recruitment was necessary "so that the homogeneous workforce does not simply replicate itself").

²⁸⁷ *Id.* For instance, research has shown that informal recruitment networks such as word-of-mouth recruiting tend to replicate the extant workforce. PHILIP MOSS & CHRIS TILLY, *STORIES EMPLOYERS TELL: RACE, SKILL, AND HIRING IN AMERICA* 226 (2001). This is the case because insiders tend to refer potential applicants with whom they enjoy a close relationship. *Id.* (quoting a supervisor mentioning that "a lot of people [are] trying to help members of their family, friends. Get them a job, get them in the company"). Research also suggests that word-of-mouth recruiting discourages outsiders from applying for jobs even where there is knowledge of job availability by reaffirming the perception that a particular firm is dominated by members of a particular group. *Id.* at 227. In this manner, informal recruitment networks "amplif[y] the effect of separation between groups," accentuating the rivalry between socially and racially defined groups. *Id.*

²⁸⁸ Ayres & Vars, *supra* note 139, at 1610.

tailoring inquiry was that it refused to view Option B as addressing the *real problem*: the need for effective outreach to women and minority communities. Instead, the court viewed Option B as a carefully-veiled preference scheme intended to achieve proportional representation of women and minorities within the licensee's workforce.²⁸⁹ This flawed approach grew directly from the D.C. Circuit's failure to conduct a meaningful compelling governmental interest inquiry.

In contrast to the D.C. Circuit, the FCC's position was that the requirement of submission of applicant pool data was intended to "give the broadcaster, the public, and the Commission more information by which to monitor the effectiveness of a station's outreach efforts."²⁹⁰ Viewing Option B as an effort to enhance inclusiveness and to level the playing field for all competitors, it becomes very difficult to see how a licensee-designed outreach program could be monitored for effectiveness in the absence of any applicant pool data. In addition, the FCC's EEO rule as a whole also contained a race-neutral alternative. Recall that broadcast licensees were always free to choose Option A, which did not "place a special emphasis upon the presence of women and minorities in the target audience."²⁹¹ Option B was triggered only at the licensee's option.²⁹² Viewed from this perspective, Option B was narrowly tailored to achieve a compelling governmental interest.

This case shows very clearly the competitive dynamics of a particular market—i.e., the market for employment with the FCC's broadcast licensees. By refusing to acknowledge these dynamics, the court turned a blind eye to systematic anticompetitive conduct, which had created unfair competitive advantages enjoyed by a particular group. As a result, the court perpetuated the existing anticompetitive structure rather than allowing the FCC to try to construct an even playing field.

B. *Competition in Education: Eisenberg v. Montgomery County Public Schools*

Education is another key area in which blacks and whites compete for access to resources. In education, patterns of private discriminatory (and anticompetitive) conduct—aided and abetted by governmental actors—has operated to lock-in benefits for whites at the expense of blacks. In *Eisenberg v. Montgomery County Public Schools*, a governmental actor attempted to disrupt this anticompetitive system and was rebuffed by the Fourth Circuit.²⁹³ As we saw in the employment context, the court's failure to analyze the underlying competitive landscape results in a decision that protects the existing anticompetitive structure.

²⁸⁹ MD/DC/DE Broadcasters Ass'n v. F.C.C., 236 F.3d 13, 21-22 (D.C. Cir. 2001).

²⁹⁰ *Report & Order*, *supra* note 233, at 2378 (¶ 120).

²⁹¹ MD/DC/DE Broadcasting, 236 F.3d at 19.

²⁹² *Report & Order*, *supra* note 233, at 2374 (¶ 104).

²⁹³ 197 F.3d 123, 124 (4th Cir. 1999).

In *Eisenberg*, a white elementary school student, Jacob Eisenberg, argued that a school district transfer policy that had prevented his transfer into a magnet program because of the potential "impact on diversity" was a violation of the Equal Protection Clause.²⁹⁴ While the district court had denied Eisenberg's motion for a preliminary injunction that would have compelled his admittance into the magnet program, the Fourth Circuit granted the injunction because "such race based governmental actions are presumed to be invalid and are subject to strict scrutiny."²⁹⁵ Again, some background on the origins of the transfer policy, and Eisenberg's challenge to it, is in order.

1. The Montgomery County Public Schools Transfer Policy

Like many other metropolitan areas, Montgomery County, Maryland experienced significant demographic shifts in the 1970's and the 1980's. During that time, the number of minority students attending the County's public schools swelled so that by the 1993-94 school year almost half of the students attending the county's public schools were minorities.²⁹⁶ This was an increase from 1970, when minority students accounted for only eight percent of the county's school population.²⁹⁷ Correspondingly, during the same period, the percentage of students that were white fell from ninety-two percent to fifty-eight percent.²⁹⁸

In 1977, the county had instituted a magnet schools program "in an attempt to desegregate areas of the county that at one time were considered most vulnerable to segregation."²⁹⁹ One purpose of the magnet program was to "attract and retain diverse student enrollment on a voluntary basis to schools outside the area in which a student lives."³⁰⁰ Subsequently, Montgomery County developed a transfer policy, which allowed transfers among schools in the district based upon five factors, one of which was the "diversity profile" or racial composition of the transferee school.³⁰¹ While transfers that adversely affected diversity were usually denied, white students were not singled out for

²⁹⁴ *Id.* at 125-30.

²⁹⁵ *Id.* at 133.

²⁹⁶ GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 210 (1996) (stating that "[I]n the 1993-94 school year, 42.3 percent of students were members of minority groups").

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 387 n.7.

²⁹⁹ *Id.* at 209.

³⁰⁰ *Eisenberg*, 197 F.3d at 125. While Montgomery County's school system had never been the subject of a court order requiring it to desegregate its schools, the system was segregated prior to the implementation of its voluntary magnet program. *Id.*; see also ORFIELD & EATON, *supra* note 296, at 207.

³⁰¹ *Eisenberg v. Montgomery County Pub. Sch.*, 19 F. Supp. 2d 449, 451 (D. Md. 1998); see also ORFIELD & EATON, *supra* note 296, at 213 (identifying the factors considered in the calculation of the "diversity profile").

unfavorable treatment.³⁰²

In the 1998-1999 school year, Jacob Eisenberg sought a transfer to the Rosemary Hills elementary school in order to take advantage of its magnet math and science program.³⁰³ Jacob's family believed that the transfer was necessary in order to provide him with the "best opportunity for realizing his personal and academic potential."³⁰⁴ Jacob's residence would otherwise have dictated that he attend the Glen Haven Elementary School, which had experienced a sharp drop in white enrollment in the years immediately preceding Jacob's transfer request.³⁰⁵ Montgomery County denied Jacob's transfer request because of the "impact on diversity" since white enrollment at Glen Haven had dropped so significantly.³⁰⁶

2. Eisenberg's Challenge to Montgomery County's Transfer Policy in the United States District Court

Jacob Eisenberg lost at the district court level because the court was convinced that a ruling in Eisenberg's favor could "lead to racial isolation among certain schools in the District."³⁰⁷ In assessing Eisenberg's motion for a preliminary injunction, the district court began with a strict scrutiny analysis.³⁰⁸ Given the race-based nature of Montgomery County's determination, there was little question that strict scrutiny would apply to its denial of the transfer request.³⁰⁹ Montgomery County argued that two interests

³⁰² *Eisenberg*, 197 F.3d at 126. "[A]t some schools, African-Americans are generally not allowed to transfer out. At other schools, white transfers are for the most part not approved. At a substantial number of schools, transfers are approved without consideration of the impact on racial or ethnic makeup of the affected schools." *Eisenberg*, 19 F. Supp. 2d at 454 (recapping the school district's argument that the "diversity profile" does not single out whites).

³⁰³ *Eisenberg*, 197 F.3d at 125.

³⁰⁴ *Eisenberg*, 19 F. Supp. 2d at 451 (quoting the stated reason included on the student's transfer request form).

