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DECODING *RICHMOND*: AFFIRMATIVE ACTION AND THE ELUSIVE MEANING OF CONSTITUTIONAL EQUALITY

Michel Rosenfeld*

INTRODUCTION

The Supreme Court's inconclusiveness in setting the constitutional boundaries of affirmative action in the decade following its decision in *Regents of the University of California v. Bakke*¹ has placed a severe strain on its equal protection jurisprudence. Not only have the Justices been bitterly divided on whether particular forms of affirmative action are compatible with constitutional principles of equality,² they have also been unable to agree upon which constitutional test is appropriate for assessing the legitimacy of preferential treatment plans.³ Although both proponents and opponents of the constitutionality of affirmative action profess to be committed to the ideal of equality,⁴ no

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1. 438 U.S. 265 (1978).

2. In none of the affirmative action cases in which the Court considered the constitutional question has a majority joined together in a single opinion. See, e.g., *United States v. Paradise*, 480 U.S. 149 (1987) (in a five-to-four decision, the Court upheld the constitutionality of a racial quota in state trooper promotions, but failed to issue a majority opinion); *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986) (in another five-to-four decision, the Court upheld the constitutionality of a 29.23% minority membership goal for a union guilty of egregious discrimination, but issued only a plurality opinion on the constitutional issue); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (in a five-to-four decision, the Court held racially preferential layoffs of public school teachers to be unconstitutional, but again without a majority opinion); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (by a six-to-three vote, the Court upheld the constitutionality of a congressionally mandated set-aside for minority business enterprises in federally funded public work projects, but failed to agree upon a majority opinion); *Bakke*, 438 U.S. 265 (four members of the Court, led by Justice Brennan, found the use of racial quotas in medical school admissions constitutional, one Justice found it unconstitutional, and the remaining four Justices found it invalid on statutory grounds).

3. Compare Justice Powell's opinion in *Bakke*, 438 U.S. at 299, 309-10 (applying the strict scrutiny test) with Justice Brennan's opinion in the same case, 438 U.S. at 359-62 (applying the intermediate scrutiny test).

4. Compare, for example, Justice Blackmun's statement in support of the affirmative action program in *Bakke*, 438 U.S. at 407, to the effect that "in order to treat certain persons equally, we must treat them differently," with Justice Stewart's statement in opposition to the affirmative action program involved in *Fullilove*, 448 U.S. at 526, that "[n]othing in [the] language [of the fourteenth amendment] singles out some 'persons' for more 'equal' treatment than others." Also, compare Reynolds, *An Equal Opportunity Scorecard*, 21 GA. L. REV. 1007 (1987) (equality re-

compromise on the proper method to achieve that ideal looms on the horizon.

The divisiveness of the issue is unsurprising, insofar as affirmative action throws into question widely accepted notions of equality, such as the idea that each person is entitled to equal treatment by the state.⁵ More generally, affirmative action has been linked, in often complex and problematic ways, with very different conceptions of equality. Some have associated it with equality of result;⁶ others, with equality of opportunity.⁷ Among the latter, moreover, there is disagreement as to whether affirmative action promotes or undermines equality of opportunity.⁸ Such questions are further complicated because the purposes to be served by affirmative action plans can differ widely, ranging from the narrowly compensatory to the broadly distributive.⁹ Finally, at an even higher level of abstraction, it can be fiercely dis-

quires repudiation of affirmative action) with Hooks, *Affirmative Action: A Needed Remedy*, 21 GA. L. REV. 1043 (1987) (the achievement of equality requires the use of affirmative action).

5. As one of the framers of the fourteenth amendment stated:

[T]he law which operates upon one man shall operate *equally* upon all. Whatever law punishes a white man for a crime, shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford "equal" protection to the black man.

CONG. GLOBE, 39th Cong., 1st. Sess. 2459 (1866) (statement of Rep. Stevens). In the same vein, Justice Powell stressed in his opinion in *Bakke* that "[i]t is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others." 438 U.S. at 295.

6. See, e.g., N. GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* 33-77 (1975) (arguing that advocates of affirmative action seek "statistical parity" rather than equality of opportunity); Reynolds, *supra* note 4, at 1018 (affirmative action advocates would substitute a "forced equality of result" for the "fourteenth amendment's guarantee of equality of opportunity").

7. See, e.g., *Bakke*, 438 U.S. at 324 (Brennan, J., concurring in the judgment in part and dissenting in part) (The Supreme Court's recognition of the legitimacy of affirmative action "affirms the constitutional power of Federal and State Governments to act affirmatively to achieve equal opportunity for all."); Hooks, *supra* note 4, at 1058 (affirmative action advocates seek equality of opportunity, not equality of result).

8. Compare Justice Brennan's position, *Bakke*, 438 U.S. at 324-79 with Justice Rehnquist's position, *United Steelworkers v. Weber*, 443 U.S. 193, 219-55 (1979) (Rehnquist, J., dissenting) (arguing that Title VII's statutory purpose of promoting equality of opportunity forecloses the use of racial quotas).

9. The distinction between "compensatory" and "distributive" purposes is based on Aristotle's distinction between compensatory and distributive justice as two complementary aspects of justice. See ARISTOTLE, *NICOMACHEAN ETHICS*, bk. v (D. Ross trans. 1980). Distributive justice refers to the fair division and distribution of benefits and burdens among members of a society. See Rosenfeld, *Affirmative Action, Justice, and Equalities: A Philosophical and Constitutional Appraisal*, 46 OHIO ST. L.J. 845, 860 (1985). Moreover, "distribution" can be broadly used to denote both the process of distribution and the product of such distribution. See J. FEINBERG, *SOCIAL PHILOSOPHY* 107-08 (1973).

Compensatory justice, on the other hand, can be defined as "the voluntary or involuntary exchange of equivalents designed to restore the equilibrium between two agents who voluntarily or involuntarily have become engaged in some transaction." Rosenfeld, *supra*, at 860. Examples of compensatory justice include damages paid by tort-feasors to their victims, or by a party breaching a contract. See *id.* at 860 n.70.

puted whether affirmative action promotes or undermines equal worth and equal dignity and respect for all persons.¹⁰

Emerging from this jurisprudence of dim uncertainties and fragile pluralities, the Court's ability to assemble a majority in its recent decision in *City of Richmond v. J.A. Croson Co.*¹¹ therefore marks an important turning point. *Croson* declared unconstitutional a minority business enterprise ("MBE") set-aside program devised by the Richmond, Virginia, City Council.¹² The holding and tenor of the Court's opinion stand in sharp contrast with the Court's 1980 decision in *Fullilove v. Klutznick*,¹³ where virtually identical federally mandated set-asides were found to be constitutional. Although the two cases are technically distinguishable,¹⁴ and although it is certainly too early to assess the full impact of *Croson*, the clear change in direction signaled by the holding in *Croson* seems likely to strike a major blow against long-standing, concerted efforts to narrow the economic gap between black and white entrepreneurs.

In *Croson*, a majority on the Court for the first time has settled on a single standard — the strict scrutiny test — to determine the constitutionality of affirmative action based on race.¹⁵ Thus, the Court now appears willing to subject affirmative action programs designed to *benefit* blacks to the same equal protection standard applied to other, less beneficial racial classifications.¹⁶ Advocates of affirmative action can take heart that all nine Justices acknowledged the constitutionality of racially based preferences, but if *Croson* is noteworthy it is because of

10. Compare A. BICKEL, *THE MORALITY OF CONSENT* 133 (1975) ("a racial quota derogates the human dignity and individuality of all to whom it is applied") with R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 227-29 (1978) (affirmative action is consistent with individual right to equal respect and concern).

11. 109 S. Ct. 706 (1989).

12. 109 S. Ct. at 717-20.

13. 448 U.S. 448 (1980).

14. In *Fullilove*, the set-aside was mandated by Congress, which was acting, *inter alia*, pursuant to its special powers under § 5 of the fourteenth amendment. See *Fullilove*, 448 U.S. at 472. The opinions of both Justice O'Connor and Justice Scalia in *Croson* lay great emphasis on distinguishing *Fullilove* on the grounds that what is permissible for Congress under § 5 of the fourteenth amendment may be forbidden to state and municipal governments under § 1. See *Croson*, 109 S. Ct. at 719-20 (plurality opinion of O'Connor, J.); at 736-37 (Scalia, J., concurring in judgment). Justices Kennedy and Marshall disagreed with Justices O'Connor and Scalia on this point, however, rejecting the proposition that a law that violates equal protection when enacted by a state could become a guarantee of equal protection if enacted by Congress. See 109 S. Ct. at 734-35 (Kennedy, J., concurring in part and concurring in the judgment); at 754-57 (Marshall, J., dissenting).

15. 109 S. Ct. at 721-22.

16. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (under the strict scrutiny test, a legal classification must be "necessary" to achieve a "compelling" state purpose); *Korematsu v. United States*, 323 U.S. 214 (1944).

the high threshold for validity it establishes,¹⁷ a threshold that may prove difficult to meet.

Yet, what is truly remarkable about *Croson* is what lurks beneath the surface, beyond the apparent reconciliation between the constitutional jurisprudence on affirmative action and generally accepted principles of equal protection. Indeed, the seeming order emerging from *Croson's* embrace of the strict scrutiny test is not the product of any genuine resolution of the divisive issues posed by affirmative action. While on the surface, *Croson* announces a new order built upon the conceptual apparatus generated in the course of the preceding constitutional debate on affirmative action, underneath there remain the same turmoil and uncertainty that have previously thwarted the Court's efforts to overcome conflict and fragmentation.

Croson achieves its superficial order through a process of decontextualization. As we shall see, such decontextualization takes many forms, including lifting race relations out of their historical setting,¹⁸ treating process as though it were unrelated to any content,¹⁹ "disaggregating" evidence so as to produce the impression that tightly linked and mutually reinforcing facts actually stand apart,²⁰ and dealing with key conceptual constructs as though they were self-sustaining when actually they are dependent on particular theoretical assumptions and on the existence of certain specified sets of facts.²¹ In light of this decontextualization, the strict scrutiny test as applied in *Croson* appears as an abstract, detached, and purely formal procedure rather than as a substantially fair and practically oriented means to resolve conflicting claims to constitutional entitlement under the equal protection clause.²² Ironically, the inadequacy of the strict scrutiny test in affirmative action cases is dramatically illustrated by the fact that while a majority on the *Croson* Court agreed that strict scrutiny was the proper test to apply, no such majority could concur on the circumstances under which affirmative action would be constitutionally permissible under this test.²³

17. Consistent with the majority's adoption of the strict scrutiny test, an affirmative action program would be constitutional if it set a racial classification that was necessarily related to a compelling course of action instituted for the benefit of a racial minority. This standard sets a very high threshold for the validity of affirmative action plans, but is acceptable to all the current Justices on the Court.

18. See *infra* Part IV; see also Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. — (forthcoming Aug. 1989).

19. See *infra* Part III.

20. See *infra* Parts II and IV.

21. See *infra* Part IV.

22. See *infra* Part III.

23. See *id.*

This Article examines the process of decontextualization with an eye toward assessing *Croson*'s implications for the broader debate on the constitutional legitimacy of affirmative action. Since the nature, scope, and purpose of decontextualization can only be understood in terms of the particular context it suppresses, ignores, alters, or distorts, it is necessary to be cognizant of the nature of the actual context which *Croson* suppresses; only in this way is it possible to understand the meaning of the suppression and the purpose of the particular instance of decontextualization. This requires a reconstruction, or "re-contextualization," of the circumstances from which the *Croson* case arose.

This Article argues, based on the most salient forms of decontextualization found in *Croson* and on the reconstructions necessary to render that decontextualization sufficiently intelligible, that adoption of the strict scrutiny test is not warranted in affirmative action cases. Moreover, an examination of the aims that led the Court to use decontextualization in *Croson* reveals that a process-based approach, such as that provided by the strict scrutiny test, is an unsatisfactory means by which to circumscribe the constitutional boundaries of affirmative action. The inadequacy of the strict scrutiny test's process-based approach is particularly evident when contrasted with an approach that relies explicitly on substantive values.²⁴ This does not mean that it is

24. For an extended discussion of the difference between process-based theories and substantive theories of judicial review of equal protection claims, see M. ROSENFELD, *AFFIRMATIVE ACTION, JUSTICE, AND EQUAL PROTECTION: A PHILOSOPHICAL AND CONSTITUTIONAL REAPPRAISAL* (forthcoming 1990). Although there are several versions of process-based theory, the principal characteristic that all the versions share is the belief that it is possible for judges to render equal protection decisions without relying on their own substantive moral or political values. Some process-based theories regard the role of the judge as being purely formal. Thus, the antidiscrimination principle, which underlies the strict scrutiny test and which simply requires that there be a "fit" between legislative means and ends has been interpreted as being purely formal. See Fiss, *Groups and the Equal Protection Clause*, in *EQUALITY AND PREFERENTIAL TREATMENT* 84, 85, 89-91 (M. Cohen, T. Nagel & T. Scanlon eds. 1977); O'Fallon, *Adjudication and Contested Concepts: The Case of Equal Protection*, 54 N.Y.U. L. REV. 19, 51 (1979) (The antidiscrimination principle "proceeds from an assumption that the requirement of equality established by the equal protection clause is purely formal, insisting only that like cases be treated alike.") (footnote omitted); see also Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4 (1977) (There is "a widely shared assumption that the equal protection clause lacks substantive content."). Furthermore, the antidiscrimination principle supposedly promotes value neutrality, by limiting the judge's role to the apparently purely mechanical and quantitative task of matching means to ends. See Fiss, *supra*, at 97-98. Another kind of process-based theory focuses on the political process and limits judicial intervention to the identification and rectification of defects in the majoritarian democratic political process. This political process theory is derived from the Supreme Court's famous *Carolene Products* footnote, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938), and its most prominent exponent is John Ely. See J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). See *infra* Parts II and V for further discussion of this approach.

Substantive theories of judicial review, on the other hand, assert that judges cannot resolve constitutional issues — especially those arising from vague and open-ended constitutional provisions such as the equal protection clause — without directly relying on substantive values. See,

impossible to find a principled manner by which to assess the constitutional permissibility of affirmative action. What it does mean is that such a determination must be made in terms of the "constitutionalization" of *some* conception of substantive equality.²⁵ Perhaps the most important lesson to be drawn from *Croson* is this: that it is impossible to come to any principled conclusion regarding the constitutionality of affirmative action without (at least implicitly) subscribing to a particular conception of substantive equality.

The final objective of this Article is to indicate how the constitutional issues raised in *Croson*, when fully reintegrated into the actual context from which they emerged, can be coherently and systematically resolved by reference to particular principles of substantive equality. Of course, the actual outcome of such a resolution depends on the nature of whatever principle of substantive equality is deemed properly applicable. Selections among available principles must not only be made but also persuasively defended as constitutionally permissible. It is beyond the scope of this Article to attempt a full justification for the choice of any particular principle. Nevertheless, there are sound reasons for selecting the equality-of-opportunity principle to illustrate the thesis that the affirmative action issues raised in *Croson* can be resolved through adherence to principles of substantive equality. Indeed, while the Court has neither been explicit nor fully consistent on this point, at least in the context of race relations, it has interpreted the equal protection clause as constitutionalizing the principle of equality of opportunity.²⁶

This Article first briefly considers the conceptual and constitutional framework out of which the controversy in *Croson* emerges. Next, the Article turns to *Croson* itself, and focuses on the Court's adoption of the strict scrutiny test, on the disagreement among the

e.g., R. DWORKIN, *supra* note 10, at 147 ("Our constitutional system rests on a particular moral theory, namely, that men have moral rights against the state. The difficult clauses of the Bill of Rights, like the . . . equal protection clause[], must be understood as appealing to moral conceptions . . ."); Morris, *Interpretive and Noninterpretive Constitutional Theory*, 94 ETHICS 501, 509 (1984) ("[I]nsofar as the [C]onstitution contains fundamental ethical terms like . . . equality without expressly indicating how to interpret them, the [C]onstitution embodies some particular moral theories, namely, the most plausible ones, and the job of the judge is to identify and use them as bases for decision."). Moreover, several constitutional scholars have argued that the equal protection clause "constitutionalizes" particular moral values. *See, e.g.*, R. DWORKIN, *LAW'S EMPIRE* 381 (1986) [hereinafter *LAW'S EMPIRE*] ("equal concern"); Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 938 n.15 (1983) ("equality of respect principle"); Karst, *supra*, at 5 ("equal citizenship principle").

25. For a definition of substantive or prescriptive equality as contrasted with descriptive equality, see *infra* note 63 and text accompanying notes 63-66.

26. See Rosenfeld, *supra* note 9, at 883-87; Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 984 (1975).

Justices concerning the test's meaning and implications, and on the Court's use of decontextualization to manipulate the key conceptual and factual issues at stake. Finally, drawing upon the principle of equality of opportunity, the Article endeavors to demonstrate how the adoption of particular principles of substantive equality can lead to a comprehensive and coherent constitutional resolution of the affirmative action issues raised in *Croson*.