³⁰⁵ *Id.* Jacob was one of nineteen white students seeking a transfer from Glen Haven in 1998, which was consistent with enrollment trends at Glen Haven. *Id.* Between 1994 and 1998, the percentage of white enrollment at Glen Haven dropped from 38.9 percent to 24.1 percent. *Id.* In the year that Jacob made his transfer request, Glen Haven had the following racial breakdown: 24.1 percent of the school's students were white, 40.5 percent were African-American, 25 percent were Hispanic and 10.1 percent were Asian. *Id.* Glen Haven's percentage of white students was far less than the county-wide average which hovered just over 50 percent. *Id.*

³⁰⁶ *See Eisenberg*, 197 F.3d at 125 n.1 (noting that, absent special circumstances, the school district refused to permit any white students to transfer out of Glen Haven Elementary School).

³⁰⁷ *See Eisenberg*, 19 F. Supp. 2d at 452.

³⁰⁸ *See id.*

³⁰⁹ *See id.*

justified its determination.³¹⁰ The first was the desire to promote diversity.³¹¹ With respect to the increasingly controversial question of whether diversity could form the basis of a compelling governmental interest, the district court responded affirmatively, ruling "that the diversity interest remains a compelling governmental interest in the context now being considered."³¹²

The County also attempted to support the transfer denial on a second, separate rationale. Montgomery County must retain the authority to deny transfer requests in order to avoid "facilitating through its actions private conduct that leads to a discriminatory environment."³¹³ Montgomery County's argument boiled down to a broad assertion that the court must recognize the reality of "white flight" so that governmental actors would not be forced to facilitate conduct that would lead to resegregation.

The district court did not shy away from the County's desire to avoid facilitating segregation. The district court accepted Montgomery County's assertion, fearing that forcing the County to grant transfer requests would result in "segregative enrollment patterns that might themselves constitute violations of the law."³¹⁴ In reaching this conclusion, the district court reached back to the Supreme Court's discussion of "passive participation" in *City of Richmond v. J. A. Croson Co.*³¹⁵ to unearth an appropriate analogy.³¹⁶ In *Croson*, the Supreme Court recognized that a governmental actor could take appropriate steps to prevent "its tax dollars from assisting these organizations in maintaining a racially segregated construction market."³¹⁷ For the district court, Montgomery County faced a similar quandary: without the ability to deny nonintegrative transfers, the result might well be "extremely low percentages of minorities, or nonminorities in certain public schools."³¹⁸

Thus, from the district court's perspective, Montgomery County had a compelling government interest in avoiding segregative enrollment patterns.³¹⁹ Having affirmed the existence of a compelling government interest, the court considered whether Montgomery County's transfer policy was narrowly

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.* at 453. The court discussed Justice Powell's decision in *Regents of University of California v. Bakke*, 438 U.S. 265, 311-15 (1978). *Eisenberg*, 19 F. Supp. 2d at 453. Powell argued that diversity in a student body enhances informal learning. *Bakke*, 438 U.S. at 312.

³¹³ *Eisenberg*, 19 F. Supp. 2d at 454.

³¹⁴ *Id.*

³¹⁵ 488 U.S. 469 (1988).

³¹⁶ *Eisenberg*, 19 F. Supp. 2d at 454.

³¹⁷ *Croson*, 488 U.S. at 503, *quoted in Eisenberg*, 19 F. Supp. 2d at 454.

³¹⁸ *Eisenberg*, 19 F. Supp. 2d at 454.

³¹⁹ *Id.* (maintaining that the Montgomery County School District has a "compelling interest in not facilitating a discriminatory environment" that would result from segregated enrollment patterns).

tailored. The court was persuaded that Montgomery County's policy neither singled out any particular racial group for disfavored treatment nor used "quotas."³²⁰ Consequently, the district court concluded that, "on balance, the District's policies have been designed as narrowly as possible while still furthering the District's stated interests."³²¹

3. Eisenberg's Challenge to Montgomery County's Transfer Policy in the United States Court of Appeals for the Fourth Circuit

On appeal, the Fourth Circuit reversed the district court's decision, holding that the County could not consider an applicant's race in granting or denying a transfer request.³²² The court's analysis mirrored that of the D.C. Circuit in *MD/DC/DE Broadcasters* in its approach to the compelling governmental interest prong of strict scrutiny review.³²³ Accordingly, the Fourth Circuit "assume[d], without holding . . . that diversity may be a compelling governmental interest," and then proceeded to question whether the transfer policy was narrowly tailored.³²⁴ As was the case in *MD/DC/DE Broadcasters*, without anchoring the court's opinion with a clear examination or determination that there is a strong compelling interest animating the governmental action at issue, the outcome of the narrow tailoring analysis is preordained.

First, in making such an assumption, the Fourth Circuit conveniently blended the two separate rationales that Montgomery County had originally put forward to justify the transfer denial.³²⁵ At the district court level, the County had put forward *both* its interest in promoting a diverse student body and its interest in avoiding the "creation, through District action, of segregative enrollment patterns that might themselves constitute violations of the law" as sufficiently compelling to justify the transfer policy.³²⁶

The Fourth Circuit, however, believed these interests to be "one and the same," thus distilling the two into a single desire to achieve racial diversity.³²⁷ Thus, the Fourth Circuit ignored what the district court had clearly recognized, that Montgomery County "obviously has a compelling interest in not

³²⁰ *Id.*

³²¹ *Id.* In deciding whether the policy was narrowly tailored, the district court also found that, given the goal as articulated, no race-neutral alternatives were available, and that periodic review of the transfer program would ensure that the transfer policy was "as narrow as possible." *Id.* at 454-55.

³²² *Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123, 133-34 (4th Cir. 1999).

³²³ See *supra* notes 281-83 and accompanying text (discussing the court's compelling interest analysis in *MD/DC/DE Broadcasters*).

³²⁴ *Eisenberg*, 197 F.3d at 130 (stressing that "[n]o inference may here be taken that we are of [the] opinion that racial diversity is a compelling government interest").

³²⁵ *Id.*

³²⁶ *Eisenberg*, 19 F. Supp. 2d at 452.

³²⁷ *Id.*

facilitating a discriminatory environment through state action.”³²⁸ Assuming without holding that racial diversity was a compelling governmental interest, the court effectively removed the question of governmental facilitation of discriminatory private conduct from the case, thereby allowing it to ignore this difficult issue. The stage was now set for the decisive narrow tailoring analysis, which allowed the Fourth Circuit to strike down the County’s plan.

Once the Fourth Circuit framed the question the way it did—“[Is] Montgomery County’s use of racial classification in its transfer decisions . . . narrowly tailored to the interest of obtaining diversity?”³²⁹—the answer became practically inevitable. Within the context of the Fourth Circuit’s narrow tailoring analysis, “racial diversity” simply became “nonremedial racial balancing.”³³⁰ As the court noted, “[Montgomery County’s transfer policy] is mere racial balancing in a pure form, even at its inception.”³³¹ The court believed the transfer policy was aimed merely at “keeping certain percentages of racial/ethnic groups within each school.”³³² Such an end, in and of itself, simply could not be constitutionally sound.³³³

This reasoning is simply circular; it amounts to ruling that racial balancing is unconstitutional *because* racial balancing is unconstitutional. The court’s reference to prior and controlling Fourth Circuit precedent, however, reveals a more satisfying answer: racial balancing is *per se* unconstitutional because it lacks an adequate factual predicate sufficient to support a narrowly tailored remedy.³³⁴ At its core, the constitutional infirmity of racial balancing is that it seeks to achieve a certain racial representation without sufficient proof that the disparity which occasioned its use is the result of identified discrimination on the part of either the governmental entity or some private actor whom the governmental entity has aided or abetted.³³⁵ In this respect, the constitutional

³²⁸ *Id.* at 454.

³²⁹ *Eisenberg*, 197 F.3d at 131.

³³⁰ *See id.*

³³¹ *Id.*

³³² *Id.*

³³³ *Id.* at 133. The court reasoned that Montgomery County was engaged in racial balancing, a practice that the court had previously invalidated. *Id.* Accordingly, Montgomery County’s rejection of the transfer application was “invalidated because it was giving effect to an unconstitutional policy.” *Id.*

³³⁴ *See id.* (citing *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 705 (4th Cir. 1999), and *Podberesky v. Kirwan*, 38 F.3d 147, 160 (4th Cir. 1994)).

³³⁵ The Fourth Circuit’s discussion of the constitutionality of a race-based scholarship program in *Podberesky* is instructive on this point:

The district court has approved the use of the Banneker Program to affirmatively admit African-American students solely on the basis of race until the composition of African-Americans on the University campus reflects the percentage of African-American Maryland high school graduates who potentially might participate in higher education at UMCP, without an accurate determination of either the extent to which the present disparity exists, . . . or the extent to which that disparity flows from past

infirmity in *Eisenberg* mirrored that which was discovered in *MD/DC/DE Broadcasters*—specifically, the failure to identify specific instances of past discrimination sufficient to support the race-based program at issue.³³⁶

4. *Eisenberg v. Montgomery County Public Schools*: Through the Lens of Intergroup Competition in the Public School System

What if the Fourth Circuit had approached the dispute in *Eisenberg* with an eye toward intergroup competition within the context of public education? There are at least two ways in which this approach could have impacted the court's decision. The first approach would explicitly recognize the importance of admission to magnet schools. Over the years we have observed a constant struggle about the meaning of educational equality. These struggles have taken place in a variety of contexts and across all educational levels, from elementary school to graduate school.³³⁷ But at all levels, the disputes were about more than simply what the content of a particular entry requirement should be. These fights also had an instrumental quality because admission into a particular educational institution also determined access to the significant social and economic advantages that such an education provided. Recently, an increasing number of suits have challenged the use of race conscious admissions standards at public schools and in particular have targeted the use of race as a factor in determining admission to public elite and "magnet" schools.³³⁸ *Eisenberg* is firmly part of this new trend.

discrimination The program thus could remain in force indefinitely based on arbitrary statistics unrelated to constitutionally permissible purposes We are thus of opinion that, as analyzed by the district court, the program more resembles outright racial balancing than a tailored remedy program. As such, it is not narrowly tailored to remedy past discrimination. In fact, it is not tailored at all.

Podberesky, 38 F.3d at 160.

³³⁶ For an incisive analysis of *Eisenberg* and two other recent Fourth Circuit public school cases that arguably "invite a new era of de facto school segregation," see John Charles Boger, *Willful Colorblindness: The New Racial Piety and the Resegregation of Public Schools*, 78 N.C. L. REV. 1719 (2000).

³³⁷ See, e.g., *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978) (sustaining a challenge against an affirmative action plan at a public medical school); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (sustaining a challenge to de jure segregation of public schools); *Hopwood v. Texas*, 236 F.3d 256, 260-61 (5th Cir. 2000) (sustaining a challenge to an affirmative action plan at a public law school).

³³⁸ See, e.g., *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305 (4th Cir. 2001) (challenging a magnet school admissions plan that used racial ratios to determine student assignment); *Brewer v. W. Irondequoit Cent. Sch.*, 212 F.3d 738 (2d Cir. 2000) (challenging an interdistrict transfer program intended to reduce racial isolation); *Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123 (4th Cir. 1999) (challenging a race conscious magnet school transfer policy); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999) (arguing that lottery admissions system for an alternative kindergarten which took race into account was unconstitutional); *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998) (challenging the constitutionality of Boston Latin School's race conscious admission

The second approach would explicitly recognize the reality of "white flight." From this perspective, the court could have considered the type of private discriminatory exclusion the transfer plan was intended to prevent or at least not to facilitate: "white flight" from substantially minority public schools.³³⁹ From this standpoint, the transfer policy would also be viewed against the backdrop of intensifying racial segregation in our nation's public schools.³⁴⁰ Triggered by "systematic avoidance" of interracial contact, white migration from urban public schools is a perceptible phenomenon, and public schools in metropolitan areas are increasingly becoming racially segregated.³⁴¹ As Professor Gary Orfield has suggested, "[i]n a society with a rapidly growing minority population and little stable residential integration, unless there are successful strategies to stabilize either school or housing integration or both, there will be a great deal of resegregation and decline in white enrollment."³⁴² Montgomery's transfer policy, intended to "ensure racial and ethnic diversity of the schools of the County,"³⁴³ was an attempt to prevent such an outcome and to "equalize integration" across the county.³⁴⁴

Given these approaches, the underlying dispute in *Eisenberg* is not simply about who will be admitted to a particular magnet program. Rather, it revolves around the question of whether the governmental interest in disrupting patterns of private discriminatory exclusion which provide manifold advantages to a dominant group outweighs an individual's interest in having access to a magnet program. While the district court took cognizance of this by explicitly recognizing the relationship between the County's actions and "segregative

policy); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 137 F. Supp. 2d 1224 (W.D. Wash. 2001) (challenging a racial "tiebreaker" for school district's open choice assignment plan); *Comfort v. Lynn Sch. Comm.*, 100 F. Supp. 2d 57 (D. Mass. 2000) (alleging that a plan intended to eliminate racial isolation within school district was unconstitutional); *Boston Children First v. Boston*, 62 F. Supp. 2d 247 (D. Mass. 1999) (challenging city-wide student assignment plan that used race as a factor in determining student placement). *But see Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358 (W.D. Ky. 2000) (addressing a challenge by African-American parents to magnet school program that capped black student enrollment at a particular level).

³³⁹ See Jeffrey R. Henig, *Race and Choice in Montgomery County, Maryland, Magnet Schools*, 96 TCHRS. C. REC. 729, 731 (1995) ("[T]he pattern of [transfer] requests in Montgomery County suggests that—unless aggressively regulated by authorities—the direction in which choice points may exacerbate, rather than ameliorate, racial segregation.").

³⁴⁰ See Orfield, *supra* note 154, at 16, 48.

³⁴¹ Charles T. Clotfelter, *Are Whites Still Fleeing? Racial Patterns and Enrollment Shifts in Urban Public Schools, 1987-1996*, 20 J. POL'Y ANALYSIS & MGMT. 199, 217 (2001).

³⁴² Orfield, *supra* note 154, at 8.

³⁴³ *Eisenberg v. Montgomery County Pub. Sch.*, 19 F. Supp. 2d 449, 454 (D. Md. 1998).

³⁴⁴ See Orfield, *supra* note 154, at 8 ("[W]hite enrollment is most stable when there are large school districts that both tend to equalize integration and to deny the possibility of finding nearby all-white schools.").

enrollment patterns,"³⁴⁵ the Fourth Circuit declined to do so and glossed over the intergroup competitive dynamic against which the County acted. In doing so, the Fourth Circuit left intact the existing structure, built on a foundation of anti-competitive conduct that continues to lock-out blacks from the resources and benefits enjoyed by whites.

C. *Competition in Housing: Walker v. City of Mesquite*

The market for housing, like the markets for employment and to education, display clear competitive dynamics. *Walker v. City of Mesquite*³⁴⁶ illustrates the built-in advantages enjoyed by a racially and socially defined group as a result of prior discriminatory state action. The state's attempts to disrupt this system are rebuffed by the court in a manner quite similar to those we have seen in employment and education. Again, the court chose to leave intact a system built on anti-competitive conduct that has locked-in benefits for one group at the expense of another.

In *Walker*, the Fifth Circuit held unconstitutional a remedial order requiring that newly constructed public housing units be located in predominantly white neighborhoods in Dallas.³⁴⁷ The district court based its remedial order on a judicial finding not only of generations of intentional discrimination in the Dallas public housing program, but also of recalcitrance on the part of the responsible government officials in ameliorating the effects of that discrimination.³⁴⁸ *Walker*, like *MD/DC/DE Broadcasters* and *Eisenberg*, is not a "classic" affirmative action case. Again, some background is in order.

1. The Early Phases of the *Walker* Litigation

The *Walker* litigation began in 1985, when minority recipients of federal housing assistance sued the Department of Housing and Urban Development ("HUD"), the Dallas Housing Authority ("DHA"), and several Dallas metropolitan area suburbs for racial discrimination in the administration of a federal housing assistance program.³⁴⁹ That litigation resulted in the district court approving a consent decree in 1987.³⁵⁰ Two years later, the district court joined the City of Dallas to the decree and made the city a party in the lawsuit

³⁴⁵ See *Eisenberg*, 19 F. Supp. 2d at 454.