I. THE CONCEPTUAL AND CONSTITUTIONAL BACKGROUND

The Supreme Court handed down nine decisions on affirmative action in the decade preceding *Croson*.²⁷ Taken together, what is most remarkable about these decisions is their failure to establish authoritatively or clearly the constitutional boundaries of affirmative action.²⁸ Nevertheless, since the Court's 1978 decision in *Bakke*, two distinct positions have emerged. The first, advanced by Justice Powell in that case, interprets equal protection as requiring that the same protection be given to every person regardless of race.²⁹ The second is perhaps best captured by Justice Blackmun's statement in *Bakke* that "in order to treat some persons equally, we must treat them differently."³⁰ The first position promotes equal treatment, or "marginal equality."³¹ The second position stresses equal results, or "global equality,"³² even if that requires imposing or tolerating marginal inequalities. Adoption of the marginal equality position is obviously less likely to lead to acceptance of affirmative action (or to a broad endorsement of it). Beyond that, however, it is unclear from the cases whether a sound justification could be found for preferring either of these positions over the other.

A more detailed picture of these two positions emerges from the

27. These nine decisions, in chronological order, are *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Local No. 93, Intl. Assn. of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986); *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986); *United States v. Paradise*, 480 U.S. 149 (1987); and *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616 (1987).

28. See Choper, *Continued Uncertainty as to the Constitutionality of Remedial Racial Classifications: Identifying the Pieces of the Puzzle*, 72 IOWA L. REV. 255 (1987); cf. Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over But the Shouting*, 86 MICH. L. REV. 524 (1987).

29. *Bakke*, 438 U.S. at 269-320.

30. 438 U.S. at 407.

31. "Marginal equality is defined with respect to (often small) changes from the status quo, with the changes being equal in magnitude for all." D. RAE, D. YATES, J. HOCHSCHILD, J. MORONE & C. FESSLER, *EQUALITIES* 51 (1981) [hereinafter D. RAE].

32. "Global equality is defined with respect to holdings above zero, with their amounts or end states being equal." *Id.*

realization that each tends to go hand in hand with a different constitutional test and a different conception of justice. Justices who adhere to the marginal equality position generally link equal treatment to the strict scrutiny test and to acceptance of affirmative action as constitutional only when it serves narrowly compensatory goals.³³ Proponents of the global equality position, on the other hand, are willing to allow preferential treatment so long as it meets the less stringent intermediate scrutiny test and is consistent with legitimate objectives of distributive justice or with aims that are at least in part distributive.³⁴

Although some Justices, in the course of formulating their opinions in affirmative action cases, have cited with approval Justice John Marshall Harlan's famous admonition that "[o]ur Constitution is color blind,"³⁵ none has, in fact, strictly adhered to that maxim. Nor is such adhesion mandated even by the strict scrutiny test that has long been the accepted constitutional standard in cases involving racial classifications that disadvantage a racial minority. Indeed, confronted with racial classifications designed to benefit rather than disadvantage racial minorities, Justices committed to the marginal equality position have declared that affirmative action satisfies the strict scrutiny test, as long as it is narrowly compensatory — *i.e.*, if it is provided by an actual wrongdoer to redress the harm inflicted upon actual victims.³⁶ In short, the marginal equality position requires that the state afford all persons equal treatment regardless of race, except that temporarily unequal treatment on the basis of race is permissible if it is necessary to enable the state to compensate the actual victims of racially discriminatory laws, policies, or conduct.

It seems intuitively correct that the narrowly compensatory use of affirmative action approved by the proponents of the marginal equality position serves a "compelling" state interest. It is, however, much more difficult to understand why the use of affirmative action for distributive or somewhat less rigidly compensatory purposes is not equally "compelling." Indeed, why should justice in the distribution

33. A good example is Justice Powell's opinion in *Bakke*, 438 U.S. at 269-320. In response to the Davis Medical School's argument that its program served the purpose of "countering the effects of societal discrimination," 438 U.S. at 306, Powell stated that the Court has "never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional . . . violations." 438 U.S. at 307.

34. Representative of this approach is Justice Brennan's opinion in *Bakke*. See 438 U.S. at 355-62. Also for an endorsement of a purely distributive use of affirmative action, see Justice Stevens' dissent in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 313-20 (1986).

35. See *e.g.*, *Fullilove v. Klutznick*, 448 U.S. 448, 522 (1980) (Stewart, J., dissenting) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

36. See *Bakke*, 438 U.S. at 353; Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 81 (1986).

of state-owned or state-controlled goods or services — such as public education, public employment, and public works contracts — be deemed a less compelling state interest than the achievement of compensatory justice? And why should courts require that affirmative action remedies remain close to the paradigm of compensation,³⁷ but not allow compensation from a particularly reprehensible wrongdoer or for a severely harmed victim if the remedy otherwise significantly strays from the paradigm (e.g., if it compensates nonvictims or is undertaken by nonwrongdoers)?

In fact, while the Supreme Court's affirmative action decisions before *Crosson* do not provide any satisfactory answers to these questions, some of the cases do approve preferential treatment plans that would be clearly invalid under the marginal equality position. Thus, in some decisions, the Court has approved plans imposed on actual wrongdoers, but which benefit persons who were not actual victims.³⁸ The Court has also acknowledged the legitimacy of plans undertaken by nonwrongdoers for the benefit of actual victims.³⁹ And, in the only case concerning the permissibility of an affirmative action plan designed to benefit women, the Court endorsed a plan that arguably involved a nonwrongdoer voluntarily dispensing preferential treatment to a class including nonvictims.⁴⁰ Furthermore, some Justices have bestowed constitutional legitimacy on plans that appear to be in part compensatory and in part distributive,⁴¹ and at least one Justice has gone so far as to defend the constitutionality of purely forward-looking plans with an exclusively distributive focus.⁴²

Unlike the marginal equality position, the global equality position may seem capable of justifying the above-mentioned decisions and

37. The paradigm of compensation can be defined as the case where the wrongdoer's unjust enrichment is equivalent to the victim's loss, and where compensation puts both wrongdoer and victim in the position in which they would have been, absent the wrong. As an example, suppose a thief steals \$10 from a victim and earns \$1 in interest while holding on to the money — the same amount which the victim would have earned as interest had she not been deprived of her \$10. In that case a payment of \$11 from the thief to the victim would fit within the paradigm of compensation. For a more extended discussion of the paradigm case and its relation to other cases of compensation, see M. ROSENFELD, *supra* note 24, at ch. I.

38. See *Local 93, Intl. Assn. of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986); *United States v. Paradise*, 480 U.S. 149 (1987).

39. See *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

40. *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616 (1987). *Johnson* arose in the context of Title VII of the Civil Rights Act of 1964 rather than under the equal protection clause. Nevertheless, *Johnson* sheds important light on the constitutionality of gender-based affirmative action as there is substantial overlap between the relevant statutory and constitutional criteria in the case of public employers.

41. See, e.g., Justice Brennan's plurality opinion in *United States v. Paradise*, 480 U.S. at 153-86; see also M. ROSENFELD, *supra* note 24, ch. VII.

42. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 313-20 (1986) (Stevens, J., dissenting).

opinions. The global equality position relies on the intermediate scrutiny test used most notably by the Court in gender discrimination cases.⁴³ Because it tolerates a looser "fit" than the strict scrutiny test,⁴⁴ the intermediate scrutiny test appears, at first, to confer constitutional legitimacy on a range of affirmative action plans that would be either questionable or downright impermissible under strict scrutiny.

Further consideration, however, reveals that both the intermediate and the strict scrutiny tests suffer from the same shortcoming. Indeed, the intermediate scrutiny test does not provide the means to distinguish between "important" and "nonimportant" state interests any more than the strict scrutiny test is genuinely capable of distinguishing between "compelling" and "noncompelling" state interests. Whereas the global equality position customarily links the intermediate scrutiny test with the constitutional legitimacy of unequal treatment in the context of race,⁴⁵ the test does not necessarily require that result. Actually, since as early as *Bakke*, Justices who are proponents of the global equality position have acknowledged that affirmative action cases do not fit neatly into the "prior analytic framework."⁴⁶ Although these Justices have paid lip service to the intermediate scrutiny test, what really distinguishes their approach from that of Justices who insist on marginal equality is that they focus on the classes affected by preferential treatment rather than on the nature of the classifications involved.⁴⁷

Exclusive focus on a classification in the abstract without regard to its disparate impact on the different classes which it affects is likely to inhibit unnecessarily the constitutional legitimation of unequal treatment. For example, a particular racial classification would be equally invalid (or valid) regardless of whether it disadvantaged (or advantaged) blacks or whites. On the other hand, if the focus shifts from the nature of the classification to the benefits or detriments which it may bring to the particular classes affected, then unequal treatment may be justified and constitutionally permissible. Thus, if for instance, preferential admissions for whites at a state university would have a devastating effect on an already underrepresented class of black appli-

43. See, e.g., *Craig v. Boren*, 429 U.S. 190, 199 (1976) (under the intermediate scrutiny test, the challenged state conduct or policy must be "substantially related" to the achievement of an "important" state purpose).

44. Indeed, to satisfy the "substantially related" criterion, see *supra* note 43, the challenged state action need not be "necessary" to the achievement of the identified state purpose.

45. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 359-79 (1978) (Brennan, J., concurring in judgment in part and dissenting in part).

46. 438 U.S. at 358 (opinion of Brennan, J.).

47. See Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 73 GEO. L.J. 89, 107 (1984).

cants, but preferential admissions for blacks would have a comparatively minor adverse effect on the class of white applicants, then affirmative action favoring blacks applicants could be constitutionally permissible even if affirmative action favoring whites clearly were not.

Focusing on the identity of the classes affected rather than on the nature of the classifications themselves may seem at first a more promising analytical framework by which to bring order to the Court's meandering affirmative action jurisprudence than either strict or intermediate scrutiny. Moreover, because the focus on classes affords greater justification to unequal treatment, it is more compatible with the pursuit of global equality. Viewed more closely, however, the focus on classes appears to be similarly insufficient. For one thing, the results in three of the nine affirmative action cases decided by the Court before *Croson* seem inconsistent with the global equality position.⁴⁸ For another, the disparate impact that a particular classification may have on the various classes which it affects may seem to justify unequal treatment. But disparate impact does not automatically justify any particular instance of unequal treatment. Would, for example, an absolute preference for blacks in public education and public employment be justifiable so long as whites remain the dominant political and economic group? Or would a limited preference for purposes that are at least in part compensatory be constitutional? Whatever the correct answers to these questions may be, they cannot be directly or exclusively derived from the fact that there are social, political, and economic disparities between the races. Accordingly, even if focusing on classes leads to the acceptance of unequal treatment as legitimate, it fails to supply sufficient means to reconcile or assess properly the various Supreme Court affirmative action decisions.

Both the antidiscrimination principle⁴⁹ — which underlies the strict and intermediate scrutiny tests — and the focus on the status of the class disadvantaged by a given legal classification are supposed to provide a process-based means of judicially determining equal protection claims.⁵⁰ Because they are believed to interfere less with the will of a state's democratic majority, process-based judicial approaches are

48. These cases are *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). In all three of these cases, the proponents of the contested affirmative action plan involved unsuccessfully sought to justify the unequal treatment it entailed on global equality grounds.

49. See *supra* note 24.

50. Concentration on the nature of the disadvantaged class can be fit within a process-based approach, provided that one understands "process" to mean the democratic political process as conceived in *Carolene*-based theories. See *supra* note 24, and *infra* text accompanying notes 53-

deemed preferable to those that rely on the implementation of substantive values.⁵¹ By concentrating on the fit between legislative means and ends, the tests under the antidiscrimination principle give the impression that judges need only perform a formal, mechanistic role, without having to pass judgment on the substantive values underlying the legislative choice.⁵² This impression is misleading, however, for as we have seen, neither the determination of the applicable level of scrutiny nor the sufficiency of a particular fit between means and ends can be mechanistically or purely procedurally derived. Indeed, to decide, for example, whether a state legislative end is "important" or "compelling," one must resort to substantive normative values by which one can establish a ranking of diverse state objectives.

Focus on the classes affected by a legal classification can also be linked to a process-based means of adjudicating equal protection claims. In its famous footnote four in *Carolene Products*, the Court declared that heightened scrutiny may be appropriate when state action is shaped by "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."⁵³ In the broadest terms, as interpreted under the process-based theory derived from *Carolene Products*, the equal protection clause entitles each person to be free from purely arbitrary state action and to participate fairly in the political process.⁵⁴ Provided these conditions are met, the will of the majority, as expressed through the legislative enactments of the state, should prevail, and judicial interference would be unwarranted. One would expect, if the majoritarian process operates fairly and efficiently, that over time most individuals would find themselves sometimes in the majority and sometimes in the minority.⁵⁵ Members of discrete and insular groups, however, are always likely to find them-

54. Accordingly, if the disadvantaged class is "insular and discrete" the classification ought to be impermissible; otherwise, it should be legitimate.

51. For a comprehensive elaboration of this position, see J. ELY, *supra* note 24. *But see* Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981), and Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980) (questioning the possibility of separating matters of process from matters of substance).

52. Fiss, *supra* note 24, at 97-98.

53. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). For a systematic elaboration of this process-based jurisprudence, see J. ELY, *supra* note 24.

54. The protection against arbitrary state action is constitutionalized through the minimum-scrutiny prong of the antidiscrimination principle applied in equal protection cases involving economic classifications. According to the minimum scrutiny test, a legal classification is constitutionally permissible if "rationally related" to a "legitimate" state purpose. *See, e.g.*, *Railways Express Agency v. New York*, 336 U.S. 106 (1949).

55. *See* Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 733 n.44 (1974).

selves as losers in the majoritarian process. This is not because they embrace causes that are intrinsically unappealing to the majority of their fellow citizens. Rather it is because, acting out of prejudice against them, the majority discourages their participation in the process and uses the majoritarian process to ensure that minorities remain isolated and disempowered.⁵⁶ Under these circumstances, judicial intervention is justified, not to impose substantive values, but to restore the integrity of the majoritarian process.

If this theory were sound and if constitutional equality could be reduced to the right of unimpeded participation in the majoritarian process, concentration on whether the class disadvantaged by a particular state action constitutes an isolated and disempowered minority would provide a principled and coherent way to assess the constitutionality of affirmative action plans. Unfortunately, it becomes clear upon further consideration that the approach based on the integrity of the majoritarian process presupposes the acceptance of certain substantive values, and that constitutional equality cannot be persuasively confined merely to a right of unimpeded participation in the majoritarian process.⁵⁷

Even concepts such as the "integrity of the majoritarian process" or "discrete and insular minority" cannot be given a sufficiently determinate meaning without reference to substantive values, and prove to be as malleable as the concepts of "compelling" and "important" state interests.⁵⁸ For example, what role, if any, should the fact of substantial disparities in education, access to information or power, or cultural background play in determining whether a majoritarian process operates with integrity? There can be no coherent answer to this question unless the notion of a properly functioning majoritarian process is situated in a concrete setting shaped by substantive values and objectives.

56. See J. ELY, *supra* note 24, at 152-70 (relationship between majority, through its elected representatives, and discrete and insular minorities is a "we-they" relationship based on prejudice and stereotype; minority legislators may be prone to embrace the official majority position instead of fighting to discredit it, and because of this, "out" groups are likely to be deprived of fair representation).

57. See Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 716 n.4 (1985) (*Carolene Products* concerned with substantive political outcomes rather than process alone).

Carolene's focus on pluralist bargaining has subtly encouraged the belief that pluralism is the alpha and the omega of the American constitutional system, and that any effort by the courts to challenge the substantive values generated by legislative compromise is necessarily antidemocratic.

We must repudiate this reduction of the American Constitution to a simple system of pluralist bargaining

Id. at 743.

58. See *id.* at 740 (courts can only uproot prejudice against members of a group on the basis of substantive moral values).

Constitutional equality may well require untrammelled participation in the majoritarian process, but it cannot be limited to that. Even if constitutional equality were confined to a right of equal protection against purely arbitrary or irrational state action, it would have to encompass more than a guarantee of the right to participate in the majoritarian process. Indeed, it is not inconceivable that a properly functioning majoritarian process could lead to state action that would arbitrarily disadvantage a class of individuals who do not belong to any discrete or insular group. And, since the distinction between purely arbitrary disadvantages and those that are rationally tolerable requires more than an exclusively process-based inquiry, constitutional equality must place some reliance on substantive values.⁵⁹

In the last analysis, while application of the judicial tests associated with the antidiscrimination principle and with *Carolene Products* requires recourse to substantive values, implementation of these tests in the context of racial classifications that tend to impose disproportionate burdens on blacks may still appear to be essentially procedural in nature. This is in part because there is such a widespread consensus concerning the particular substantive values involved — namely, that state-sanctioned racism and unequal treatment of blacks that relegates them to the position of inferiors or outcasts is utterly unjust. There is thus ordinarily no need for explicit elaboration or justification of these values in the course of judicial determinations of the constitutional validity of a given state action.⁶⁰ But the fact that no dispute arises concerning the substantive values implicated does not mean that judicial decisionmaking can avoid reliance on such values. The “procedural” flavor these cases have is purely an illusion — a function of simply forgetting the unspoken consensus on substantive values that remain in the background. Under the *Carolene Products* approach, it simply seems obvious, in light of the long history of racism in the United States, that blacks are a “discrete and insular” group that has been prevented from full and fair participation in the majoritarian pro-

59. In other words, the minimum scrutiny test under the antidiscrimination principle, *see supra* note 54 and accompanying text, requires the courts to draw a distinction between “rational” and “arbitrary” state means — a distinction that is hardly more self-evident or quantifiable than the distinction between “substantially related” and “less than substantially related” means made pursuant to the intermediate scrutiny test.

60. This is by no means to suggest that racism in America has disappeared. Rather, the point is that the legal discourse concerning race-related issues among judges, legal practitioners, and legal scholars is premised on the proposition that treating blacks as inferiors is morally, legally, and constitutionally reprehensible. Thus, even as adamant a foe of race-based affirmative action as William Bradford Reynolds, the Assistant Attorney General in charge of the Civil Rights Division of the Justice Department during the Reagan administration, has declared his commitment to the principle of equality among the races. *See Reynolds, supra* note 4, at 1041.

cess, and that the continuing denial of that participation is substantively unjust.

In the context of affirmative action, where racial classifications are drawn for the *benefit* of blacks, on the other hand, there is nothing approaching an underlying consensus relating to applicable substantive values.⁶¹ This is made plain by the clash between the two judicial positions formulated by the Justices who addressed the constitutional issue in *Bakke*. Moreover, as we have seen, the strict scrutiny test itself does not provide the means by which to resolve this clash. Therefore, in affirmative action cases, the strict scrutiny test cannot give judges a purely process-based means of deciding equal protection claims. Furthermore, the *Carolene Products* approach cannot yield determinate results in affirmative action cases, as there is even disagreement concerning the proper definition of the group disadvantaged by state-sanctioned racial preferences.⁶² Ultimately, in all cases, the outcome of the strict scrutiny test or of the *Carolene Products* approach is dependent on a judicial choice among substantive values. In affirmative action cases, however, this choice must be among contested values and therefore seems bound to appear much more intrusive than in other cases where it merely reflects a broad-based consensus.

Notwithstanding the Supreme Court's emphasis on what appear, in the abstract, to be largely process-based concerns, one can find in its affirmative action decisions preceding *Croson* significant indications of judicial commitment to particular substantive values. These values have served to inform the nature and scope of constitutional equality as defined by the Court. Indeed, beneath the Court's preoccupation with matters of process, there lurk definite traces of visions of substantive equality.⁶³

The equal protection clause is too general and open-ended to com-

61. See *supra* notes 4 & 10.

62. Compare Ely, *supra* note 55 (the white majority is the disadvantaged group) with *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 295 (1978) (disadvantaged groups are various white ethnic groups, each of which constitutes a political minority).

63. Substantive or *prescriptive* equality must be distinguished from *descriptive* equality. See, e.g., Westen, *The Concept of Equal Opportunity*, 95 ETHICS 837, 842-43 (1985). Prescriptive equality refers to who *ought to be* equal to whom — e.g., one group to another or every individual to every other individual, regardless of race or sex — and in what respect they *ought to be* equal to one another — e.g., according to need, merit, or rank. Descriptive equality, on the other hand, focuses on who *is* equal to whom and on what *is* equal to what, according to some recognized standard of measurement. See *id.* In addition, different standards of prescriptive equality may require different configurations of descriptive equalities and inequalities. For example, if justice requires that each individual be treated equally according to merit, then individuals of equal merit should be treated equally and those of unequal merit unequally. And accordingly, (descriptive) equal treatment of persons of (descriptively) unequal merit would violate the applicable canons of prescriptive equality.

pel any particular conception of substantive equality.⁶⁴ Nor has the Supreme Court, in its interpretation of the equal protection clause, consistently embraced any particular conception of substantive equality. Nevertheless, in its affirmative action decisions, and in other decisions concerning race relations going back to *Brown v. Board of Education*,⁶⁵ the Court has read the equal protection clause as constitutionalizing the principle of equal opportunity.⁶⁶ At a higher level of abstraction, these same equal protection decisions can be viewed as constitutionalizing the principle of equal worth, equal dignity, and equal respect for all individual members of society.⁶⁷

When a conception of substantive equality specifically relies on the principle of equal opportunity, it becomes possible to identify the proper roles for distributive and compensatory justice.⁶⁸ Distributive justice would be satisfied if all distributions of scarce goods were made in accordance with the principle of equality of opportunity. Furthermore, compensatory justice would be realized if the harms resulting from deprivations of equal opportunity to compete for scarce goods were fully compensated. But even if these specifications were strictly followed by the Court, its conception of substantive equality developed prior to *Croson* would still be too vague to permit a cogent determination of the proper constitutional boundaries of affirmative action. And the reason for this is that unless the principle of equality of opportunity is sufficiently fleshed out, it is unclear whether or not it can justify affirmative action.⁶⁹

In the last analysis, the two positions that emerge out of *Bakke* can neither be satisfactorily reconciled, nor can a principled choice be made between them, because the Court's affirmative action decisions before *Croson* yield a conception of substantive equality that is not sufficiently specific. Even though there seems to be a convergence of opinion on the Court concerning what substantive equality requires at higher levels of abstraction, the clash between the marginal equality

64. See *LAW'S EMPIRE*, *supra* note 24, at 382 (equal protection constitutionalizes the concept of equality, but not any particular conception of it).

65. 347 U.S. 483 (1954).

66. See 347 U.S. at 493 ("In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."); Rosenfeld, *supra* note 9, at 886-87.

67. See *supra* note 24.

68. For a more extended discussion of the relation between compensatory and distributive justice in the context of adherence to the principle of equality of opportunity, see *infra* Part VI. For a general discussion of the relation between compensatory and distributive justice, see M. ROSENFELD, *supra* note 24, ch. I; Rosenfeld, *supra* note 9, at 860-65.

69. See *supra* note 8.

and global equality positions suggests conflicting conceptions of what substantive equality requires in concrete situations. Hence, on the eve of its decision in *Croson*, the Court had left us with certain broad outlines of a conception of substantive equality that satisfies the constitutional requirements imposed by the equal protection clause. Many details still need to be filled in, however, before anyone can reasonably claim that the constitutional boundaries of affirmative action have been clearly set.

II. *CROSON* AS FACT AND SYMBOL

The most striking features about the factual setting of the controversy in *Croson* are the uncanny mixture of the familiar and the unexpected, the clashing juxtaposition of traditional and emerging symbols, and the retelling of a familiar tale with disruptive additions that are difficult to integrate or comprehend. At the core of the *Croson* controversy is the minority set-aside provision of the Richmond municipal public works contract ordinance. In Justice Marshall's words, that provision is "indistinguishable in all meaningful respects"⁷⁰ from the congressionally mandated set-aside upheld by the Supreme Court in *Fullilove*.⁷¹ Unlike the population of the United States or the membership of Congress, which are comprised of a large majority of whites, however, Richmond's population is fifty percent black, and its City Council, which enacted the controverted set-aside provision, was composed at all relevant times of five black and four white members.⁷² The six minority groups identified by the Richmond set-aside provisions for preferences were exactly the same as the ones favored by the federal set-aside at issue in *Fullilove*: Blacks, the Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.⁷³ Ironically, however, as the Court was quick to point out, there is no evidence that Richmond ever had an Eskimo or Aleut citizen.⁷⁴ Therefore, by borrowing a judicially approved federal formula without apparent regard for relevant differences in context, the Richmond City Council opened itself up to the charge that its preferential set-asides could not be deemed legitimately remedial even in the broadest sense of the term.

70. 109 S. Ct. 706, 739 (1989) (Marshall, J., dissenting).

71. 448 U.S. 448 (1980). Leaving federalism issues aside, the only significant difference between the two plans was that in *Croson* there was a 30% set-aside, while in *Fullilove* the set-aside was only 10%. See *Croson*, 109 S. Ct. at 713; *Fullilove*, 448 U.S. at 454. However, in *Fullilove* the relevant minority population represented between 15% and 18% of the total population, see 448 U.S. at 459, while in *Croson* it represented 50%, see 109 S. Ct. at 722.

72. 109 S. Ct. at 722.

73. 109 S. Ct. at 713.

74. 109 S. Ct. at 728.

As the "cradle of the Old Confederacy,"⁷⁵ Richmond stands as a symbol of the sad history of slavery, racial discrimination, and segregation that cast blacks as inferiors and systematically deprived them of the most basic rights and benefits enjoyed by whites. Moreover, as Justice Marshall recounts, Richmond unfortunately typifies through its "disgraceful recent history"⁷⁶ the massive official resistance against the extension of basic civil rights to blacks in the wake of the *Brown v. Board of Education* decision.⁷⁷ Well into the last decade, Richmond stood as a vivid epitome of the stubborn persistence of racial "apartheid"⁷⁸ in all too many municipalities throughout the United States. Through the official acts of its governing officials, Richmond, among other things, deliberately diluted the voting rights of its black residents, mounted stiff hurdles against school desegregation, and sanctioned pervasive housing discrimination.⁷⁹

Juxtaposed to this all-too-negative picture of Richmond, however, is a much more positive and hopeful one of more recent vintage. Not only have blacks now come to share political power with whites in Richmond, but members of both races have "joined hands" to deal constructively with controversial matters.⁸⁰ For example, since 1975, Richmond has outlawed discrimination by the city and by private parties in the award and performance of public contracts.⁸¹ Thus, the *Croson* controversy is embedded in a sequence of events marking the transition between two eras.

This is not to say that Richmond has achieved racial equality. The construction industry in particular had been particularly resistant to racial integration, with minorities virtually completely left out.⁸² This phenomenon, however, was not unique to Richmond. The construction industry had been notorious in its exclusion of blacks on both a statewide and a nationwide basis.⁸³ The problem in Richmond was therefore both similar to, and part of, a much broader national problem. Not surprisingly, the solution sought by Richmond was along the same lines as that adopted earlier by Congress.

While Richmond's 1975 outlawing of discrimination in public contracts removed formal barriers to participation by minorities, it did

75. 109 S. Ct. at 757 (Blackmun, J., dissenting).

76. 109 S. Ct. at 748 (Marshall, J., dissenting).

77. 347 U.S. 483 (1954).

78. *Croson*, 109 S. Ct. at 748 (Marshall, J., dissenting).

79. 109 S. Ct. at 748 (Marshall, J., dissenting).

80. 109 S. Ct. at 753 (Marshall, J., dissenting).

81. 109 S. Ct. at 751 (Marshall, J., dissenting).

82. 109 S. Ct. at 714.

83. 109 S. Ct. at 714.

not bring about racial integration in the city's construction industry.⁸⁴ In 1983, when Richmond enacted its ordinance mandating the preferential set-asides, the city's population was 50% black, but only 0.67% of its prime construction contracts had been awarded to MBEs in the five years preceding adoption of the ordinance.⁸⁵ Against this background, the city enacted an affirmative action plan ("the Plan") requiring contractors awarded city construction contracts to subcontract a minimum of 30% of the total dollar amount of each contract to MBEs.⁸⁶

The Plan was supposed to be "remedial" in nature and was enacted "for the purpose of promoting wider participation by minority business enterprises in the construction of public projects."⁸⁷ Adoption of the Plan came after a public hearing, at which a member of the City Council testified to widespread "race discrimination and exclusion on the basis of race"⁸⁸ in the construction industry. In addition, participants at the hearing introduced the statistics concerning the disparity between Richmond's black population and the number of city contracts awarded to MBEs, and noted the virtually complete lack of MBE membership in local construction trade associations.⁸⁹

There was bitter disagreement between the majority and the dissent in *Croson* over whether direct evidence of race discrimination by the city or by prime contractors relating to public construction contracts had been presented at the hearing preceding adoption of the plan. Justice O'Connor, speaking for the majority, stated that no direct evidence of discrimination against minority subcontractors had been presented at the hearing, and implied that the reason for the very low percentage of MBEs engaged in public construction projects was that MBEs were just not available.⁹⁰ Writing in dissent, Justice Marshall, on the other hand, found that the evidence introduced at the hearing provided a "strong," "firm," and "unquestionably legitimate" basis for the Richmond City Council's conclusion that "the effects of past discrimination warranted a remedial and prophylactic governmental response."⁹¹ Moreover, Justice Marshall was sharply critical of the majority's assessment. In his own words, "to suggest that the facts on which Richmond has relied do not provide a sound basis for

84. 109 S. Ct. at 726.

85. 109 S. Ct. at 714.

86. 109 S. Ct. at 712-13.

87. 109 S. Ct. at 713 (quoting Richmond, Va., City Code § 12-158(a)).

88. 109 S. Ct. at 714 (quoting statement of Councilperson Marsh).

89. 109 S. Ct. at 714.

90. See 109 S. Ct. at 714.

91. 109 S. Ct. at 746 (Marshall, J., dissenting).

its finding of past racial discrimination simply blinks credibility.”⁹²

That the Plan was genuinely intended to be remedial seems obvious from its limited duration (five years) and from the fact that it was not renewed upon its expiration in June 1988,⁹³ a full six months before the Supreme Court issued its decision in the case. It is thus ironic that this important affirmative action decision — which finally saw a majority on the Court agree upon a constitutional standard to be employed in the judicial assessment of race-based preferential treatment, and which was characterized by the dissenting Justices as “a deliberate and giant step backward in this Court’s affirmative action jurisprudence”⁹⁴ — should settle a dispute over a defunct plan.⁹⁵ Perhaps this fact, more than any other, is indicative of the essential acontextual approach that characterizes the *Croson* decision.

III. THE LOOSE CONSTRUCTION OF STRICT SCRUTINY

Superficially, *Croson*’s contribution to the constitutional jurisprudence of affirmative action seems to be simple and clear: for the first time a majority of Justices on the Court agreed that race-based preferential treatment can be justified under the equal protection clause only if it meets the strict scrutiny test. Upon more probing consideration, however, the picture that emerges is anything but clear. First, although six of the Justices found the Plan to be unconstitutional, only five agreed that the strict scrutiny test provided the correct judicial standard.⁹⁶ Of those five, moreover, only four — a mere plurality — agreed on what would satisfy strict scrutiny in the context of race-based affirmative action: that is, compensation to actual victims of past discrimination, even if not undertaken by the actual wrongdoer(s).⁹⁷ The fifth Justice in this group, Justice Scalia, had a more narrow conception of strict scrutiny and argued that it would only be satisfied when compensation is undertaken by actual wrongdoers.⁹⁸

The dissenting Justices rejected adoption of the strict scrutiny test

92. 109 S. Ct. at 746 (Marshall, J., dissenting).

93. 109 S. Ct. at 713.

94. 109 S. Ct. at 740 (Marshall, J., dissenting).

95. Although the Plan was defunct, the controversy, as the Court points out, was not moot. *Croson* was seeking damages for not having been awarded a public construction contract which, as the only bidder, it would have obtained but for its failure to comply with the Plan’s set-aside provisions. See 109 S. Ct. at 713.

96. Justice Stevens joined the majority’s holding but did not embrace the strict scrutiny test. Indeed, Justice Stevens’ dissenting opinion appears to rely on an intermediate scrutiny standard. See 109 S. Ct. at 732-33 (Stevens, J., concurring in judgment) (arguing that the Court must look at characteristics of advantaged and disadvantaged classes that may justify disparate treatment).

97. See 109 S. Ct. at 729.

98. 109 S. Ct. at 737 (Scalia, J., concurring in judgment).

in favor of the more lenient intermediate scrutiny test.⁹⁹ They also noted that, in prior affirmative action cases, the Justices disagreed on the appropriate standard of review but always took a practical approach.¹⁰⁰ Finally, notwithstanding their contention that the strict scrutiny test "is strict in theory but fatal in fact,"¹⁰¹ the dissenters sought to demonstrate that, contrary to the majority's conclusions, the Plan involved in *Croson* met even the requirements of strict scrutiny.¹⁰²

Notwithstanding their disagreements on several other matters, all nine Justices seem to agree in *Croson* on the proper conception of constitutional equality at the highest levels of abstraction. They all believe that the equal protection clause is designed to uphold the equal worth, dignity, and respect of every individual regardless of race.¹⁰³ Moreover, in spite of their differences on the legitimacy of color-conscious means, all the Justices share the notion that the ultimate fulfillment of constitutional equality lies in the establishment of a truly color-blind society.¹⁰⁴ Also, several Justices reiterate that it is a central purpose of the equal protection clause to constitutionalize the principle of equality of opportunity.¹⁰⁵ Yet for all these points of convergence, the disagreements concerning the proper constitutional standard by which to assess affirmative action evince a failure on the part of all the Justices to make necessary connections between different levels of abstraction, and to promote a satisfactory resolution of the continuing split over the two conflicting judicial positions articulated in *Bakke*.

A. Justice O'Connor's Plurality Opinion

Because of Justice Scalia's refusal to join her opinion on this point, Justice O'Connor's views on strict scrutiny are only shared by a plurality of Justices. Her analysis is firmly anchored in the marginal equality position articulated in *Bakke*.¹⁰⁶ Justice O'Connor focuses on

99. 109 S. Ct. at 743 (Marshall, J., dissenting).

100. 109 S. Ct. at 745 (Marshall, J., dissenting).

101. 109 S. Ct. at 752 (Marshall, J., dissenting) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).

102. See *infra* text accompanying notes 148-53.

103. 109 S. Ct. 706, at 720-21 (plurality opinion of O'Connor, J.); at 730 (Stevens, J., concurring); at 736-39 (Scalia, J., concurring in judgment); and at 750 (Marshall, J., dissenting).

104. See, e.g., 109 S. Ct. at 727 (asserting the American "dream of a Nation of equal citizens where race is irrelevant to personal opportunities and achievement . . ."); at 735 (Scalia, J., concurring in judgment).