³⁴⁶ 169 F.3d 973 (5th Cir. 1999) [hereinafter *Walker V*].

³⁴⁷ *Id.* at 975-76.

³⁴⁸ See *id.* at 976-77 (outlining the procedural history of case); see *Walker v. HUD*, 734 F. Supp. 1289, 1293 (N.D. Tex. 1989) [hereinafter *Walker III*] ("At any time—yes, at any time—the City of Dallas could have forced DHA to stop its deliberate policy of strict racial segregation in low-income public housing in Dallas." (emphasis in original)).

³⁴⁹ *Walker v. HUD*, 912 F.2d 819, 821 (5th Cir. 1990) [hereinafter *Walker IV*]. The suburban communities were later dismissed from the litigation after they agreed to participate in the federal Section 8 program. *Id.* at 822.

³⁵⁰ *Walker V*, 169 F.3d at 976.

because the city was a "substantial cause of DHA's deliberate racial segregation and discrimination in its public housing programs in Dallas."³⁵¹

In joining the City of Dallas to the decree, the district court canvassed the history of the DHA and found that, "[f]rom its beginning, the primary purpose of DHA's public housing program was to prevent blacks from moving into white areas of this city."³⁵² The DHA accomplished this through a variety of methods, including: repeatedly and intentionally siting public housing developments in "Negro slum areas,"³⁵³ yielding to demands from white property owners that "Negro project[s]" not be sited in white areas;³⁵⁴ constructing the racially segregated West Dallas project with "separate parks and commercial areas . . . for the separate races,"³⁵⁵ and refusing to allow most minority tenants to use Section 8 housing assistance certificates that would have allowed them to secure housing in suburban areas.³⁵⁶ As a result, blacks "were purposefully segregated for decades into either Section 8 housing in minority areas of Dallas or predominantly black housing projects in minority areas of Dallas."³⁵⁷

The 1987 consent decree required the defendants to demolish and replace several thousand dilapidated housing units, and to "assist black families joining the Section 8 program in finding housing in white areas of Dallas."³⁵⁸ The DHA did not comply, engaging in a long period of recalcitrance and repeatedly violating the decree.³⁵⁹ The district court ultimately vacated the 1987 decree because the remnants of intentional segregation remained, granted summary judgment on liability for plaintiffs, and entered remedial orders affecting the DHA and HUD.³⁶⁰ These remedial orders are the subject of the *Walker v. City of Mesquite*.³⁶¹ More specifically, the remedial order affecting the DHA, like

³⁵¹ *Walker III*, 734 F. Supp. at 1290 ("Throughout the history of the [Dallas Housing Authority], the City has known of DHA's blatant practices of racial segregation and discrimination, . . . not only did the City refuse to intervene to stop these illegal practices, it actually participated in this conscious discrimination against minorities in public housing in Dallas." (emphasis in original)).

³⁵² *Id.* at 1293.

³⁵³ *Id.*

³⁵⁴ *Id.* at 1294.

³⁵⁵ *Id.* at 1296.

³⁵⁶ *Id.* at 1300. See generally George Rodrigue, Craig Flournoy and David Tarrant, *Segregation in Dallas: How Integration of Housing Failed*, DALLAS MORNING NEWS, Feb. 14, 1985, 1985 WL 4017103 (noting that "[a]ffluent communities in and around Dallas have slammed their doors" to a federal initiative aimed at developing low income housing in suburbs and the DHA "has yet to build desperately needed family housing outside minorities areas").

³⁵⁷ *Walker V*, 169 F.3d 973, 976 (5th Cir. 1999).

³⁵⁸ *Id.* at 977.

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ *Id.* at 975-76.

the 1987 consent decree before it, required the DHA to demolish certain public housing units and replace those units through new construction and Section 8 assistance.³⁶² Key to the DHA remedial order was the requirement that the DHA "develop *all* new public housing units in predominantly white areas until there are as many units in predominantly white areas as there are in minority areas."³⁶³

2. The Challenge to the Remedial Order

In *Walker*, the plaintiffs sought to enjoin the construction of two forty-unit public housing projects adjacent to their neighborhoods.³⁶⁴ The plaintiffs, who were white, lived in a neighborhood that was more than sixty percent white.³⁶⁵ They asserted two arguments. First, they argued that they were the victims of purposeful racial discrimination because the defendants had singled their neighborhood out to accommodate the new projects on the basis of race.³⁶⁶ Second, they argued that the siting decision would "inflict specific injury including decreased property values, increased crime and population density, environmental problems, and diminished aesthetic values of the neighborhood."³⁶⁷ The district court had denied the plaintiffs' request for injunctive relief, but the Fifth Circuit vacated the remedial order.³⁶⁸

At the outset, the Fifth Circuit agreed with the plaintiffs that they would be injured by the proposed construction plan.³⁶⁹ Why was this the case? The court opined that the challenged remedial order embodied a racial classification because "these homeowner's 'whiteness' is one of two controlling elements which identified the specific sites adjacent to their neighborhoods for new public housing construction."³⁷⁰ Thus, the very presence of an explicit racial classification within the remedial order generated standing to sue.³⁷¹ With this determination, the Fifth Circuit confirmed that the

³⁶² *Id.* at 977.

³⁶³ *Id.* The remedial order defined "predominantly white area" as any area with less than thirty-seven percent minority residents. *Id.* at 977-78.

³⁶⁴ *Id.* at 978.

³⁶⁵ *Id.* at 979 (noting that the DHA selected the plaintiffs' neighborhood primarily because it was more than sixty-three percent white).

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 988. In the district court, a group of tenants in the public housing program sought a declaratory judgment that the remedial orders were constitutional. *Id.* at 976. The district court found for the tenants, but the Fifth Circuit reversed. *Id.* at 988. In a separate action that was consolidated, residents sought a stay of construction. *Id.* The district court entered judgment against the homeowners, but the Fifth Circuit enforced the stay. *Id.*

³⁶⁹ *Id.* at 978-81.

³⁷⁰ *Id.* at 979.

³⁷¹ *See id.* at 980-81 ("In general, the racial classification of the homeowners is an injury in and of itself."). The court in *Walker V* mentioned also that the homeowners alleged

homeowners' sued for an injury grounded in their race as a shared characteristic, as well as for any economic or aesthetic injury generated by construction of the projects in their neighborhoods.³⁷²

The Fifth Circuit ruled that because the remedial order required the siting of the new public housing projects in predominantly white areas, the decision amounted to a "racial classification" scheme to which strict scrutiny must apply.³⁷³ Like the courts in both *MD/DC/DE Broadcasters* and *Eisenberg*, the Fifth Circuit did not discuss the nature or scope of the government's compelling governmental interest in its strict scrutiny analysis. The plaintiffs cleverly conceded that the remedial order was supported by the compelling governmental interest of "remedy[ing] the vestiges of past discrimination and segregation within Dallas's public housing programs."³⁷⁴ Thus, the court found it unnecessary to engage in any significant examination of the underpinnings of that interest.³⁷⁵ Instead, the court simply assumed that a compelling governmental interest animated the remedial order, and proceeded directly to the narrow tailoring inquiry.³⁷⁶ Consequently, the narrow tailoring discussion had an otherworldly quality, consisting of the court carefully engaging in a five factor balancing test imported from the Supreme Court's opinion in *United States v. Paradise*,³⁷⁷ but making little reference to the governmental interest which the narrow tailoring analysis was intended to modify.

The Fifth Circuit ruled that the remedial order was not narrowly tailored because a race-neutral remedy was available that could achieve the same desegregation.³⁷⁸ The narrow tailoring analysis was premised on the notion that the construction of new public housing projects in predominantly white areas was race-conscious, but that the provision of Section 8 housing assistance with the express intent of moving minority families into privately owned rental housing in predominantly white areas was actually race-

potential loss of property value as well as other problems like crime and aesthetic value. *Id.* at 980. The court added, "HUD and DHA cite no cases in which standing has been denied to homeowners who asserted their quality of life and property values would be diminished by a next-door public housing or other HUD project." *Id.*

³⁷² See *id.* at 980-81.