105. See, e.g., 109 S. Ct. at 720-21 (plurality opinion of O'Connor, J.); at 730 (Stevens, J., concurring in judgment).

106. See *Bakke*, 438 U.S. at 269-320.

equal treatment and on classifications rather than classes because she believes that racial classifications cause stigmatic harm, perpetrate notions of racial inferiority, and serve the aims of racial politics.¹⁰⁷ Accordingly, in Justice O'Connor's view, the purpose of strict scrutiny is to "smoke out" illegitimate uses of racial classifications by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.¹⁰⁸ She further argues that even if a governmental objective is clearly compelling, unless there is a tight "fit" between means and ends, it is impossible to rule out the possibility that the classification was motivated by racial prejudice or stereotype.¹⁰⁹

Justice O'Connor specifies that race-based affirmative action can meet the strict scrutiny test if it is "remedial" in nature.¹¹⁰ A remedial race-based affirmative action plan serves a compelling state interest if it is compensatory in nature, and if it is properly circumscribed to benefit only actual victims of discrimination.¹¹¹ Such a plan need not, however, be carried out by a wrongdoer in order to remain constitutional¹¹² so long as a nonwrongdoer assumes a duty of compensation voluntarily.

Although theoretically defensible, Justice O'Connor's conception differs from that of Justice Powell in *Bakke*,¹¹³ on whom she relies as a proponent of equal treatment,¹¹⁴ and from that expressed in his plurality opinion in *Wygant*,¹¹⁵ which she joined. In his opinions in *Bakke* and *Wygant*, Justice Powell stresses that in order to be constitutionally permissible, compensatory affirmative action must be dispensed by a wrongdoer.¹¹⁶ If it is provided by a wrongdoer, however, compensatory affirmative action does not cease being constitutional if its benefits extend beyond "actual" victims of racial discrimination.¹¹⁷ Accordingly, it appears that in *Bakke* Justice Powell equates constitutional compensatory affirmative action with the paradigm case of compensatory justice,¹¹⁸ while in *Wygant* he equates it with a model that differs

107. *Croson*, 109 S. Ct. at 721.

108. 109 S. Ct. at 721.

109. 109 S. Ct. at 721.

110. 109 S. Ct. at 721.

111. 109 S. Ct. at 727-28.

112. 109 S. Ct. at 729.

113. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 269-320 (1978).

114. *Croson*, 109 S. Ct. at 721 (quoting *Bakke*, 438 U.S. at 298).

115. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-77 (1986).

116. See *Wygant*, 476 U.S. at 274-77; *Bakke*, 438 U.S. at 307-09.

117. *Wygant*, 476 U.S. at 277-78.

118. See *supra* note 37.

from the paradigm on the side of the victim but not on that of the wrongdoer. In short, the two opinions by Justice Powell in *Bakke* and *Wygant* and Justice O'Connor's opinion in *Croson* yield three different models of constitutionally permissible compensatory affirmative action.

Although all three models are predicated on adoption of the marginal equality position announced in *Bakke*, they cannot be reconciled or comprehensively evaluated on the basis of the conception of constitutional equality that emerges from the Supreme Court's affirmative action decisions. All three models implicitly acknowledge the validity of limited departures from equal treatment, but it is not clear whether the particular departure associated with any one of the three models is more consistent with the governing principle of equal treatment. On the other hand, the more general tenets of constitutional equality invoked by the Court — such as the principles of equal worth of each person and of equality of opportunity — have not received sufficient judicial elaboration to provide much guidance. Indeed, in the abstract, these tenets are arguably as consistent with equal treatment as with substantially unequal treatment in the pursuit of certain equalities of result.¹¹⁹ Therefore, from the perspective reflected in Justice O'Connor's opinion in *Croson*, no principled determination can be made between compelling and noncompelling compensatory affirmative action, because of the lack of a sufficiently developed conception of substantive constitutional equality.

Embracing a much broader conception of what counts as "remedial," Justice O'Connor asserts that a city like Richmond has a compelling interest in preventing the expenditure of its tax dollars in furtherance of private racial discrimination:

[I]f the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.¹²⁰

Thus, if the construction industry is dominated by white-owned busi-

119. For an argument that the unequal treatment of whites disadvantaged by affirmative action is consistent with equal respect and concern for all, see R. DWORKIN, *supra* note 10, at 227-29. Moreover, achieving equality of opportunity may require equal treatment — *e.g.*, providing the same education to all — or unequal treatment — *e.g.*, providing special remedial education to those who are educationally disadvantaged — depending on one's conception of equal opportunity. *Cf.* D. RAE, *supra* note 31, at 74-75 (distinguishing between marginal and global equality of opportunity).

120. 109 S. Ct. at 720.

nesses that systematically refuse to deal with MBEs or to hire black candidates for employment, then a municipality would have a compelling interest in instituting a set-aside provision reserving some of its public construction contract work for MBEs.

This latest compelling state interest is in a broad sense "remedial," in that it is designed to rectify the effects of objectionable past or present private practices. Unlike the previous compelling interest advanced by Justice O'Connor and discussed above, however, the interest now under consideration relates to a distributive rather than a compensatory use of affirmative action. Indeed, on the assumption that public authorities have had no hand in the institution and maintenance of private racially discriminatory practices in the construction industry, the government would have no compensatory duty toward any of the victims of such private discrimination. Furthermore, institution of the set-aside would not lead to exaction of compensation from the private wrongdoers, in the sense of divesting them from unjust gains already realized or forcing them to make any of their victims "whole." Nor would such a set-aside necessarily serve to compensate actual victims of private discrimination, because it presumably draws no distinction between victim and nonvictim MBEs. On the other hand, through implementation of the set-aside, the government would prevent the use of public funds in furtherance of a private scheme in the construction industry designed to prevent minorities from receiving any significant share of the available construction business.

Although distributive in nature, the compelling state interest in not having public funds used to further private racial discrimination is not purely forward-looking. It aims to thwart the derivation of future distributive benefits traceable to the exploitation of advantages gained by past wrongdoing. Under ordinary circumstances, and in the absence of any discriminatory practices, public construction work would be awarded exclusively on the basis of competitive bidding. Such bidding, moreover, would be justified under the principle of equality of opportunity. To the extent that private discriminatory practices result in the systematic exclusion of MBEs from public construction contracting and subcontracting work, however, adherence to formal equality of opportunity¹²¹ would only serve to perpetuate the unfair

121. Formal equality of opportunity is understood here as a negative obligation by the state *not to interfere* with private market mechanisms. If one assumes that equal protection constitutionalizes formal equality of opportunity, then the state has no obligation to eradicate the effects of systematic private discrimination so long as it stays out of the marketplace. However, once the state enters the marketplace through the award of public contracts, it arguably assumes the additional obligation to see to it that its participation does not directly serve to bolster the effects of private discrimination. For the difference between "formal" and "fair" equality of opportunity, see *infra* note 213.

advantage secured through racial exclusion. Therefore, to cancel out the distributive advantages gained through private discrimination, public authorities would have to institute, at least temporarily, a means of distribution of public construction contract work that does not depend exclusively on the implementation of the principle of (formal) equality of opportunity.

Justice O'Connor's opinion does not furnish a theoretical nexus between her relatively narrow conception of constitutionally permissible compensatory affirmative action and her relatively broad conception of constitutionally permissible distributive affirmative action. At a practical level, however, those two conceptions are linked inasmuch as they both condition the constitutional legitimacy of affirmative action on the existence of past or ongoing racial discrimination. Therefore, consistent with Justice O'Connor's analysis, whether it is compensatory or distributive, affirmative action can only be constitutional if it is "necessary" to remedy wrongs caused by past or ongoing discrimination.

In the course of her arguments that the Plan is unconstitutional, Justice O'Connor frequently shifts from assertions that there is insufficient evidence of discrimination to justify Richmond's claimed remedial interests,¹²² to statements that affirmative action is not necessary because of the availability of alternative race-neutral remedial means.¹²³ Moreover, a close reading of her opinion reveals ambiguities concerning whether certain types of acknowledged discrimination, such as "societal discrimination," are insufficient *per se* or whether they may be sufficient to create a compelling state remedial interest, but are simply too "amorphous" to establish the race-conscious remedy as genuinely "necessary."¹²⁴ Also, as I will more fully examine below, Justice O'Connor imposes a very stringent standard for the establishment of the proper nexus between discrimination and resulting injury.¹²⁵ She requires that the links between discrimination and its effects be tightly and directly drawn, and appears to go to great lengths to present a series of events, which would ordinarily be viewed as being related, as though they were utterly disconnected. Finally, Justice O'Connor suggests that affirmative action cannot be a "necessary" remedy if some race-neutral alternative is available, but she is less clear about what kind of race-neutral remedy might properly be

122. See 109 S. Ct. at 724, 730.

123. See 109 S. Ct. at 728-29.

124. 109 S. Ct. at 723-24 (paraphrasing, in part, Justice Powell's opinion in *Bakke*, 438 U.S. at 307).

125. See *infra* text accompanying notes 165-72.

considered as a legitimate alternative.¹²⁶ Must the race neutral alternative be as effective and as speedy as the proposed race-conscious remedy? Or, is it sufficient that the race-neutral alternative provides a remedy, albeit a slower and less effective one?

Justice O'Connor's opinion fails to provide an overall framework that would reconcile her vision of what makes race-based affirmative action a necessary means toward a compelling state end with some coherent vision of constitutional equality. Her conception of strict scrutiny as articulated in *Croson* leaves many important questions unanswered. Moreover, Justice O'Connor's refusal to uphold the constitutionality of the Plan seems at odds with her relatively broad tolerance of distributive affirmative action. Actually, she only manages to reconcile the two by combining an exceptionally stringent causal requirement with a completely abstract and acontextual grasp of the relevant facts.

Finally, there is yet another factor which Justice O'Connor considers in connection with her application of the strict scrutiny test in *Croson* but which she fails to integrate satisfactorily with the other relevant factors discussed above. This factor is the harmful effect which the Plan seems likely to produce on white-owned enterprises competing to obtain public contracts. In Justice O'Connor's view, the Plan's set-aside denies whites the opportunity to compete for a fixed percentage of public contract dollars "based solely upon their race,"¹²⁷ and thus implicates their individual rights to treatment with equal dignity and respect.¹²⁸ That alone, according to Justice O'Connor, requires that the Plan be subjected to strict scrutiny.¹²⁹

Besides stressing that the above factor should trigger strict scrutiny, Justice O'Connor does not give it any further consideration in her assessment of the constitutionality of the Plan. In particular, she does not indicate whether depriving whites of the opportunity to compete for a set percentage of public contract work taken alone would suffice to invalidate an otherwise constitutional affirmative action plan, or what importance it should have when considered in light of other relevant factors. Moreover, she does not refer to the Court's consideration of this issue in *Fullilove*,¹³⁰ or to Justice Powell's suggestion in

126. 109 S. Ct. at 728-29. Justice O'Connor does offer a list of possible race-neutral means of aiding disadvantaged businesses "in the absence of evidence of discrimination," 109 S. Ct. at 729, but it is not clear that these would obviate the need for more direct, race-conscious remedies where past discrimination could be shown.

127. 109 S. Ct. at 721.

128. 109 S. Ct. at 721.

129. 109 S. Ct. at 721.

130. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

that case that the burden of a set-aside on whites should be weighed against the benefits derived from it.¹³¹ Strictly speaking, since Justice O'Connor found the Richmond Plan constitutionally wanting on other grounds, there was no need for her to articulate a position on this issue. Nevertheless, in the absence of any guidance on the subject, it is impossible to draw a full picture of the constitutional constraints imposed on affirmative action from the standpoint of the position expressed by Justice O'Connor in *Croson*.

B. Justice Scalia's Concurring Opinion

Justice Scalia's conception of what strict scrutiny requires in the context of race-based affirmative action differs substantially from that of Justice O'Connor.¹³² Of all the Justices, Justice Scalia comes closest to adopting the principle that the Constitution is color-blind, but stops short of that assertion by recognizing the legitimacy of two narrowly drawn color-conscious practices. First, he asserts that race-conscious classifications are constitutionally permissible if they are necessary to save life or limb.¹³³ Second, he is willing to accept race-conscious classifications if they fit the paradigm case of compensatory justice — that is, if they are necessary for an actual public wrongdoer to compensate its actual victims.¹³⁴

The principle that all legal classifications must be color-blind possesses three major virtues. First, it is very easy to implement and does not require the elaboration of any complicated theoretical apparatus to determine the nature and scope of its proper application. Second, justification of the color-blind principle could rest entirely on the moral axiom that it is wrong for public authorities to draw any distinctions on the basis of race. This would obviate the need to delve at any depth into the divisive realm of substantive equality. Third, it provides an effective means of assuring the prohibition of racial classifications that inure to the disadvantage of oppressed racial minorities.

For all its virtues, however, the color-blind principle is too blunt, and therefore, in spite of his obvious attraction to it, Justice Scalia feels compelled to admit that the scope of constitutional equality extends beyond it. Strict confinement to color-blindness would preclude the use of race-conscious policies even for the limited purpose of compensating actual victims of official breaches of the color-blind principle. In this way, strict adherence to the color-blind principle is

131. 448 U.S. at 514-15.

132. See 109 S. Ct. at 737 (Scalia, J., concurring in judgment).

133. 109 S. Ct. at 735 (Scalia, J., concurring in judgment).

134. 109 S. Ct. at 737 (Scalia, J., concurring in judgment).

incompatible with the Supreme Court's endorsement of color-conscious remedies in a long line of school desegregation cases.¹³⁵

Once one ventures beyond the color-blind principle, however, it becomes impossible to stake out a coherent position on the nature and scope of consitutional equality without relying on some fairly developed conception of substantive equality. Thus, to maintain that constitutional equality permits some particular deviations from the color-blind principle, but not others, one must be prepared to back her claim by drawing principled distinctions between justified and unjustified deviations. As the discussion of Justice O'Connor's opinion suggests, such distinctions cannot be expected to emerge from the mere application of the strict scrutiny test. Indeed, both Justices O'Connor and Scalia apply the strict scrutiny test in *Croson* and yet Justice O'Connor finds constitutionally permissible far broader deviations from the color-blind standard than does Justice Scalia. Furthermore, the opinions of both Justices provide glimpses of their respective conceptions of substantive constitutional equality and reveal a fairly similar stress on the equal worth, dignity, and respect of each individual and adoption of the marginal equality position articulated in *Bakke*. How then, from apparently similar conceptions of substantive equality, can they be led to different conclusions concerning the amount of deviation from color-blindness that may be constitutionally tolerated consistent with strict scrutiny?

One possible answer is that neither of their conceptions of substantive equality is sufficiently developed to permit a precise delimitation of the permissible deviations. Thus, both Justices could agree on the broad outlines of a conception of substantive equality, but certain unarticulated differences concerning more concrete aspects of their respective conceptions could well lead them to divergent views of what strict scrutiny requires. In any event, what is clear is that Justice Scalia, like Justice O'Connor, does not offer a sufficiently elaborated vision of substantive equality to circumscribe a strict scrutiny test that is stable, predictable, and reliable.

C. Justice Marshall's Dissenting Opinion

The dissenting Justices, for their part, embrace the global equality position articulated in *Bakke* and reject the propriety of subjecting racial classifications favoring blacks to the strict scrutiny test.¹³⁶ Unlike the Justices who joined Justice O'Connor's opinion and in contrast to

135. See, e.g., *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Green v. County School Bd.*, 391 U.S. 430 (1968).

136. 109 S. Ct. at 752 (Marshall, J., dissenting).

Justice Scalia, the dissenting Justices believe that constitutional equality is compatible with unequal treatment (or marginal inequality) if such treatment is likely to promote certain kinds of equality of result (or global equality), and if such unequal treatment can be justified on broadly remedial, rather than exclusively distributive, grounds.¹³⁷ The dissenting justices advocate adoption of the intermediate scrutiny test in the context of affirmative action favoring blacks,¹³⁸ but at the same time lay stress on the importance of pursuing a practical approach.¹³⁹ Finally, while Justice Marshall's opinion criticizes the majority's embrace of the strict scrutiny test, he nonetheless offers a demonstration that the Richmond Plan, placed in its proper historical, social, and political context, does satisfy the requirements imposed by that test.¹⁴⁰

The asymmetry between racial classifications that disfavor blacks and those that disfavor whites underlies a powerful doctrinal argument made by Justice Marshall against the application of strict scrutiny to race-based affirmative action plans. Based on an equal protection jurisprudence developed in cases not involving affirmative action, the Court has concluded that racial classifications must be submitted to the strict scrutiny test,¹⁴¹ while gender-based classifications must be assessed according to the less stringent intermediate scrutiny test.¹⁴² Thus, racial classifications are more suspect than gender-based ones, on the ground that the former are more likely to be invidious than the latter. So long as one focuses on classifications rather than on classes, as the *Croson* majority does, it follows that race-based affirmative action must satisfy the strict scrutiny test to be constitutional, whereas gender-based affirmative action should be entitled to constitutional approval if it satisfies the significantly less stringent requirements of intermediate scrutiny.¹⁴³ Assuming that the injuries suffered by American blacks on account of race are at least as severe as those experienced by American women on account of gender, however,

137. See 109 S. Ct. at 756 (Marshall, J., dissenting).

138. 109 S. Ct. at 743 (Marshall, J., dissenting).

139. 109 S. Ct. at 745 (Marshall, J., dissenting).

140. See *infra* text accompanying notes 148-54.

141. See *supra* note 16.

142. See *supra* note 43 and accompanying text.

143. Since the only gender-based affirmative action case decided by the Supreme Court arose under Title VII of the 1964 Civil Rights Act rather than the equal protection clause, the Court did not have occasion to prescribe which constitutional standard should apply when preferential treatment is undertaken for the benefit of women. See *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616 (1987). Nevertheless, there is every reason to expect that the Court would not apply a stricter standard of scrutiny for affirmative action programs that favor women than it would for other gender-based classifications favoring either men or women.

there is no justification for making it substantially more difficult to remedy wrongs perpetrated against blacks than those inflicted on women.

Justice Marshall offers another, perhaps more important, argument for adopting the intermediate scrutiny test in race-based affirmative action cases. Whatever the theoretical boundaries of strict scrutiny, in practice it is likely always to be fatal when applied by its proponents to race-based affirmative action plans.¹⁴⁴ It is true that the Plan in *Croson* may be reasonably interpreted as actually satisfying the strict scrutiny test and that nothing inherent in that test compels the conclusion that race-based affirmative plans are almost without exception unconstitutional. Yet, as Justice Marshall's opinion reveals, shifting from strict to intermediate scrutiny may be important primarily as a way of reducing the number of obstacles that might be raised against remedial affirmative action plans.¹⁴⁵

From a theoretical standpoint, the intermediate scrutiny test is as objectionable as the strict scrutiny test¹⁴⁶ — a point which seems to have been anticipated by Justice Marshall, and which may account for both his stress on a practical approach and for his analysis suggesting that the Plan satisfies strict scrutiny. Indeed, intermediate scrutiny lacks determinate boundaries just as strict scrutiny does. Without a more elaborate conception of substantive equality than that put forth by the proponents of intermediate scrutiny, it is impossible to provide a coherent explanation for certain key distinctions. For example, one would be hard pressed to justify, without further reference to particular canons of substantive equality, why remedial affirmative action plans designed to ameliorate the present effects of past discrimination should satisfy intermediate scrutiny, but purely forward-looking distributive plans would not.¹⁴⁷ To sustain the distinction, one would have to demonstrate that the former serves an "important" state interest, whereas the latter does not. But without sufficiently elaborated

144. 109 S. Ct. at 752-53 (Marshall, J., dissenting).

145. Although both strict scrutiny and intermediate scrutiny are amorphous, and have no precise boundaries, strict scrutiny is nevertheless *relatively* more restrictive than intermediate scrutiny. Thus, if a particular kind of affirmative action plan has been approved under strict scrutiny, then *a fortiori* it would be legitimate under intermediate scrutiny. On the other hand, if a plan has been rejected under strict scrutiny, its proponents might still have a reasonable hope of getting it approved under intermediate scrutiny.

146. See *supra* text accompanying notes 45-46.

147. This is apparently the position of the Brennan group in *Bakke*, 438 U.S. at 356-62 (Brennan, J., concurring in judgment in part and dissenting in part), and of the dissenters in *Croson*, 109 S. Ct. at 752-54 (Marshall, J., dissenting). But see Justice Stevens' dissent in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 313-20 (1986) (purely forward-looking race-based affirmative action plan designed to promote minority teachers as role models permissible under equal protection clause).

normative criteria indicating what makes a state interest important, no such demonstration is likely to be forthcoming.

According to Justice Marshall's assessment, the Plan in *Croson* clearly satisfies the strict scrutiny test. In his view, Richmond can advance two compelling interests for enacting the Plan. The first is the city's interest in "eradicating the effects of past racial discrimination."¹⁴⁸ Even assuming that racial discrimination in Richmond is a thing of the past, the city still has, in Justice Marshall's judgment, a compelling interest to remove "barriers to competitive access, which had their roots in racial and ethnic discriminations, and which continue today."¹⁴⁹ In other words, so long as equality of opportunity is not fully realized in the competition for public works construction contracts due to lingering effects of past discrimination, Richmond has a compelling interest to intervene in that competition, through affirmative action if necessary, in order to level the field of competition. Furthermore, in this context, preferential treatment of blacks who are not "actual" victims of racial discrimination would be justified as a "necessary" means to end disproportionate opportunities for success deriving ultimately from past racist practices. Therefore, preferential treatment of nonvictims, which Justice O'Connor considers to be inadmissible under strict scrutiny, satisfies Justice Marshall's interpretation of that test.¹⁵⁰

The second compelling interest singled out by Justice Marshall in *Croson* is also considered compelling by Justice O'Connor. This is Richmond's interest in preventing city funds from being spent in ways that reinforce and perpetuate the effects of private discriminatory practices in the public works construction industry.¹⁵¹ In spite of their agreement that this interest is compelling, Justices O'Connor and Marshall are led to opposite conclusions largely on the basis of their respective assessments of the relevant facts and circumstances present in *Croson*. As far as Justice Marshall is concerned, this is not surprising since he believes that Justice O'Connor and the other Justices who joined her opinion merely pay "lip service" to the importance of the city interest involved.¹⁵² But even if one takes Justice O'Connor's statements at face value, the divergence between her conclusions and those of Justice Marshall can be readily accounted for in terms of the

148. 109 S. Ct. at 743 (Marshall, J., dissenting).

149. 109 S. Ct. at 743-44 (Marshall, J., dissenting) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 478 (1980)).

150. See 109 S. Ct. at 754-55 (Marshall, J., dissenting).

151. 109 S. Ct. at 744 (Marshall, J., dissenting); at 720 (plurality opinion of O'Connor, J.).

152. 109 S. Ct. at 744 (Marshall, J., dissenting)

inherent indeterminacy of the strict scrutiny test, and in terms of the different conceptions that the two Justices have concerning the kind of causal link that must be established between discrimination, injury, and remedy in order to satisfy strict scrutiny.

Unlike Justice O'Connor, Justice Marshall does discuss the impact of the Plan on innocent nonminority businesses. In his view, this impact is minimal, since although the set-aside affects thirty percent of the *public* contracting dollars, that represents only three percent of the total contracting dollars in the Richmond area.¹⁵³ Relying on the Court's decision in *Fullilove*, Justice Marshall concludes that exclusion from the competition for three percent of the available contracting opportunities imposes only a "relatively light," and hence constitutional, burden on nonminority businesses.¹⁵⁴ Furthermore, although Justice Marshall himself does not make this point, his conclusion is supported by the balancing test proposed by Justice Powell in *Fullilove*.¹⁵⁵ Indeed, it seems fair to conclude that the benefits derived from eliminating the detrimental effects of systematic past racial discrimination in the construction industry and from preventing the expenditure of public funds to promote and perpetuate the effects of private discrimination in that industry outweigh the burdens imposed on nonminority businesses by the three percent reduction in their overall contracting opportunities.¹⁵⁶ Nevertheless, neither the fact that the burden on nonminorities is relatively light nor the fact that this burden is acceptable under a balancing test settles the issue of whether a racial quota can *ever* be consistent with the protection of the equal-worth and equal-respect rights of those whom it disadvantages. And nothing in the intermediate or strict scrutiny tests, or in any of the positions taken by Justice Marshall in *Croson* offers sufficient guidance on how this issue might be satisfactorily resolved consistent with legitimate notions of constitutional equality.¹⁵⁷ Accordingly, like Justice

153. 109 S. Ct. at 750 (Marshall, J., dissenting).

154. 109 S. Ct. at 750 (Marshall, J., dissenting)

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

156. See 109 S. Ct. at 750 (Marshall, J., dissenting).

157. In contrast to Justice Marshall, Justice Scalia does not believe that the burden imposed on nonminority businesses is constitutionally permissible. According to Justice Scalia, all quotas, even "benign" ones, are unconstitutional because they violate the sense of equal worth and dignity of those adversely affected by them. 109 S. Ct. at 739 (Scalia, J., concurring in judgment) (quoting in part BICKEL, *THE MORALITY OF CONSENT* (1975)). Accordingly, for Justice Scalia, the fact that a quota imposes only light burdens or generates benefits that clearly outweigh its burdens cannot make it any more palatable.

Justice Scalia is a proponent of the marginal equality position, whereas Justice Marshall subscribes to the global equality position, but that alone does not explain their opposing views on the constitutionality of racial quotas. Indeed, Justice Powell, an architect of the marginal equality position, is also the original proponent of a balancing test to assess the impact of affirmative action on those who are disadvantaged by it. Furthermore, at the higher levels of abstraction,

O'Connor, Justice Marshall fails to provide a sufficiently detailed conception of substantive equality to enable a principled and systematic justification for the positions he takes.

In the last analysis, the majority's adoption of the strict scrutiny test as the applicable standard by which to determine the constitutionality of race-based affirmative action does not introduce any significant new measure of clarity or stability to the confusing status of preferential treatment plans under the equal protection clause. As we have seen, besides being inherently indeterminate, strict scrutiny means different things to different Justices, and there is no majority agreement in *Croson* on what it requires. Nevertheless, all the conceptions of strict scrutiny elaborated in *Croson* share the following least common denominator: to satisfy the strict scrutiny test, it is necessary to establish a causal nexus between past or ongoing racial discrimination and a resulting present injury or disadvantage. As we shall see, however, acceptance of this proposition does not mean that the Justices share a common understanding on its principal constituent terms.

IV. DISCONNECTING FACT, CAUSE, AND CONTEXT BY BLURRING THE MULTIPLE MEANINGS OF DISCRIMINATION

In contrast to their disagreements concerning the applicable constitutional standard and how that standard may be met, the Justices in *Croson* do agree on the principal facts. Yet, paradoxically, the bitter split between the Court's majority and the dissenters ultimately revolves more around the proper interpretation of commonly accepted facts than around disputes concerning constitutional doctrine. Indeed, acceptance of the same principal facts leads to diametrically opposed conclusions concerning the meaning and existence of compensable discrimination, the causal links between such discrimination and a compensable injury or disadvantage, and suitable remedies to redress the injury or eliminate the disadvantage. Moreover, these opposite conclusions are traceable to reliance on contrasting modes of interpretation. The first of these — to which I will refer as the atomistic mode of interpretation — is a more discrete mechanical mode of interpretation, relying on the disconnection of facts from the context in which they are embedded, and on the recombination of such disconnected facts into mechanistic causal chains made up of direct and linear links.

there seems to be complete agreement between Justices Marshall and Scalia concerning the requirements of prescriptive constitutional equality: they both believe in the dignity and equal worth of each person. See 109 S. Ct. at 739 (Scalia, J., concurring in judgment); and at 756 (Marshall, J., dissenting). Accordingly, it appears that neither of the two has formulated a sufficiently comprehensive conception of substantive equality to justify his respective position on the constitutionality of racial quotas.

The second mode of interpretation — which I will refer to as the ecological mode of interpretation — is more holistic and systemic in nature, approaching social facts and events in terms of the interaction between individuals, groups, and their social, political, and historical environment. Moreover, under an ecological mode of interpretation, causal relationships need not be direct or linear. Instead, they may be indirect and multifaceted as they are shaped by the historical sequence of adaptations and disruptions that characterize the interactions between human actors and their intersubjective environment.

The contrast between these two modes of interpretation is particularly useful in the context of *Croson* because it helps explain the sharp division between the Court's majority and the dissenters concerning the key issues of racial discrimination and its relation to the disproportionately small number of MBEs awarded public construction contracting work. The majority's emphasis on "amorphous" societal discrimination,¹⁵⁸ and the supposed absence of an unbroken direct causal link between such discrimination and the infinitesimally small number of MBEs engaged in public construction contracting work,¹⁵⁹ clearly exemplifies the atomistic mode of interpretation. In contrast, the dissent's focus on the voluminous historical record of official discrimination¹⁶⁰ and on the interrelationship between numerous race-conscious and seemingly race-neutral practices,¹⁶¹ avails itself of the ecological mode of interpretation.

Justice O'Connor, following a line of reasoning going back to Justice Powell's opinion in *Bakke*, concludes that race-based affirmative action cannot be constitutionally justified as a remedy for societal discrimination.¹⁶² Societal discrimination, which Justice O'Connor (like Justice Powell before her) characterizes as "amorphous," may connote something sporadic, erratic, and diffuse — something that leaves no clearly demarcated traces and produces no readily ascertainable direct effects. Actually, however, what Justice O'Connor and other Justices on the Court refer to as "societal discrimination" may be pervasive and systematic. For example, in Justice Powell's interpretation of the relevant facts in *Bakke*, the state medical school whose preferential admissions plan was at issue had not itself discriminated against minority applicants.¹⁶³ Nevertheless, many of its minority applicants

158. 109 S. Ct. at 722-23.

159. 109 S. Ct. at 723-26.

160. 109 S. Ct. at 740-43, 746 (Marshall, J., dissenting).

161. 109 S. Ct. at 751 (Marshall, J., dissenting).

162. See 109 S. Ct. at 727; *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978).

163. See 438 U.S. at 300-02.

presumably had been the victims of systematic, officially perpetrated or officially condoned racial discrimination by having been compelled to attend inferior, racially segregated public schools.¹⁶⁴

Racial discrimination in admissions by the medical school against a specified number of minority applicants who would have been accepted but for such discrimination would constitute the kind of factual occurrence that can be disconnected from its broader social and historical context, and directly linked to a specific, clearly defined and readily compensable injury. It is not necessary to understand a broader sweep of social history to be able to see that a manifest harm has been effected and that a remedy is justified. On the other hand, racial discrimination at the elementary and secondary school levels cannot be so clearly or directly linked to the failure of a candidate to gain admission to a medical school that does not itself discriminate on the basis of race. In the latter case, it is not necessarily true that but for the inferior, segregated education received in public school, the rejected applicant would have gained admission. Indeed, not everyone who receives a superior public school education eventually gains admission to medical school, and there are a multitude of possible intervening causes from the time of high school graduation that might explain the applicant's ultimate rejection from medical school. Accordingly, even after isolating the facts of a candidate's segregated public school education and of her rejection from medical school, it appears very unlikely that anyone could establish a clear or direct unbroken causal link between the two, without more evidence to support the connection.

Viewing the matter from the standpoint of the atomistic mode of interpretation, as does Justice O'Connor, it is even more difficult in the factual setting of *Croson* to extract any direct causal links than in that of *Bakke*. Unlike the state medical school involved in *Bakke*, the City of Richmond had been itself guilty of massive and systematic racial discrimination in education, housing, and the granting of the franchise.¹⁶⁵ In addition — and this fact seems particularly important since Richmond's public construction projects involve the expenditure of public funds in ways that benefit the construction industry — private racial discrimination in the construction industry has been rampant and pervasive nationwide, resulting in the virtually complete exclusion of black laborers from construction trade unions, and of black entrepreneurs from construction trade associations.¹⁶⁶ Yet,

164. See 438 U.S. at 362-66.

165. 109 S. Ct. at 748-49 (Marshall, J., dissenting).

166. 109 S. Ct. at 714.

although Justice O'Connor acknowledges "the sorry history of both private and public discrimination in this country,"¹⁶⁷ she then reduces it in Richmond's case to the label "societal discrimination," which in her view does not warrant imposing a "rigid racial quota" in the award of public construction contracts.¹⁶⁸

Justice O'Connor's conclusion seems amply justified in accordance with the canons of atomistic interpretation. This is because two different sets of relevant factual considerations conceivably lead to a break in the mechanistic causal chain that otherwise would directly link the admitted "sorry history" of discrimination to the virtually complete lack of MBEs in public construction contract work in Richmond prior to the institution of the Plan. The first of these factual considerations relates to the enactment in 1975 by Richmond of a city ordinance prohibiting "both discrimination in the award of public contracts and employment discrimination by public contractors,"¹⁶⁹ and to the lack of evidence concerning violations of this ordinance.¹⁷⁰ When these two facts are singled out and presented alongside Richmond's prior systematic racial discrimination, they can be viewed as raising significant doubts about whether the gross racial imbalance in Richmond's public construction industry existing on the eve of the Plan is directly traceable to pre-1975 racial discrimination by the City.

The second set of relevant factual considerations relates to the existence of non-racial factors that may account for MBEs' lack of success in the competition for Richmond's public construction contracts. Among these non-racial factors, Justice O'Connor mentions "deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures, and disability caused by an insufficient track record," all of which she believes are likely to affect anyone seeking to establish a new business, regardless of race.¹⁷¹ Finally, moving beyond these specific factors which serve to cast doubt on the existence of direct links between past racial discrimination and current racial imbalance in public construction, Justice O'Connor speculates that perhaps today's imbalance may be due ultimately to black entrepreneurs' disproportionate attraction to industries other than construction.¹⁷² In short, Justice O'Connor appears to disconnect salient occurrences from one another and from the broader con-

167. 109 S. Ct. at 724.

168. 109 S. Ct. at 724.

169. 109 S. Ct. at 726 n.3.

170. 109 S. Ct. at 726 n.3.

171. 109 S. Ct. at 724.

172. 109 S. Ct. at 726.

text in which they emerge, and to accept the existence of causal links between such occurrences only if every other plausible alternative has been conclusively ruled out.

In contrast to Justice O'Connor, Justice Marshall adopts the ecological mode of interpretation, and reaches diametrically opposed conclusions concerning discrimination, its effects, and the need for affirmative action. For him, racial discrimination is not merely the product of certain separable and clearly definable acts with fully circumscribed and readily recognizable effects. Instead, when placed in its proper context, discrimination, according to Justice Marshall, "takes a myriad of 'ingenious and pervasive forms.'"¹⁷³ From his perspective, the evidence of racial discrimination in *Croson* is so overwhelming that the Court's majority is not simply wrong, but stubborn in its refusal to see things as they are:

The majority . . . takes the disingenuous approach of disaggregating Richmond's local evidence, attacking it piecemeal, and thereby concluding that no *single* piece of evidence adduced by the city, "standing alone" . . . suffices to prove past discrimination. But items of evidence do not, of course, "stan[d] alone" or exist in alien juxtaposition; they necessarily work together, reinforcing or contradicting each other.¹⁷⁴

Whether it is ultimately fair to characterize the majority as "disingenuous" depends at least in part on the possibility of justifying the use of the atomistic mode of interpretation in the context of a case like *Croson*. But before that issue can be properly addressed, it is necessary to focus briefly on the meaning that the facts in *Croson* take under the ecological mode of interpretation.