³⁷³ *Id.* at 981-82 ("Any race-conscious remedial measure receives strict scrutiny under the Equal Protection Clause. This is true no matter which race is burdened or benefitted by the racial classification in question." (citations omitted)).

³⁷⁴ See *id.* at 981-82.

³⁷⁵ *Id.* at 982.

³⁷⁶ *Id.*

³⁷⁷ 480 U.S. 149 (1987). In *Paradise*, the court upheld a district court's order that required the Alabama Department of Public Safety to promote one black officer for every white officer promoted. *Id.* at 153. Applying strict scrutiny, a plurality of the Court concluded that the order was narrowly tailored because there was no other viable option available to the Court. *Id.* at 177.

³⁷⁸ *Walker V*, 169 F.3d at 982-88.

neutral.³⁷⁹ As Martha Mahoney has persuasively explained, it was bizarre to label the provision of Section 8 certificates to minority tenants to desegregate white areas as race-neutral, while at the same time characterizing the construction of two forty-unit apartment complexes in white neighborhoods race-conscious, and therefore ultimately unconstitutional.³⁸⁰ Both modes of remedial action sought exactly the same race-conscious end: the placement of minority tenants in white neighborhoods.³⁸¹ Indeed, there is an argument that, because both modes of remedy seek race-conscious ends, both are equally unconstitutional.³⁸² But such an argument is inapplicable in a situation where the court is evaluating an attempt to remedy invidious discrimination supported by significant recalcitrance on the part of the responsible government entity.

In reaching its conclusion, the Fifth Circuit ignored questions raised about the efficacy of Section 8 certificates for producing actual desegregation. The district court had ruled that the provision of Section 8 certificates alone was not an adequate remedy because reliance on the private market alone would not disestablish the vestiges of the prior discrimination.³⁸³ Thus, the district court had determined that "Section 8 needed to be combined with new construction or acquisition in predominantly white areas in order to remedy the effects of past discrimination."³⁸⁴ But from the Fifth Circuit's perspective, if Section 8 could somehow be shown to be an effective desegregation method, then there

³⁷⁹ *Id.* at 983-85 (calling Section 8 a "race-neutral measure" and indicating that it is "superior to a race-conscious remedy in that it allows market forces and personal preferences rather than racial criteria to guide the homemaking decision"). Section 8 housing vouchers provide housing assistance to eligible recipients so that they can secure housing in the private rental market. See *Federal Rental Assistance: Overview of the Section 8 Program*, 76 CONG. DIG. 229, 232 (1997).

³⁸⁰ Martha R. Mahoney, *Whiteness and Remedy: Under-Ruling Civil Rights in Walker v. City of Mesquite*, 85 CORNELL L. REV. 1309, 1351-52 (2000) ("Bizarrely, the *Walker* court calls 'race neutral' a plan to give certificates to African Americans who were victims of discrimination, even when it approves sending these tenants to 'nonblack' neighborhoods, but it calls 'race-conscious' a plan to put two small apartment complexes into white neighborhoods." (emphasis in original)).

³⁸¹ See *Walker V*, 169 F.3d at 977, 984-85 (discussing the goals of Section 8 and of the district court's remedial order).

³⁸² See Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2333 (2000) ("[S]trict scrutiny under the Equal Protection Clause is triggered by a law motivated by a racially discriminatory purpose, regardless of whether the law employs an express racial classification or is race-neutral on its face. As the Supreme Court's affirmative action cases establish, the purpose to benefit racial minorities is a discriminatory purpose.").

³⁸³ See *Walker V*, 169 F.3d at 983-85 (discussing the basis for the district court's remedial order).

³⁸⁴ See *id.* at 984; Mahoney, *supra* note 380, at 1347 ("Studies of Section 8 housing around the United States published after the district court's remedial order show that, without race-conscious intervention, Section 8 often fails to produce desegregation.").

was no reason to trammel the alleged rights of third parties.³⁸⁵ Thus, the Fifth Circuit required that the race-neutral Section 8 program be used and clearly found to fail prior to the institution of race-conscious public housing siting decisions.³⁸⁶ The district court's finding that if defendants did not "attach a race-conscious site selection criterion to new construction, then the new units [would] end up in minority areas," was rejected as "unfounded."³⁸⁷

What *Walker* shares with *MD/DC/DE Broadcasters* and *Eisenberg* is the brevity of the compelling governmental analysis in conjunction with a robust narrow tailoring inquiry. But if there was any reason to jettison the compelling governmental interest analysis in *MD/DC/DE Broadcasters* and *Eisenberg*, there is even less of one in *Walker*. Both *MD/DC/DE Broadcasters* and *Eisenberg* featured essentially voluntary actions on the part of governmental actors to ameliorate or guard against discrimination in the private market, while *Walker* featured a governmental actor who had to be dragged, "kicking and screaming," to recognize its own complicity in racial discrimination.

3. *Walker v. City of Mesquite*: Through the Lens of Intergroup Competition for Housing Opportunities

What if the Fifth Circuit had analyzed the dispute from the standpoint of intergroup competition for housing opportunities? The framework of the analysis would have changed and a different outcome would have been possible. As was the case in *MD/DC/DE Broadcasters* and *Eisenberg*, the dispute in *Walker* comes down to this: may dominant players continue to enjoy privileged access to opportunities and be allowed to "lock-out" other competitors in the process? Viewing the dispute in *Walker* from this perspective, how might this approach have changed the court's analysis?

The *Walker* court's lack of discussion of the nature of the compelling governmental interest involved is deeply problematic. By assuming that the defendants had a compelling governmental interest in remedying "the vestiges of past discrimination and segregation within Dallas's public housing programs,"³⁸⁸ the court focused on the potential of the race-neutral Section 8 remedy without having to examine the scope and nature of the underlying problem.

Instead, imagine if the court's analysis had viewed the dispute from the perspective of intergroup competition for housing opportunities and searched for potential barriers to entry to the housing market. From this perspective, the white homeowners in *Walker* were the beneficiaries of prior discriminatory governmental regulation. The governmental defendants in *Walker* had used

³⁸⁵ See *Walker V*, 169 F.3d at 984-85.

³⁸⁶ *Id.* at 985 ("When Section 8 has evidenced such promising results, options such as these should be explored and tested before adopting a race-conscious remedy as a last resort.").

³⁸⁷ *Id.* at 985.

³⁸⁸ *Id.* at 981.

blatantly discriminatory means to create and maintain separate white and black neighborhoods within the Dallas metropolitan area for several generations.³⁸⁹ Until the remedial order at issue in *Walker*, the white homeowners had enjoyed the benefits that came with living in a predominantly white neighborhood without worrying about the pressures that could be created by minority entrants.

While the plaintiffs were not necessarily acting with animus, it is also fair to say that they were the beneficiaries of a previous government "charter" that mandated racial segregation in Dallas metropolitan area neighborhoods and, concomitantly, within the surrounding schools. One way of seeing *Walker*, then, is as an attempt to preserve a built-in advantage that had been created by prior discriminatory state action. That discriminatory state action had created a tangible benefit by erecting a barrier of entry against rival racial and socially defined groups in the same manner that a benefit is bestowed by governmental regulation or licensing creating a regulatory monopoly. Prior governmental action had acted as a barrier to entry to white neighborhoods and schools, and the *Walker* plaintiffs successfully sought to maintain that barrier by urging the judicial system to rule in their favor.

From this perspective, it would also be possible to see that the dispute in *Walker* was necessarily linked to the interrelationship of race, housing, and education. Many of the same themes animate both *Walker* and *Eisenberg*. For instance, we know that a majority of whites are extremely hesitant to inhabit neighborhoods with more than a token number of black residents.³⁹⁰ Thus, white out-migration grows as the number of minority neighbors increases.³⁹¹ In addition, many white residents actively relocate to areas where white residency is predominant in order to avoid integration.³⁹² Additionally, the aversion to living in neighborhoods with black residents functions to maintain a discriminatory housing market, as the real estate industry seeks to cater to the "presumed values of customers."³⁹³

"White flight" has the effect of stripping whites from more racially diverse neighborhoods and injecting them into areas already containing high

³⁸⁹ See *Walker III*, 734 F. Supp 1289, 1293-1309 (N.D. Tex. 1989) (summarizing the history of deliberate segregation in public housing in Dallas by the DHA).