From the standpoint of Justice Marshall's contextual approach, the juxtaposition of Richmond's massive pre-1975 official racial discrimination, of the systematic nationwide and local private discrimination in the construction industry, of Richmond's 1975 antidiscrimination ordinance, and of the fact that by 1983 only 0.67% of the city's public construction contracting work went to MBEs clearly points to the conclusion that the present-day racial imbalance is the effect of past (and present) invidious discrimination. Indeed, when placed in its proper historical context, Richmond's 1975 race-neutral antidiscrimination ordinance does not break the causal chain that leads from past systematic discrimination to subsequent grossly disproportionate racial imbalance in the construction industry. Instead, the antidiscrimination ordinance has the effect of largely freezing the

173. 109 S. Ct. at 745 (Marshall, J., dissenting) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 387 (1978) (Marshall, J., concurring in part and dissenting in part)).

174. 109 S. Ct. at 746 (Marshall, J., dissenting) (citation omitted).

racial imbalance attributable to the outlawed pre-1975 practices.¹⁷⁵ While adherence to the ordinance may prevent the imbalance from worsening through further purposeful exclusion, it does nothing to rectify the imbalance as it stood in 1975. Thus, if — as is the case in *Croson* — construction trade associations have virtually no black members,¹⁷⁶ race-neutral public contracting practices alone are not likely to lead to an increase in MBE participation. That result might not seem unjust if the paltry minority representation among Richmond's contractors were truly simply a matter of choice. But, when placed in context, the fact that only a disproportionately small number of blacks seek to join the construction industry, contrary to Justice O'Connor's suggestion,¹⁷⁷ is not a matter of mere predilection. It is rather a reflection of the long experience of humiliation and rejection which has made blacks reluctant to enter what they justifiably perceive as a hostile environment.

Justice Marshall also rejects Justice O'Connor's suggestion that since certain nonracial factors may have contributed to the failure of MBEs to obtain a greater proportion of Richmond's public construction contracts, available race-neutral remedies must be exhausted before turning to affirmative action. According to Justice Marshall, race-neutral remedies, such as loosening bonding requirements or simplifying bidding procedures, have not led to significant improvements for MBEs when used in the past.¹⁷⁸ Moreover, one might add, from a contextualist standpoint, that the seemingly race-neutral factors invoked by the Court remain so only when viewed in isolation. In the context of systematic racial discrimination, these factors take on another light, as they are likely to exacerbate the relative disadvantages experienced by victims of racism. As an illustration, the inability of an entrepreneur to meet bonding requirements may not be unjust if it is the consequence of unwise past business practices on his part rather than of racial oppression. Accordingly, loosening bonding requirements for all enterprises instead of instituting a set-aside for the victims of racial oppression may be an overbroad remedy, providing a competitive windfall for certain nonminority entrepreneurs without placing the victims of racism in the competitive position in which they would have been absent discrimination.

The atomistic and ecological modes of interpretation also lead to divergent outcomes in the probative value they attach to the statistical

175. See 109 S. Ct. at 751 (Marshall, J., dissenting).

176. 109 S. Ct. at 714.

177. 109 S. Ct. at 726.

178. 109 S. Ct. at 751 (Marshall, J., dissenting).

disparity itself in *Croson*. The ratio of contracts awarded MBEs to the total black population in Richmond (0.67% to 50%) is certainly dramatic. Justice O'Connor argues, however, that since the performance of public construction contracting work requires specialized skills, the proper comparison is not to the general black population of Richmond, but rather to the much smaller figure representing the total number of qualified MBEs in the metropolitan area.¹⁷⁹ For purposes of determining whether public contracts are awarded in a race-neutral manner, Justice O'Connor's choice of relevant statistics seems entirely appropriate. But if the issue is the broader one of gauging the continuing impact of historically grounded racial discrimination on the present structure of the construction industry, then Justice O'Connor's choice, as Justice Marshall argues, is inadequate.¹⁸⁰ Indeed, from the broader historical perspective espoused by Justice Marshall, it is perfectly legitimate to compare the 0.67% figure to that of the total black population in Richmond.¹⁸¹ Actually, failure to do so would unjustifiably ignore the fact that some blacks lack the requisite qualifications to become successful entrepreneurs in the construction industry precisely because they have been the victims of systematic, official racial discrimination, and that some other blacks, who might have otherwise chosen a career in the construction industry, did not even seek entry into that industry because of its long history of racial hostility and oppression.

Finally, the contrast between the two modes of interpretation casts a useful light on Justice Scalia's rejection of quotas as violative of the equal worth and dignity of individuals. In support of his conclusion that quotas are unconstitutional, Justice Scalia states that

[t]he relevant proposition is not that it was blacks, or Jews or Irish who were discriminated against, but that it was individual men and women, "created equal," who were discriminated against. And the relevant resolve is that that should never happen again.¹⁸²

As an abstract proposition, and as the expression of a normative aspiration, Justice Scalia's statement is certainly unexceptionable.

From the standpoint of the ecological mode of interpretation, however, Justice Scalia's statement is plainly inadequate because it is ahistorical and acontextual. He disconnects various instances of discrimination and assesses them from the perspective of the individual as moral subject. In so doing, he ignores that as a concrete histori-

179. 109 S. Ct. at 725.

180. 109 S. Ct. at 747 (Marshall, J., dissenting).

181. 109 S. Ct. at 746-47 (Marshall, J., dissenting).

182. 109 S. Ct. at 739 (Scalia, J., concurring in judgment).

cal matter, the three types of discrimination to which he refers differ from one another in nature and scope. Thus, for example, if the racist portrays blacks as being lazy and irresponsible¹⁸³ while the anti-Semite depicts Jews as cunning and dishonest, the concrete injuries of racism are likely to differ from those of anti-Semitism. To the extent that victims internalize and adopt the perspective of those who cast them as inferiors,¹⁸⁴ blacks and Jews are likely to have different attitudes toward education and employment. Racist stereotypes depict blacks as ill-suited to succeed in education and on the job. Anti-Semitic stereotypes, however, do not at all suggest that Jews are similarly handicapped. On the contrary, in the anti-Semite's view, the Jew may appear to be particularly prone to succeed because driven by an insatiable thirst for power and domination. Accordingly, what may be an adequate remedy for one may not be appropriate for the other. In short, notwithstanding Justice Scalia's firm stand, from the standpoint of the ecological mode of interpretation, quotas should not be rejected out of hand without inquiry into their potential as remedies for the specific injuries perpetrated by racism.

It is beyond the scope of this Article to evaluate the differences between the two modes of interpretation in any systematic or comprehensive manner. For present purposes, it suffices to focus on a distinguishing feature of atomistic inquiry. By disconnecting salient events from the mass of daily occurrences and by requiring that recombinations of these events be made only on the basis of mechanistic, linear, and direct causal chains, the atomistic mode of interpretation accomplishes the following: It privileges the extraordinary over the quotidian and imposes a very high threshold for proof of causal connection.

Use of the atomistic mode of interpretation seems particularly appropriate in settings in which there is a strong presumption that the flow of events conform with certain well-established norms and expectations. In those settings, the principal focus of the law is likely to be on the extraordinary, on occurrences that stand out for failing to meet widely shared normative expectations. Moreover, insistence on the establishment of clear and direct causal links seems especially apt in situations in which the law is intended to impose responsibility on an actor for the occurrence of an extraordinary event only if there is a

183. See Bayles, *Reparations to Wronged Groups*, in REVERSE DISCRIMINATION 304 (B. Gross ed. 1977); see also Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1373 (1988).

184. Cf. *Castaneda v. Partida*, 430 U.S. 482, 503 (1977) (Marshall, J., concurring) (“[M]embers of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority.”).

high degree of probability that, but for that actor's acts (or omissions), the extraordinary event would not have occurred. Criminal cases are therefore the paradigm for appropriate use of the atomistic mode of interpretation.¹⁸⁵ Indeed, criminal acts are considered extraordinary departures from the social norm, and criminal defendants are given the benefit of every reasonable doubt, because of the strong presumption of conformity to legal norms,¹⁸⁶ and because of the disproportionate distribution of power between the prosecuting state and the individual accused of a crime. Also, although cases involving intentional torts depart somewhat from the paradigm, they are close enough to it — particularly with respect to the conduct of the tortfeasor and to the injurious consequences flowing from such conduct — to warrant use of the atomistic mode of interpretation.

Certain affirmative action cases clearly seem to justify recourse to the atomistic mode of interpretation. These include most notably cases in which compensatory, court-ordered affirmative action is sought against an alleged wrongdoer and cases in which the implementation of an affirmative action plan is likely to upset significantly the legitimate rights of innocent third parties.¹⁸⁷ Because Richmond set up its Plan voluntarily, the first concern was not present in the case. As for the second, although this is by no means as obvious, the Plan in *Croson* was arguably unlikely to have *significantly* upset the *legitimate* rights of nonminority businesses in the construction industry.

185. Cf. *In Re Winship*, 397 U.S. 358, 364 (1970):

It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact[]finder of his guilt with utmost certainty.

186. Cf. *Winship*, 397 U.S. at 364 (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

187. When the purpose of affirmative action is to remedy ongoing racial discrimination or to exact compensation from a wrongdoer, such as an organization that has systematically excluded minorities from hiring or promotion, see, e.g., *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421, 445 (1986) (Title VII case involving a union's egregious past and ongoing racial discrimination where the Supreme Court upheld a court-ordered 29.3% minority membership goal), and *United States v. Paradise*, 480 U.S. 149, 167 (1987) (on similar facts, Supreme Court upheld the constitutionality of a promotions quota to be implemented by Alabama Public Service Department), then it is obviously important not to saddle anyone but a proven wrongdoer with the onerous burdens that implementation of an affirmative action plan might require. Similarly, in the context of a sphere of activity where instances of racial discrimination have been few and far between, very few whites would be likely to have benefited from such discrimination. Accordingly, before imposing an affirmative action plan that might require the lay-off or termination of white employees to make room for minorities, special care should be taken to demonstrate that the plan does not impermissibly abridge their almost certainly valid distributive claims to their current positions:

This last point may seem at first counterintuitive. Customarily, it is inappropriate to disturb legitimate distributive rights to satisfy someone else's compensatory rights — thus, the torts maxim that, as between two innocent parties, a loss should lie where it falls. Assuming, therefore, that the nonminority businesses which would have obtained public construction contracts but for the set-aside were not themselves guilty of racial discrimination, it appears unjust to deny them their distributive right to such work in order to satisfy the compensatory rights of the MBE class. Moreover, to the extent that individual MBEs do not have to prove themselves to have been the “actual” victims of racial discrimination before being able to benefit from the set-aside, the compensatory rights of any such individual are at best uncertain. In an ideal case, compensation ought to put everyone affected in the position in which she would have been but for the wrong necessitating that compensation.¹⁸⁸ Conversely, the more uncertain it is that a person would really have been in a different position but for the wrong, the less justification there seems to be for disturbing existing patterns of distribution through the granting of compensation.

Keeping this in mind, it is also important that the degree of uncertainty concerning the validity of a compensatory right not be evaluated in a vacuum. Rather, it should be measured against the degree of uncertainty that also exists concerning the validity of those distributive rights that would have to be upset in order to carry out the proposed compensation. Given the massive official racial discrimination present in Richmond before 1975 and given the systematic and virtually complete exclusion of blacks from the construction industry, there is arguably a significant degree of uncertainty concerning the distributive rights claimed by white entrepreneurs in the construction industry. Indeed, many of them would have lost public construction work over the years to MBE competitors had past discrimination not so effectively excluded them.¹⁸⁹ Therefore, even if they are individually innocent of any racial discrimination, the white entrepreneurs' distributive rights are arguably as uncertain as the black entrepre-

188. See *supra* note 9. Putting wrongdoer and victim in the positions they would have been in but for the wrong is also required by Nozick's principle of rectification. See R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 152-53 (1974). For a discussion of a philosophical defense of affirmative action in accordance with Nozick's principle of rectification, see M. ROSENFELD, *supra* note 24, at ch. II.

189. Generally, according to the operation of Nozick's principle of rectification, see R. NOZICK, *supra* note 188, the legitimacy of entitlement claims depends upon their pedigree. If a claim of entitlement is not confronted by any valid claim to rectification, then it is legitimate. Conversely, the greater the number of plausible claims to rectification that can be interposed against a claim to entitlement, the less certain it becomes that the latter is valid. For a more extensive discussion of this point, in the context of affirmative action, see M. ROSENFELD, *supra* note 24, at ch. III.

neurs' compensatory rights. If that were the case, there would no longer seem to be any powerful justification for affording greater recognition and protection to asserted distributive rights than to asserted compensatory rights. In sum, in a setting where there is substantial uncertainty as to the validity of asserted distributive claims, the biases against compensation built into the atomistic mode of interpretation can no longer — all other things remaining equal — be justified.

If it is constitutionally legitimate for Richmond to do whatever is required to eradicate racial discrimination and its lingering effects in all public construction contracting work, then a strong argument can be made that recourse to the ecological mode of interpretation is amply justified. The ecological mode of interpretation in this case would start from the observation that the effects of discrimination are multiple, multifaceted, and often not readily discernible, and would proceed by carefully tracking their sinuous paths through the historical, social, and institutional practices that have shaped Richmond and its construction industry. For example, while the abolition of officially sanctioned racial discrimination marks an important turning point in the evolution of race relations, it does not abolish racism nor eliminate the unfair advantages and disadvantages that racism produces. Racism may go underground or take on another mantle, but, given the extent to which racism is embedded in our national psyche,¹⁹⁰ it is likely to persist and even grow more pernicious as it becomes more difficult to identify. Moreover, even if racism itself abates, race-neutral antidiscrimination laws may speak against racism while, at the same time, perpetuating the unjust gains and losses which racism has previously generated. None of this is likely to emerge, however, from considerations of isolated or disconnected events. What is required to obtain an adequate picture that would make possible the discovery of suitable remedies is a more comprehensive contextual approach. This, in turn, is possible only through the ecological mode of interpretation.¹⁹¹

190. See Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

191. Judicial recognition has been given to certain departures from the atomistic approach and from the constraints it imposes on what should count as sufficient proof. This is true, for example, in certain product liability cases. A notorious example is provided by the DES cases, in which plaintiffs sued drug companies for injuries they suffered as a consequence of their mothers' use of the drug DES during pregnancy. See, e.g., *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 163 Cal. Rptr. 132, 140 (1980) (finding that plaintiffs had a cause of action even though they could not establish which particular manufacturer had produced the drugs consumed by their mothers):

In our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs.

One who subscribes to the preceding assumption, and who nevertheless insists that atomistic interpretation should be used in a case like *Croson*, may justifiably be accused of being disingenuous. Indeed, in that case, it would seem that use of the atomistic mode of interpretation would be purely strategic, for purposes of obfuscating important causal connections which would otherwise come to light. Conceding that all forms of racism and all its effects must be eliminated, and yet imposing onerous and unnecessary constraints on proofs of racism and its multiple effects, evinces at least some degree of bad faith. Furthermore, to the extent that this is a fair characterization of the majority's position in *Croson*, Justice Marshall's charge of disingenuity¹⁹² may well be warranted.

On the other hand, if only a more narrowly compensatory project for combatting racism is considered constitutionally permissible, then Justice Marshall's charge of "disingenuity" would be unfair. Thus, for example, if one accepts Justice Scalia's position — that the Constitution should be color-blind except for compensation by an actual wrongdoer to his actual victim — then recourse to the atomistic mode of interpretation would seem perfectly justified.

In the last analysis, in the context of a case like *Croson*, one may be strongly intuitively drawn to either of these two modes of interpretation, depending on whether one has a narrow or a broad conception of the responsibilities of the state with respect to racism. Moreover, the marginal equality position seems to go hand-in-hand with the atomistic mode of interpretation, while the global equality position seems more compatible with the ecological mode of interpretation.¹⁹³ Nonetheless, in the end, a principled decision concerning which mode of interpretation to embrace cannot be made without reference to a conception of substantive equality. Thus, even the disagreements among the justices in *Croson* concerning facts and the inferences to be drawn from them cannot be resolved without the constitutionalization of a sufficiently elaborated conception of substantive equality.

Id. at 144.

In one sense, the situation in *Croson* is the opposite of that in *Sindell*, where the victims were known but not the particular tort-feasor. In *Croson*, the alleged wrongdoers were identified but not their individual victims. Notwithstanding this and other differences, both cases share an important similarity. Unless a departure from the atomistic approach is permitted, patently meritorious claims would so remain without a remedy.

192. See *supra* note 174 and accompanying text.

193. Intuitively, it seems that a mechanical approach is more suitable to determining if a particular allocation was made through the distribution of equal portions or whether it complied with equal treatment than to determining if it produces global equality. For example, a purely mechanical approach is unlikely to indicate whether the same public education puts a black child from an urban ghetto in the same global position vis-à-vis the job market as a white middle-class child living in an affluent suburb.