³⁹⁰ Kyle Crowder, *The Racial Context of White Mobility: An Individual-Level Assessment of the White Flight Hypothesis*, 29 SOC. SCI. RES. 223, 244 (2000) ("[R]esearch consistently shows that a majority of Whites prefer neighborhoods that are all—or nearly all—White and are willing to tolerate only a very limited number of minority neighbors . . .").

³⁹¹ *Id.* at 244-45.

³⁹² See *id.* (stating that a majority of whites surveyed indicated that they would try to move out of a neighborhood in which they were outnumbered by minority residents).

³⁹³ See Reynolds Farley, Charlotte Steeh, Maria Krysan, Tara Jackson & Keith Reeves, *Stereotypes and Segregation: Neighborhoods in the Detroit Area*, 100 AM. J. SOC. 750, 776 (1994) (describing the perception of some whites that minorities invite filth and crime into neighborhoods).

concentrations of white residents.³⁹⁴ This process merges groups of white individuals, enhances their strength by concentrating resources, and creates a defined political base: suburban communities. This movement facilitates both control over and increased funding to local public schools.³⁹⁵ Additionally, there is a mutually reinforcing relationship between neighborhoods and schools. Prospective residents seek access to certain neighborhoods because of the quality of the surrounding schools; neighborhoods with good schools are highly attractive, adding to the value of the homes within those neighborhoods.³⁹⁶ Indeed, there is little doubt that there is a strong relationship between neighborhood quality and school quality.³⁹⁷ So one way to view *Walker* is as an attempt to erect barriers to entry to white neighborhoods in an effort to “lock-up” the supply of these valuable benefits. From this perspective, the plaintiffs in the case have chosen to “stand and fight” to preserve neighborhood integrity against incursion from a rival racially, socially, and economically defined group.

As has been discussed, current interpretations of the Equal Protection Clause have thrown the constitutionality of affirmative action programs into grave doubt. Indeed, this new skepticism of affirmative action has crept into the evaluation of governmental decisionmaking with respect to race in areas that do not necessarily implicate “classic” affirmative action problems. In the cases we have examined, the courts have stringently applied the strict scrutiny analysis to measures designed to redress past grievances. In doing so, however, each of these courts failed to undertake a meaningful compelling interest inquiry. Instead, the courts simply struck down the measures at issue because they were not “narrowly tailored” to achieve a compelling governmental interest—even though the courts had not fully explored what those compelling interests might be. These holdings are symptomatic of an approach that places stringent requirements on the government to first prove that it (or a private actor it aided) caused the disparity its plan seeks to ameliorate and then prove that the underlying race-based decision was truly necessary to ameliorate that identified problem. The courts maintained that affirmative action remedies are only justified when they are employed to thwart current, overt *acts* of racism.

³⁹⁴ Crowder, *supra* note 390, at 223.

³⁹⁵ Rhodes Cook, *Suburbia: Land of Varied Faces and a Growing Political Force*, 55 CONG. Q. 1209, 1209 (1997) (“The power of the suburbs to tip both the presidential and the congressional balance underscores the shape of American politics in the late 20th century.”).

³⁹⁶ Ellen, *supra* note 152, at 1513-14 (indicating that many people desire good schools and low crime and believe that the presence of minorities will decrease the quality of schools and neighborhoods).

³⁹⁷ With few exceptions, suburban schools and schools with a larger percentage of white students enjoy enhanced funding, better physical plants and higher levels of maintenance, higher quality teachers, produce students who perform better on standardized tests, offer advanced placement and other specialized courses, and provide havens from rather than direct exposure to high levels of poverty and associated ills. Powell, *supra* note 151, at 339.

The more appropriate question was: what is the appropriate remedy for the current *effects* of past discriminatory activity? As the previous discussion of several recent cases demonstrated, the effects of prior racial discrimination are still felt powerfully today because of "lock-in" effects in the areas of housing, education and job opportunities. Thus, even if all decisionmakers today were to act without regard to race, the effect would be to leave in place the "distribution" scheme previously set up that was admittedly based on race.

At the same time, our discussion of social structural and social psychological approaches to discrimination leads us to believe that, left alone, members of socially and racially defined groups will act to exclude members of other groups.³⁹⁸ Members of groups often allocate resources to those within their group and discriminate against outgroup members because to do so contributes to their own individual self-conception. This suggests that the levels of inequality among racial groups we currently observe can be expected to be quite durable. The government should not be disabled from attempting to correct for what are essentially the present effects of past discriminatory conduct. Rather, governments ought to be permitted to take into account how groups compete for resources. The courts, in applying significant constraints on governmental actors attempting to correct such wrongs, have created a regime which essentially says compliance with the Equal Protection Clause requires that the governmental actor simply cease engaging in harmful conduct, that it "sin no more." But once a defendant has been found to have violated the Equal Protection Clause, that violation cannot be cured simply by cessation of the harmful conduct.

IV. PLACING INTERGROUP COMPETITION AT THE CENTER OF THE CONSTITUTIONAL ANALYSIS: *ADARAND CONSTRUCTORS, INC. v. SLATER*

In our survey of affirmative action cases in the "markets" of employment, education and housing, we have seen how anticompetitive behavior has allowed whites to lock-up access to benefits and opportunities. The courts have largely failed to consider the competitive dynamics underlying these cases, resulting in decisions that serve to maintain white competitive advantage. However, there is one important exception, and it appears in the Tenth Circuit's recent opinion in *Adarand Constructors, Inc. v. Slater* ("*Adarand VII*").³⁹⁹

The importance of the Tenth Circuit opinion lies in its explicit recognition of the deeply anti-competitive nature of the construction industry. The Tenth Circuit recognized that the inability to form relationships with powerful incumbents and the lack of access to exclusive social contacts can frustrate the ability of players to compete for bidding opportunities.⁴⁰⁰ The court

³⁹⁸ See *supra* Part II.

³⁹⁹ 228 F.3d 1147 (10th Cir. 2000).

⁴⁰⁰ *Id.* at 1170-71 (acknowledging "powerful" evidence that discrimination within and throughout the construction industry has created a "decidedly uneven playing field for

synthesized the behavior of white-dominated contractors, unions, and lending companies.⁴⁰¹ The result, according to the court, is an anti-competitive force that served to lock-in white advantage in that marketplace.⁴⁰² This recognition allowed the court to conclude that a compelling governmental interest animated the affirmative action program at issue and that the program was narrowly tailored to achieve the governmental interest, thus satisfying strict scrutiny review.⁴⁰³

A. *A (Very) Brief History of the Adarand Litigation*

The development of the *Adarand* litigation from its inception through its most recent sojourn to the United States Supreme Court has truly been a "long and winding road." The importance of the litigation, culminating but certainly not ceasing with the Court's decision in *Adarand Constructors, Inc. v. Peña*⁴⁰⁴ is not to be underestimated. The *Adarand* litigation concerned several provisions of the Small Business Act of 1958⁴⁰⁵ ("SBA") which presumed that minority group members were socially and economically disadvantaged when competing for federal contracting opportunities.⁴⁰⁶ The SBA set government-wide participation goals in order to facilitate the award of federal contracts to small businesses controlled by socially and economically disadvantaged individuals and required heads of federal agencies to adopt agency-specific goals for participation by disadvantaged businesses.⁴⁰⁷ At the time, the Surface Transportation and Uniform Relocation Assistance Act of 1987⁴⁰⁸ ("STURAA") provided that ten percent of all funds appropriated by the Department of Transportation be awarded to businesses controlled by socially and economically disadvantaged individuals.⁴⁰⁹ This goal was enforced via a contract term, the "subcontractor compensation clause," which paid a prime contractor a financial bonus when a portion of the dollar amount of the contract was expended on a disadvantaged business enterprise, or "DBE."⁴¹⁰

minority subcontracting enterprises seeking to compete in the area of federal construction subcontracts").