V. *CROSON* AND THE DEMOCRATIC PROCESS, OR STANDING
CAROLENE PRODUCTS ON ITS HEAD

Justice O'Connor turns to yet another independent source to justify her conclusion that strict scrutiny is appropriate in *Croson* — the process-oriented approach that originated in *Carolene Products*' footnote four.¹⁹⁴ As already discussed, this approach, which posits as the governing norm a properly functioning democratic majoritarian political process, cannot be coherently followed without at least implicit commitment to substantive norms.¹⁹⁵ Leaving this important point aside, however, I will, in this section, take the *Carolene* process approach at face value for purposes of demonstrating that Justice O'Connor's appropriation of it in the context of *Croson* fails on its own terms.¹⁹⁶ Moreover, as we shall see, this failure can be traced to the majority's oversight of a key asymmetry because of its tendency to decontextualize.

John Ely, the foremost exponent of the process-oriented approach derived from *Carolene*, maintains that, in accordance with that approach, race-based affirmative action that favors blacks is constitutionally permissible.¹⁹⁷ Professor Ely's conclusion is based on the assumption that whites constitute the relevant political majority, and blacks a disfavored and isolated minority.¹⁹⁸ Since whites are in the majority, Professor Ely posits, any legislative decision that disadvantages whites to the benefit of a minority group is unlikely to have been reached in a way that undermines the integrity of the majoritarian political process:

When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review, are lacking. A White majority is unlikely to disadvantage itself for reasons of racial prejudice; nor is it likely to be tempted either to underestimate the needs and deserts of Whites relative to those of others, or to overestimate the costs of devising an alternative classification that would extend to certain Whites the advantages generally extended to

194. See *Croson*, 109 S. Ct. at 722.

195. See *supra* note 57 and accompanying text.

196. Since I take the position that the *Carolene* approach cannot be followed without adherence to substantive norms, what I mean by "on its own terms," is the following: I will assume that the *Carolene* approach is process-based although I know that certain substantive values are embedded in it. Thus, the substantive proposition that blacks constitute a "discrete and insular" group is deemed to be self-evident and many of its most obvious implications are deemed to be the subject of widespread consensus. As such, those substantive values can be relegated to the background and related process-based issues brought into the foreground.

197. Ely, *supra* note 55, at 727.

198. *Id.*

Blacks.¹⁹⁹

Relying on the facts that Richmond's population is fifty percent black and that the City Council that enacted the Plan had a five-to-four black majority, Justice O'Connor concludes, based on her understanding of Professor Ely's theory, that strict scrutiny is warranted.²⁰⁰ Since blacks hold a majority of seats on Richmond's City Council while not constituting a minority in that city, and since the Plan benefits blacks at the expense of whites, Justice O'Connor reasons that the situation in *Croson* is analogous to that of a case where a white majority enacts a law that disfavors blacks.²⁰¹

Justice O'Connor's conclusion is erroneous, however, for two principal reasons: first, the analogy she draws is not supported by the facts; and, second, more importantly, even if it were, it would be, valid only at a purely abstract and superficial level.

It is true that blacks in Richmond are not a minority, but neither are they a majority. This latter fact, which Justice O'Connor apparently overlooks, has important consequences from the standpoint of the *Carolene* process approach. Even assuming that all majority decisions favoring the majority should be considered suspect — an assumption which neither *Carolene* nor Professor Ely makes — it does not follow that a decision backed by the one half of the population that is favored by it should likewise be considered suspect. Indeed, so long as all members of society have a voice, one half of the population cannot, consistent with the premises underlying the *Carolene* approach, use the majoritarian process to subjugate the other half. Furthermore, although there may be a majority of blacks on the City Council, the fact that there is no black majority in Richmond should serve as a powerful incentive for black Council members not to act with disregard for the interests of one half of their constituents. In any event, the Richmond City Council's decision to adopt the Plan was not made strictly along racial lines. One white councilmember voted with the majority and another abstained.²⁰² Moreover, given the one white vote in favor of the Plan, the Plan would have gone through even if one of the black councilmembers had been replaced by a white member who would have voted against the Plan. If that had been the case, the Plan, consistent with Justice O'Connor's reasoning, would not have been suspect, because it would have been adopted by a Council with a white majority. Accordingly, to make the scrutiny of an affirm-

199. *Id.* at 735.

200. 109 S. Ct. at 722.

201. 109 S. Ct. at 722.

202. 109 S. Ct. at 753 (Marshall, J., dissenting).

ative action plan turn on the racial composition of the governmental body that adopted it, without regard for the racial breakdown of the actual vote of approval, or of the electorate represented by that governmental body, seems entirely arbitrary. Given the facts concerning the Richmond City Council's vote in favor of the Plan, there is no justification for simply equating that vote with that of an overwhelmingly white legislature acting to disadvantage a group of blacks which is unmistakably in the minority.

Even if the factual circumstances had been somewhat different — say that blacks represented fifty-one percent of Richmond's population, and the City Council had voted for the Plan strictly along racial lines — Justice O'Connor's conclusion would still be unwarranted under the *Carolene* standard. Under those circumstances, it is true that one could draw an abstract and rather superficial analogy to cases where white majorities have approved action that disadvantaged black minorities. Nevertheless, the analogy could not hold, if all the relevant factors were taken into account, and events were placed in their proper social, political, and historical context.

This last point, is best illustrated by reference to the "reversal test."²⁰³ According to this test, the legitimacy of a state of affairs resulting from unequal treatment can be determined by imagining role switches among the individuals involved. Thus, by imagining that the blacks involved in a given affirmative action case are white and the whites involved black, the reversal test probes our intuitions about whether the race preferences are legitimate. One of the principal virtues of the reversal test is its ability to weed out stereotypes and prejudices in the assessment of race-conscious policies. For example, a racist who sees nothing wrong about a law that disfavors blacks — say a law that conditions public employment on results in a racially biased written examination — might feel altogether different had the law in question been enacted by a black majority to the disadvantage of a white minority.

Viewed in terms of the reversal test, Justice O'Connor's use of the *Carolene* approach to reach the conclusion that Richmond's Plan was suspect may, at first, seem justified. By taking the Plan and switching the respective places of whites and blacks, one obtains (on the slightly modified facts discussed above) an affirmative action plan favoring whites instituted by a governmental body comprised of a white majority in a municipality with a white majority. Such a plan would constitute a paradigm case calling for strict scrutiny under the *Carolene*

203. The reversal test has been suggested as a means to determine the legitimacy of affirmative action. See A. GOLDMAN, JUSTICE AND REVERSE DISCRIMINATION 16 (1979).

approach. Hence, the reversal test would suggest that the actual plan favoring blacks be similarly scrutinized.

This application of the reversal test is adequate if blacks and whites are taken abstractly as two races standing outside the realm of history or politics. If the differences between blacks and whites relevant for purposes of assessing the legitimacy of unequal treatment are more than a mere matter of skin pigmentation, however, then the reversal test is superficial and misleading. To be meaningful, the reversal test must take these differences into account, entailing more than its simple hypothetical color switch, but also a switch in economic, political, and historical conditions, and a switch in attitudes, beliefs, and psychological makeups.

Based on a complete role switch²⁰⁴ — as opposed to the superficial one that underlies Justice O'Connor's analysis — the reversal test applied to *Croson* would yield something like the following. After centuries of slavery and official racial discrimination by black-dominated government entities, the white citizens of Richmond who represent (according to a reversal of our modified facts) a bare majority of the city's population have enacted through the City Council (on which they have a majority of one) a temporary affirmative action plan favoring them. Pursuant to that plan, whites are assured, for a limited period of time, a certain proportion of the city's public construction contracting work, in the context of a national and local construction industry completely controlled by blacks and from which whites have been almost completely excluded because of racism. Although whites constitute a bare majority in Richmond, they are a minority at the state and national levels, and both their state legislature and the Congress of the United States are comprised of an overwhelming majority of black legislators. Finally, the black-controlled Congress has enacted an affirmative action plan favoring whites in public construction contracting work at the national level, which is virtually identical to the Richmond plan, and which has served as a model for the local version.

Should this affirmative action plan favoring whites be considered suspect under the *Carolene* approach? If one remembers that the purpose of strict scrutiny under that approach is to protect "discrete and insular" minorities from abuses of the majoritarian process,²⁰⁵ a strong argument can be made that the blacks of our counterfactual example

204. For a more extended discussion of the difference between a complete role switch and a partial role switch, and between a complete and a limited reversal of perspectives, see M. ROSENFELD, *supra* note 24, chs. III and IX.

205. See *supra* notes 53-56 and accompanying text.

are in no need of special protection because they are not a powerless minority that cannot get redress in the majoritarian process. Even if they were always to lose in local municipal politics — an unlikely possibility given their greater wealth, and their greater power and influence in the city's social and professional circles — they would still retain a high degree of leverage at the state and national levels where they are unquestionably dominant. Given their great advantages on the state and national scales, it seems ludicrous to think that they could be intimidated by the slim white majority in local politics. For these reasons, Richmond's imagined affirmative action plan favoring whites should not be subject to strict scrutiny under the *Carolene* approach. A complete reversal of roles, therefore, rather than the limited and abstract one that underlies Justice O'Connor's analysis, indicates that, when put in its proper context, the actual Richmond Plan should not be considered suspect under the *Carolene* based approach.

VI. RECONTEXTUALIZING *CROSON*: SUBSTANTIVE EQUALITY AND CONSTITUTIONAL AFFIRMATIVE ACTION

In the preceding sections, I have argued that the constitutionality of affirmative action in general, and of the Richmond Plan in particular, cannot be determined cogently through a process-based judicial approach and a decontextualized analysis. In this section, I suggest that a principled assessment of the constitutionality of affirmative action can be made only by reference to a sufficiently developed conception of substantive equality. Reliance broadly on substantive equality is unlikely to end the debate over the constitutionality of affirmative action, since equal protection is arguably compatible with more than one conception of substantive equality.²⁰⁶ A strong case can be made for the constitutionalization of one of those conceptions — equality of opportunity — but my principal concern here is not with arguing for one conception over another, so much as showing that explicit reference to *some* conception of substantive equality is essential to a coherent analysis of affirmative action. To illustrate the usefulness of this approach, I will take a fresh look at the *Croson* case, this time evaluating it from a perspective informed by a commitment to equality of opportunity, one of several possible substantive conceptions of equality. In doing so, I am interested in shifting this debate from the decontextualized realm of process-based constitutional jurisprudence to the more concretely grounded realm in which actual social, political, and

206. See *supra* note 64.

historical circumstances can be linked to specific conceptions of substantive equality.

Neither in *Croson* nor in any of its other affirmative action decisions does the Court provide a sufficient account of equal opportunity to indicate whether this conception of equality might justify the use of race-based affirmative action. Articulating a satisfactory account of equal opportunity is by no means simple. Indeed, while commitment to it is widespread,²⁰⁷ determining what constitutes equal opportunity is complex and problematic.²⁰⁸ Accordingly, I will not attempt a comprehensive account of equality of opportunity, but only a sufficiently detailed picture of it to satisfy the requirements of the task at hand.

Equality of opportunity leads to inequality of result,²⁰⁹ and can be justified when scarcity of some coveted good prevents the achievement of equality of result.²¹⁰ The allocation of public education, public employment, and public construction contracting work all involve scarcity to the extent that demand for each of them exceeds supply. Because of this scarcity, one can justify requiring government allocations of these goods to be made according to the principle of equality of opportunity.

As a substantive principle, equality of opportunity is prescriptive in nature.²¹¹ What it requires cannot be established with sufficient specificity, however, unless one has an adequate notion of equality of opportunity as a descriptive concept. From a descriptive standpoint,

207. See D. RAE, *supra* note 31, at 64 (equality of opportunity is the most compelling element of our national ideology).

208. See Rosenfeld, *Substantive Equality And Equal Opportunity: A Jurisprudential Appraisal*, 74 CALIF. L. REV. 1687, 1698 (1986).

209. See D. RAE, *supra* note 31, at 64 (equality of opportunity means that "[o]pportunities of power, right, and acquisition are to be equal; power, right and acquisition themselves are not").

210. By virtue of acceptance of the proposition that all individuals are of equal moral worth, arguably everyone's good faith claims to public goods ought to be satisfied. Accordingly, the achievement of equality of result with respect to such claims would seem *prima facie* to be morally justified. In case of scarcity, however, equality of result may only be possible by depriving everyone of the coveted public good. This would be the case if the scarce goods to be allocated could not be divided into a sufficient number of lots to provide each person who is morally entitled to it with an equal distribution. For example, if there are one hundred persons who deserve to obtain a particular kind of job, and only fifty such jobs are available, the only way to achieve equality of result would be by refraining from allocating any such job to any of the deserving persons involved. If that alternative is unacceptable, equality of opportunity provides the best means to ensure a just distribution of scarce public goods.

A distribution that does not give all equally deserving claimants an equal share must, in the interests of justice, at least preserve an "equality of opportunity"

. . . Resort to the concept of "quality of opportunity" is a *faute de mieux* procedure, a counsel of despair, as it were. It represents a means for achieving an equalization of opportunities (and risks) in cases in which a direct allocation of shares to claims is infeasible.

N. RESCHER, *DISTRIBUTIVE JUSTICE: A CONSTRUCTIVE CRITIQUE OF THE UTILITARIAN THEORY OF DISTRIBUTION* 94 (1966). For a more extended discussion of the relation between equality of opportunity and equality of result, see M. ROSENFELD, *supra* note 24, ch. I.

211. See *supra* note 210.

equal opportunity can either be “means-regarding” or “prospect-regarding.”²¹² Moreover, a further distinction can be drawn between “formal” and “fair” means-regarding equality of opportunity.²¹³

Considerations of human dignity and efficiency militate against requiring that state allocations of education, employment, and public construction work conform to prospect-regarding equality of opportunity.²¹⁴ That leaves means-regarding equality of opportunity, and the question becomes whether constitutional equality should be understood as requiring formal or fair means-regarding equality of opportunity. So long as our focus remains on affirmative action, however, we need not resolve this question as the weaker requirement of formal equality of opportunity is sufficient to justify preferential treatment to remedy the present effects of past racial discrimination, and accordingly to legitimate the Plan involved in *Croson*.²¹⁵

One of the significant advantages of formal equality of opportunity is that it imposes, in the first instance, only negative obligations on the state. Thus, if equal protection demands that Richmond adhere to formal means-regarding equality of opportunity in the allocation of public construction contracts, then the city must refrain from discriminating against any business enterprise that seeks to compete for public construction work. Furthermore, to the extent that the prime contrac-

212. “Means-regarding” equality of opportunity refers to a situation where the competitors for a scarce good possess the same tools or instruments for obtaining the good they seek. See D. RAE, *supra* note 31, at 66. “Prospect-regarding” equality of opportunity, on the other hand, refers to a situation where all competitors for a scarce good have the same probability of obtaining that good. See *id.* at 65.

213. Formal equality of opportunity has been defined as follows: “X and Y have equal opportunity in regard to A so long as neither faces a legal or quasi-legal barrier to achieving A the other does not face.” R. FULLINWIDER, *THE REVERSE DISCRIMINATION CONTROVERSY* 101 (1980). By contrast, those who maintain that equality of opportunity requires in addition the elimination of all relevant differences directly attributable to inequalities in social conditions are proponents of “fair equality of opportunity.” Cf. J. RAWLS, *A THEORY OF JUSTICE* 73 (1971) (requiring that careers open to talent be supplemented by the principle of fair equality of opportunity, under which “those with similar abilities and skills should have similar life chances . . . irrespective of the income class into which they are born”). For further discussion of the difference between formal and fair means-regarding equality of opportunity, see Rosenfeld, *supra* note 208, at 1696-97.

214. The achievement of prospect-regarding equality of opportunity would be contrary to the preservation of human dignity to the extent that equalization of probabilities of success would require depriving certain individuals of the use of means — e.g., abilities, skills, or talents — that they already possess. For example, if the objective is to equalize the probabilities of success at playing soccer, and one member of the group is permanently paralyzed from the waist down, then equality of prospects may, strictly speaking, require breaking the legs of the remaining members of the group.

On the other hand, prospect-regarding equality of opportunity may interfere with efficiency if it is to be achieved through a lottery. Let us assume, for example, that awarding a scarce public job or contracting opportunity to the most qualified applicant would maximize efficiency. In that case, allocating the job or contract on the basis of a lottery would be in all likelihood inefficient.

215. For a philosophically based argument in favor of the constitutionalization of fair means-regarding equality of opportunity, see M. ROSENFELD, *supra* note 24, ch. X.

tors who compete for city contracts themselves discriminate on the basis of race in the allocation of subcontracting work, the principle in question imposes on the city a further negative duty. That duty requires the city not to spend its public monies in a way that directly aids and perpetuates private racial discrimination in the construction industry.

Adoption for the future of a distributive system based on formal means-regarding equality of opportunity does not justify prospective-looking affirmative action. Advocates of formal equality of opportunity cannot legitimately tolerate any preferential treatment in the allocation of scarce public goods, because any such preference would violate the prevailing principle of distribution. Indeed, if the governmental allocation is to be carried out through a competition open to all who wish to obtain the scarce good, then the setting of preferences favoring some competitors over others would undermine the integrity of the means of distribution.

Violations of the principle of equality of opportunity, however, may justify the compensatory use of affirmative action. Particularly if violations are systematic and prolonged, damages and the reinstatement of formal means-regarding equality of opportunity may not adequately compensate for past injuries or ensure the future integrity of the distributive system. But to understand why this may be the case, it is necessary to look a little closer at the complex structure of means-regarding equality of opportunity.