⁴⁰¹ *Id.* at 1168-72 (noting that prime contractors and lenders act as "old boy" networks and that unions "place before minority firms a plethora of barriers to membership").

⁴⁰² *Id.* at 1168 (noting that the discriminatory practices of contractors, unions and lenders "precludes from the outset [minority] competition for public construction contracts").

⁴⁰³ *Id.* at 1187.

⁴⁰⁴ 515 U.S. 200 (1995) [hereinafter *Adarand III*].

⁴⁰⁵ 15 U.S.C. §§ 631-657e (2000).

⁴⁰⁶ *Adarand III*, 515 U.S. at 207.

⁴⁰⁷ *Id.* at 206 (citing 15 U.S.C. § 644(g)(1)-(2) (2000)).

⁴⁰⁸ Pub. L. No. 100-17, 101 Stat. 132 (1987) (prior to 1995 and 1998 amendments).

⁴⁰⁹ *Adarand III*, 515 U.S. at 208.

⁴¹⁰ *Id.* at 208-10. In 1989, the Department of Transportation entered into a contract with Mountain Gravel & Construction Co. ("Mountain Gravel") for the construction of a highway in Colorado. *Id.* at 205. According to the terms of the contract, Mountain Gravel

Adarand Constructors, Inc. ("Adarand") complained that it had submitted the low bid for the guardrail portion of a federal construction project funded under the STURAA, yet it was not awarded the contract.⁴¹¹ Instead, the contract was awarded to Gonzales Construction Company ("Gonzales"), a minority-controlled company that had been certified as a DBE.⁴¹² Adarand argued that the government's use of the subcontractor compensation clause denied it equal protection of the laws.⁴¹³ In *Adarand III*, the Supreme Court held that all racial classifications, whether state or federal, must satisfy the demands of strict scrutiny.⁴¹⁴ But because of the complexity of the regulatory scheme involved, the Court remanded the case to the lower courts to determine whether the subcontractor compensation clause at issue was narrowly tailored to achieve a compelling governmental interest.⁴¹⁵

Subsequently, however, the Colorado Department of Transportation granted Adarand DBE status, essentially providing it with the same preference that Gonzales had enjoyed.⁴¹⁶ As a result, the Tenth Circuit ruled that Adarand's cause of action was moot, and directed that the district court dismiss the case.⁴¹⁷ In 2000, the Supreme Court issued its second ruling in the *Adarand* litigation, and held that because Adarand's status as a DBE could be invalidated by the Department of Transportation in the future, it was not "absolutely clear that the litigant no longer had any need of the judicial protection that it sought."⁴¹⁸ Consequently, the Court reversed the Tenth Circuit's decision, declaring that Adarand's "cause of action remains alive."⁴¹⁹

The issue on remand, however, was complicated by the fact that after *Adarand III*, the federal government significantly changed the highway

would receive additional compensation for awarding subcontracts to DBE's. *Id.* at 209. The Court dubbed this the "subcontractor compensation clause." *Id.* at 210.

⁴¹¹ *Id.* at 205 (noting that the Mountain Gravel's chief estimator submitted an affidavit stating it would have awarded that subcontract to Adarand had it not been for the subcontractor compensation clause).

⁴¹² *Id.*

⁴¹³ *Id.* at 204, 212-13. Because the government-actor was the federal government, Adarand alleged that the contract was inconsistent with the equal protection component of the Fifth Amendment. *Id.* at 204.

⁴¹⁴ *Id.* at 227-29 (overruling *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), which applied an intermediate level of scrutiny for benign racial classifications adopted by the federal government).

⁴¹⁵ *Id.* at 237-39.

⁴¹⁶ *Adarand Constructors, Inc. v. Slater*, 169 F.3d 1292, 1296 (10th Cir. 1999) [hereinafter *Adarand V*] (noting that since Adarand now enjoyed the very preference it had challenged, "it can no longer assert a cognizable constitutional injury").

⁴¹⁷ *Id.* at 1297, 1299.

⁴¹⁸ *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) [hereinafter *Adarand VI*].

⁴¹⁹ *Id.* (holding that while the possibility of the harm may be too conjectural to confer standing, it may not be so speculative as to render the case moot).

construction contracting program in an effort to comply with the Supreme Court's ruling.⁴²⁰ While the preference for minorities and women was continued, the changes made it more difficult for members of those groups to qualify for preferential treatment.⁴²¹ For instance, the program incorporated a net worth limit in order to maintain DBE status,⁴²² required that "businesses not exceed a certain amount of gross receipts in order to be eligible for the DBE program,"⁴²³ and set a time limit for any particular company's participation in the DBE program.⁴²⁴ Program regulations also specifically denounced the use of quotas and noted that the use of set-asides was prohibited except "when no other method could be reasonably expected to redress egregious instances of discrimination."⁴²⁵ Thus, in an effort to address the "narrow tailoring" prong of the strict scrutiny test, racial preferences were seen as a "last resort,"⁴²⁶ and the ten percent DBE participation goal was described as "aspirational" rather than as compulsory.⁴²⁷

The difficult challenge presented to the Tenth Circuit on remand was to evaluate the program in both its pre- and post-1996 incarnations.⁴²⁸ Ultimately, the Tenth Circuit determined that the program as structured before the relevant changes was unconstitutional as per *Adarand III*, but that the post-change program, which still incorporated racial classifications, withstood strict scrutiny review.⁴²⁹ The Supreme Court ultimately denied certiorari.⁴³⁰

⁴²⁰ *Adarand VII*, 228 F.3d 1147, 1155 (10th Cir. 2000).

⁴²¹ *Id.* at 1191-95 (analyzing regulatory changes).

⁴²² 49 C.F.R. § 26.67(b)(1) (2001) (stating that if an individual owner of a firm has a personal net worth in excess of \$750,000, the presumption of economic disadvantage for that firm is rebutted); see *Adarand VII*, 228 F.3d at 1193.

⁴²³ 49 C.F.R. § 26.65(b) (2000); see *Adarand VII*, 228 F.3d at 1193.

⁴²⁴ 15 U.S.C. § 636(j)(10)(C)(i) (2000); 13 C.F.R. § 124.2 (2000); see *Adarand VII*, 228 F.3d at 1193.

⁴²⁵ 49 C.F.R. § 26.43(b) (2000); see *Adarand VII*, 228 F.3d at 1193.

⁴²⁶ ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 707 (2d ed. 2002) (describing the Department of Transportation regulations implementing the Transportation Equity Act for the 21st Century and suggesting that under the program, "racial preferences will be used only on a showing of a substantial disparity in contracting in particular areas and then only as a last resort upon a determination that race-neutral alternatives are inadequate").

⁴²⁷ 49 C.F.R. § 26.41(b) (2000).

⁴²⁸ *Adarand VII*, 228 F.3d at 1157-59. Because *Adarand* sought protective relief, the court decided it was necessary to consider the intervening statutory and regulatory changes. *Id.* at 1158. However, in anticipation of potential future statutory and regulatory changes, the court also decided to address the constitutionality of the previous scheme as well. *Id.* at 1159.

⁴²⁹ *Id.* at 1187 ("[A]fter examining the current [preference program], we conclude that the 1996 defects have been remedied, and the relevant programs now meet the requirements of narrow tailoring.").

⁴³⁰ *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 102 (2001). Originally, the Court

B. *Through the Lens of Competition: Adarand v. Slater*

The Tenth Circuit's decision is important because the court explicitly recognized the competitive dynamics of the market at issue in the case, and used the vocabulary of competitive analysis in its decision. At each step, this context informed the court's analysis, making an enormous difference in both the way it framed its inquiry and in the way it resolved the issues raised. The Tenth Circuit opinion subjected the post-*Adarand* DBE program to strict scrutiny review.⁴³¹ As usual, the first question was whether there was a compelling governmental interest that might justify the use of race-conscious measures.⁴³²

Unlike the earlier cases we have analyzed, the Tenth Circuit began its analysis by performing an in-depth evaluation of the "*nature and the extent of the evidence*" that Congress had before it with respect to discrimination in the construction industry.⁴³³ The Tenth Circuit rejected the notion that mere statements by members of Congress alleging discrimination in the construction industry could support the finding of a compelling government interest.⁴³⁴ Instead, the court asked whether there was a "strong basis in evidence to support the legislature's conclusion."⁴³⁵

Relying on *Croson's* "passive participant" language, the court probed Congress's understanding of discrimination in the construction industry.⁴³⁶ Here, the Tenth Circuit perceived two types of "discriminatory barriers to minority subcontracting enterprises."⁴³⁷ The first type of discriminatory barrier prevented minority subcontracting companies from forming in the first instance; these were essentially "creation barriers."⁴³⁸ The second type of discriminatory barrier was the "competition barriers" that impeded "fair competition between minority and non-minority subcontracting enterprises."⁴³⁹ Both of these types of barriers to minority participation were supported by disparity studies demonstrating that minority subcontractors have been under-

granted certiorari. 532 U.S. 967 (2001). Subsequently, however, *Adarand* indicated that it did not wish to challenge the Tenth Circuit's determination on the DOT's state and local procurement program and instead wished only to challenge the DOT's direct procurement program. 534 U.S. at 103. Since the Tenth Circuit never addressed the direct procurement program, the Supreme Court dismissed the writ of certiorari as improvidently granted. *Id.* at 111.

⁴³¹ See *Adarand VII*, 228 F.3d at 1164-87 (applying the compelling interest and narrow tailoring tests).

⁴³² See *id.* at 1164.

⁴³³ See *id.* at 1167 (emphasis in original).

⁴³⁴ *Id.*

⁴³⁵ *Id.*

⁴³⁶ *Id.*

⁴³⁷ *Id.* at 1167-68.

⁴³⁸ *Id.* at 1168.

⁴³⁹ *Id.*

utilized⁴⁴⁰ and evidence suggesting that there was a sharp reduction in minority participation in federal contracting opportunities after the withdrawal of affirmative action programs.⁴⁴¹

With respect to creation barriers, the court cited several congressional studies which concluded that “discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide.”⁴⁴² Discriminatory conduct by these actors included the presence of “old boy” networks in the family-dominated construction industry that refused to deal with minority firms, white dominated subcontractors’ unions that excluded minority firms, and race-based denial of access to capital and lending opportunities by white dominated financial institutions.⁴⁴³ Taken together, these various barriers to entry prevented the creation of minority subcontracting enterprises that would ultimately compete with white dominated firms.⁴⁴⁴

On the competition barrier side, the court also pointed to myriad Congressional studies that detailed the manner in which existing minority firms were hampered in their ability to compete with established players in the industry. For instance, the court noted that the government had presented “powerful evidence” which suggested that:

[C]ontracting remains a closed network, with prime contractors maintaining long-standing relationships with subcontractors with whom they prefer to work. Because minority owned firms are new entrants to most markets, the existence and proliferation of these relationships locks

⁴⁴⁰ *Id.* at 1172-73.

⁴⁴¹ *Id.* at 1174.

⁴⁴² *Id.* at 1168.

⁴⁴³ *Id.* at 1168-70.

⁴⁴⁴ Indeed, this was precisely the point made by Justice Stevens’s dissenting opinion in *Adarand III*. Justice Stevens explained the Congressional rationale which animated the presumptions of social and economic disadvantage at issue:

I think it is particularly significant that the current program targets the negotiation of subcontracts between private firms In this case, in contrast, the program seeks to overcome barriers of prejudice between private parties—specifically, between general contractors and subcontractors. The [statutes at issue] embody Congress’ recognition that such barriers may actually handicap minority firms seeking business as subcontractors from established leaders in the industry that have a history of doing business with their golfing partners. Indeed, minority subcontractors may face more obstacles than direct, intentional racial prejudice: They may face particular barriers simply because they are more likely to be new in the business and less likely to know others in the business. Given such difficulties, Congress could reasonably find that a minority subcontractor is less likely to receive favors from the entrenched businesspersons who award subcontracts only to people with whom—or with whose friends—they have an existing relationship. This program, then, if in part a remedy for past discrimination, is most importantly a forward-looking response to practical problems faced by minority subcontractors.

515 U.S. 200, 261-62 (1995).

them out of subcontracting opportunities. As a result, minority-owned firms are seldom or never invited to bid for subcontracts on projects that do not contain affirmative action requirements.⁴⁴⁵

Based upon the court's review of the evidence compiled by Congress, it concluded that minority firms had been systematically excluded from the ability to bid on construction projects, and that that systematic exclusion was a result of more than just "outright racism."⁴⁴⁶

More importantly for our purposes, the court acknowledged that such exclusion resulted from "insularity" and "informal, racially exclusionary business networks."⁴⁴⁷ In this manner, minority firms were the quintessential outsiders; they were on the outside of the inner workings of the established construction industry which functioned to support, sustain and champion insiders just as much as it discriminated against and excluded outsiders.⁴⁴⁸ Disparity studies and the impact on minority firms after affirmative action programs were removed also supported this conclusion.⁴⁴⁹ Consequently, the court found that the government's post-*Adarand* DBE program which included a race-conscious remedy was justified by a compelling governmental interest.⁴⁵⁰ Finally, the Tenth Circuit also found that the DBE program was narrowly tailored, particularly because the new program emphasized "the continuing need to employ nonrace-conscious methods even as the need for race-conscious remedies is recognized" and because there were appropriate limitations on its duration.⁴⁵¹

The Tenth Circuit's willingness to recognize the existence and ramifications of competition was a solid first step toward a more nuanced and more accurate understanding of the intergroup conflict that is played out in affirmative action cases. By analyzing the anticompetitive behaviors engaged in by white firms, the court was able to recognize the structural problems created for black competitors. As courts begin to engage in this type of inquiry, a deeper understanding of competition will inform affirmative action cases. This shift would go a long way toward structuring "rules of the game" that are truly fair for all participants, regardless of race.

CONCLUSION

This Article explored the basic ideas of competition that underlie much of American society. Social science theory informs how blacks and whites

⁴⁴⁵ *Adarand VII*, 228 F.3d at 1170 (citing Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,042, 26,058 & nn.98-99 (1996) (Appendix: The Compelling Interest for Affirmative Action in Federal Procurement)).

⁴⁴⁶ *Id.* at 1171.

⁴⁴⁷ *Id.*

⁴⁴⁸ *See id.*

⁴⁴⁹ *Id.* at 1172-75.

⁴⁵⁰ *Id.* at 1176.

⁴⁵¹ *Id.* at 1179-80.

engage in intergroup rivalry based on race. It then explores the process by which that intergroup rivalry is acted out, particularly the anti-competitive conduct in housing, education, and appointment. By combining these two strands of thought, we see that whites, as a group, can act in ways analogous to firms in a market, seeking to develop sustainable competitive advantage. The Article then applied this thesis to affirmative action cases in employment, education, and housing. In each area, it highlighted cases in which the courts failed to recognize competitive dynamics, and failed to engage in a meaningful compelling governmental interest analysis, resulting in erroneous conclusions.

The Article then highlighted the Tenth Circuit's decision in *Adarand VII* as an example of a court properly recognizing competitive dynamics, resulting in a fair outcome. The Tenth Circuit's decision in *Adarand VII* is important because the court engaged in a meaningful compelling governmental interest analysis. In so doing, the court took a hard look at the competitive dynamics underlying the bidding for governmental contracts in the construction industry. By analyzing the process by which minority contractors have been systematically "locked out" of meaningful competition for bidding opportunities, the court was able to develop a nuanced understanding of the compelling governmental interest in the case. A nuanced and carefully calibrated narrow tailoring analysis followed from that conclusion.

As more cases involving intergroup rivalry arise, courts need to understand and consider the dynamics of competition and how it plays out in "markets" such as education, employment, and housing. By adhering to outmoded, cramped approaches to notions of discrimination that focus solely on animus or racial "preferences," the courts are largely missing the point. Competitive dynamics underlie many aspects of black-white intergroup relations. By analyzing these dynamics, the courts will gain a powerful tool with which to create richer jurisprudence in this area.