Means-regarding equality of opportunity is, in effect, an equality wedged between two inequalities: inequality of initial circumstances and inequality of result.²¹⁶ Moreover, if the allocation of a scarce good is determined through an open and unconstrained competition, the inequality of result to which this process is bound to lead — *e.g.*, allocation of a scarce public job to one of a large number of competing applicants — is likely to be the product of the inequality of initial circumstances among the competitors. Thus, for example, if the relevant competition consists in taking a test designed to measure mathematical ability and learning, those applicants who possess the greatest talent for mathematics and who have obtained the most extensive training in that discipline are most likely to succeed and to earn the scarce good. In view of this, the difficult question is which of the inequalities in initial circumstances must be removed in order to achieve means-regarding equality of opportunity. The range of plausible answers spans the entire spectrum from none to all, since the determina-

216. See Rosenfeld, *supra* note 208, at 1698.

tion concerning which means ought to be equalized, and which ought to be left as found in the initial circumstances, is a function of particular theories of substantive equality.²¹⁷

There is a great advantage to limiting the state's equal protection obligation to the upholding of formal means-regarding equality of opportunity. Indeed, such an obligation does not impose on the state a burden to equalize any of the numerous inequalities likely to be encountered in any set of initial circumstances. All that the state must do is refrain from tampering with initial circumstances in a way that would alter the ratio of existing inequalities and affect the outcome of the competition. Moreover, while this view of equal protection does not impose any positive duty on the state to equalize the means possessed by would-be competitors, neither does it forbid the state from voluntarily undertaking to provide its citizens with additional tools which might be useful in the competition. Should the state choose to distribute additional tools, it would then be obligated to do so in a nondiscriminatory manner,²¹⁸ for discrimination would amount to tampering with the initial circumstances in order to privilege certain competitors at the expense of others.

For example, the state has no affirmative federal constitutional obligation to provide free public education to its citizens.²¹⁹ Accordingly, even though the possession of educational assets is an important factor in shaping the outcome of the competition for scarce public goods, the state's obligation is merely not to interfere with the private efforts of its citizens to obtain educational assets. Whatever inequalities in the possession of educational assets may be produced (absent interference by the state) would be legitimate. However, if the state decided to make it illegal for blacks to obtain an education, the deficits in the possession of educational assets attributable to that state action would clearly be unacceptable.²²⁰ Similarly, if instead of forcibly preventing blacks from obtaining an education, the state granted free education to whites but not to blacks, or provided blacks and whites inherently unequal educations, the resulting inequalities in educational assets would be just as objectionable as those resulting from the state's

217. For example, disparities in economic wealth and social assets are compatible with a libertarian conception of equality of opportunity, *cf.* R. NOZICK, *supra* note 188, at 151 (explaining entitlement principle of justice, whereby each person can freely use whatever assets she has legitimately acquired), but not with the contractarian conception articulated by Rawls, *see* J. RAWLS, *supra* note 213, at 73.

218. *Cf.* *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (state is not constitutionally obligated to provide free public education, but once it does, it "must [make that education] available to all on equal terms").

219. *See* 347 U.S. at 493.

220. *See* 347 U.S. at 493.

outright prohibition of education for blacks.²²¹ In short, to the extent that equal protection constitutionalizes formal means-regarding equality of opportunity, the state has a duty of non-interference with the private acquisition of competitive assets, and should the state decide to undertake the public distribution of any such assets, it must make them available equally to all who wish to acquire them.

We are now in a position to understand the nature of the injury caused by systematic and prolonged official racial discrimination in the context of a competition for scarce public goods. This injury consists in the loss of assets capable of improving their holders' chances of success in the competition. The extent of this injury can be measured by the difference between the assets that an individual victim actually holds and those she would have possessed absent the violation of her formal means-regarding equal opportunity rights.

Turning to *Croson*, the relevant assets likely to affect the outcome of an open competition for public construction contracting work include the following: educational assets; social assets, such as access to influential members of the community; professional assets, such as trade association membership; financial assets, such as the possession of sufficient working capital; and, finally, experience and know-how in running a construction business. Some of these assets may be capable of being acquired by an individual, given sufficient opportunity; others may take several generations to amass.

Even without any discrimination whatsoever, any starting position (*i.e.*, the competitive status an individual enjoys immediately preceding the onset of a competition) seems bound to be riddled with inequalities in all of the relevant categories of assets. Such "natural" inequalities, however, do not call for corrective state action under the principle of compensation, which requires for its invocation the existence of an initial wrong. It is essential, therefore, under this model, to distinguish between inequalities traceable to state violations and those attributable to other causes.

Further complicating the picture, the relevant assets are such that inequalities with respect to one may often produce further inequalities with respect to others. For example, the possession of educational assets is often linked to the subsequent acquisition of professional assets and of economic wealth, so that marked inequalities in the possession of educational assets may lead to further inequalities in the possession of professional and economic assets. For the same reasons, inequalities attributable to violations of equal opportunity rights are often

221. See 347 U.S. at 493.

likely to generate further inequalities. Full compensation, therefore, must redress not only those inequalities found in the asset targeted by the initial violation, but also those inequalities caused by it in other assets as well. Thus, for example, even if state discrimination is confined to the sphere of public education, the ripple effect of that discrimination may well be the creation of additional inequalities in the economic and professional spheres. Accordingly, the task of making the victims of such discrimination whole would have to include redress for the inequalities in the economic and professional spheres attributable to original discrimination in education.

To the extent that it is possible to make the victim of racial discrimination whole by means of a distribution of additional assets, there would be no need for preferential treatment in the competition for public goods.²²² Often, however, that possibility does not exist. For example, it may simply take too long, perhaps more than a lifetime, to put a person who received an inferior racially segregated education in the position she would have been in but for racial segregation in public education. Or, the "but for" proposition or counterfactual needed to fix the proper measure of compensation may be too speculative to justify redress. Thus, for instance, not all those who receive an adequate public education amass fortunes, make the right professional contacts, or possess other qualities necessary for success in business. Accordingly, it seems purely speculative to assert that but for public school racial segregation any particular individual would have actually succeeded in business.

In both kinds of cases described above, where a distribution of assets is unlikely to provide a satisfactory remedy, affirmative action may well afford the best possible means of redress. In order to understand how this might be, we must focus briefly on some elementary aspects of the relationship between means and prospects.²²³ In the broadest terms, it is obvious that an individual's prospects of success in a competition will depend on the relevant means which she has at her disposal. For example, if success in a competition depends on physical strength, then the physically stronger competitors have a better prospect of winning the competition than their weaker counterparts. Likewise, if physical strength were the only factor that might

222. Indeed, once such victims are provided with the assets that they would have possessed but for racial discrimination, they ought to compete for scarce public goods just as effectively as everyone else. Since, at that point, the effects of discrimination will presumably have been completely eliminated, any preferential treatment would amount to unjustified tampering with equal opportunity, which might itself require a remedy.

223. For a more extended discussion of the relationship between means and prospects, see D. RAE, *supra* note 31, at 74-75.

have a bearing on the outcome of a competition, then all those who possess equal physical strength would have equal prospects of success. Now, in any actual competition the relationship between means and prospects is likely to be more complex. In a competition conducted in accordance with the principle of formal means-regarding equality of opportunity, there are likely to be substantial inequalities of means to which there would correspond substantial inequalities of prospects. These inequalities are legitimate under the applicable principle, and therefore give rise to no valid claim of compensation. However, inequalities of means that are the product of violations of the applicable principle generate further inequalities of prospects which are not themselves justified. Accordingly, from the standpoint of the competition for scarce public goods, the injury caused by violations of the principle of formal means-regarding equality of opportunity is the *diminished prospect of obtaining such a scarce good*.

Affirmative action in the form of a quota, such as the one at issue in *Croson*, seems perfectly suited to correct the reductions in prospects of success attributable to violations of formal equal opportunity rights. To illustrate this point, let us assume that as a consequence of a city's racist policies, its black citizens have been deprived of certain means, causing them to suffer a ten-percent loss in their prospects of success in the competition for scarce public goods. In that case, a racial quota that has the effect of raising their prospects of success by ten percent would clearly appear to be the best means to put them in the position in which they would have been but for past racial discrimination. Provided that the blacks involved are minimally qualified to handle the scarce public good which they seek to obtain,²²⁴ the quota's elimination of the unjust deficit in prospects of success is clearly preferable to the much more difficult process of making up directly for the corresponding deficit in means through a distribution of relevant assets. On the other hand, a quota raises prospects but does not guarantee ultimate success,²²⁵ and therefore, unlike certain outright distributions of assets, a quota does not compensate for purely speculative harms.²²⁶

224. Affirmative action programs resulting in the allocation of scarce public goods, such as jobs or construction contracts, to those who are not minimally qualified would not only be completely inefficient, but also self-defeating. Indeed, placing responsibilities on those who are incompetent to handle them is hardly likely to contribute to their integration into the mainstream of society. Accordingly, affirmative action may only provide partial compensation, but that does not make it unjust. Those whom it cannot compensate should not be left without a remedy; they should be afforded a different, more suitable remedy.

225. Provided, of course, that the number of minimally qualified members of the benefited class is greater than the number of places or positions sought to be allocated through the quota.

226. Consistent with this analysis, one can meet a seemingly powerful criticism made against affirmative action. This criticism is that affirmative action benefits the most qualified members of the discriminated-against group, who presumably need help the least, at the expense of its least

Once this is understood, the objection against using affirmative action as a remedy for societal discrimination loses most of its force. Indeed, what seems objectionable about granting a preference in employment to a victim of discrimination in education, for example, is that it is speculative to assume that but for the deprivation in educational assets the beneficiary of the preference would have secured the employment for which he is now competing. However, if the employment quota is properly perceived as awarding the job applicant the increased prospect of success that she would have enjoyed absent the discrimination in education, then the remedy does not appear to exceed the harm.

Conceding that affirmative action is the best-suited means of compensation for violations of formal means-regarding equal opportunity rights, there are still certain substantial objections that may be raised against it even from the perspective of those who are committed to the principle of equal opportunity. I shall deal briefly with the three most important among these objections: (1) that while affirmative action satisfies compensatory equal opportunity it violates distributive equal opportunity;²²⁷ (2) that while some kinds of affirmative action may be justified, race-based affirmative action is not, because it is both over- and underinclusive;²²⁸ and (3) that notwithstanding its virtues, race-based affirmative action violates the substantive equality rights of its "innocent" white victims.²²⁹

As we have seen, purely forward-looking distributive application

qualified members, who are presumably in the greatest need of assistance. See A. GOLDMAN, *supra* note 203, at 90-91.

This criticism misses its mark because it fails to take into consideration that to be legitimate, affirmative action must be parasitic on a distribution system based on . . . equality of opportunity . . . Equality of opportunity favors more talented and more qualified individuals at the expense of less qualified and less talented ones, and so does affirmative action. As a matter of fact, when equality of opportunity is the norm, discrimination causes proportionately greater harm to its more talented victims, and, conversely, it has the effect of bestowing proportionately greater undeserved benefits on the least qualified members of the groups not subject to discrimination. In accordance with this, affirmative action tends to take away undeserved benefits from those who would not have received them absent discrimination even as it tends to increase the prospects for receiving benefits of those who would have been the most likely to receive them had they not been the victims of discrimination.

Rosenfeld, *supra* note 9, at 908.

227. Cf. Fullinwider, *On Preferential Hiring*, in FEMINISM AND PHILOSOPHY 210 (M. Vetterling-Braggin, F. Elliston & J. English eds. 1977) (assuming maximizing efficiency is the distributive objective of careers open to talents, preferential treatment works against the ends of distributive justice).

228. See, e.g., A. GOLDMAN, *supra* 203, at 76 (not all blacks were unjustly denied jobs or education).

229. *Id.* at 103 (passive receipt of certain benefits attributable to past discrimination, which are thrust upon them by society, does not justify imposing a distributive share of collective guilt on innocent white males).

of the equal opportunity principle precludes the use of affirmative action, while compensation for violations of the same principle may require it. Thus, we seem to reach an impasse: to compensate we must apparently violate our distributive rule whereas to adhere to the latter we may well be compelled to deny just compensation. There is, however, a way out of this dilemma.²³⁰ Indeed, upon further consideration, it becomes plain that unless provision for compensation is made for abridgements of distributive rights, those who are bent on violating such rights could eventually completely undermine legitimate distributive principles with impunity. To preserve the integrity of an established distributive principle, therefore, it is necessary to give precedence to compensatory claims for violations of distributive rights under that principle, even if that entails a temporary suspension of the application of that distributive principle. Paradoxically, preservation of the integrity of a distributive system may require deviation from it.

Consistent with this understanding of the proper nexus between compensatory and distributive concerns, affirmative action designed to remedy the present effects of past discrimination is predominantly compensatory, at least from the perspective of its beneficiaries.²³¹ The purpose of such affirmative action is to compensate the victims of past discrimination for the reduction in their prospects of success attributable to violations of their equal opportunity rights. Moreover, since relative prospects of success come into play in the distributive arena, affirmative action operates on, and therefore has a direct effect on, the sphere of distribution. Nevertheless, affirmative action's predominant compensatory purpose in this context should not be obscured by its distributive effects. If affirmative action operates on the distributive sphere it is because that is where the relevant injuries caused by violations of equal opportunity rights become manifest. As conceived here, however, affirmative action is not meant to effect any permanent changes in distributive relationships, a fact evinced by the temporary nature of many affirmative action plans, including the one at stake in *Croson*.²³² Indeed, once discrimination is eliminated and preferential treatment has brought prospects to where they would have been absent discrimination, compensation will have been completed and there would be no further need for affirmative action. Accordingly, in the context of a theory of substantive equality that embraces the principle of formal means-regarding equality of opportunity, affirmative action

230. This solution is proposed by Alan Goldman. *See id.* at 65-67.

231. In other words, although affirmative action has a distributive effect on society at large, it remains compensatory from the perspective of its beneficiaries.

232. 109 S. Ct. at 713.

can be justified as a means to compensate victims of racism for the present effects of past discrimination.

The second broad objection can be summarized as follows: Assuming that affirmative action is a legitimate compensatory tool, race-based affirmative action is nonetheless objectionable because it is both over- and underinclusive. Not all blacks are "actual" victims of discrimination and not all victims of discrimination are black. Accordingly, race-based affirmative action provides unjust windfall benefits in the distributive sphere to blacks who were not confronted by "actual" discrimination, and leaves other nonminority victims uncompensated.

This objection can be met with two arguments. The first rebuts the conclusion that race-based affirmative action is overinclusive; the second argues that neither is it underinclusive. Race-based affirmative action is not overinclusive because all American blacks are likely to have suffered some deprivation resulting in a reduction in their prospects of success which can be traced to the systematic and pervasive history of official racism throughout the United States in general,²³³ and in Richmond in particular.²³⁴ Moreover, even if a black individual has not been the "actual" victim of discrimination — in the sense of having been directly confronted by an official denial of formal equal opportunity because of her race — it is still highly probable that official racism has deprived her of some asset she would have otherwise possessed, thus causing some reduction in her prospects of success. For example, the child of parents who were forced to attend inferior, racially segregated public schools is likely to be deprived of certain assets which she otherwise would have received from her parents, and, consequently, to suffer a reduction in her prospects of success. Also, the cumulative effect of the long history of systematic racial discrimination in education, housing, employment, trade unions, and trade associations in the construction industry, and in virtually every other sphere of social interaction, is likely to have a substantial negative impact on the prospects of success of all blacks.²³⁵ In other words, because of the ravaging effects of state-sponsored and -condoned racism, it seems fair to conclude that but for such racism, the prospects of success in the distributive arena of all American blacks would be significantly higher than they are.

233. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 387-402 (1978) (Marshall, J., concurring in part and dissenting in part); Maguire, *The Triumph of Unequal Justice*, 95 CHRISTIAN CENTURY 882, 883-84 (1978) (blacks are treated as the lowest caste of society); cf. A. GOLDMAN, *supra* note 203, at 187 (marked statistical differences between groups is strong evidence of discrimination and of present lack of equality of opportunity).

234. See *supra* text accompanying notes 75-79, 82, 84 & 85.

235. See *supra* note 233.

On the other hand, the reason why race-based affirmative action is not underinclusive is that, as already pointed out, the injuries of racism are different from those resulting from other forms of discrimination.²³⁶ It is true that equal opportunity rights have been violated on the basis of gender, religion, and additional considerations other than race. Nevertheless, when placed in their proper context, the injuries attributable to racism are bound to differ significantly from those attributable to sexism, anti-Semitism, or other bases of prejudice.²³⁷ As we have seen, the racist's stereotypes differ markedly from the anti-Semite's with the consequence that the actual obstacles facing the victims of racism are not likely to be the same as those confronting those of anti-Semitism. And to the extent that violations of equal opportunity rights of blacks attributable to racism lead to injuries that are different in nature and scope from those traceable to other kinds of negative group stereotyping, race-based affirmative action designed to redress unjust deficits in prospects due to racism should not be viewed as underinclusive.²³⁸

The third objection concerns the injuries that race-based affirmative action is supposed to inflict upon "innocent" whites. Because of preferential treatment for blacks, certain whites who have never consciously engaged in racial discrimination are harmed inasmuch as they are deprived of goods which they otherwise would have obtained. Thus, in the context of the Plan in *Croson*, several of the white entrepreneurs who failed to obtain public construction subcontracting work would have undoubtedly been successful but for the thirty-percent set-aside. The fact that "innocent" whites may be harmed by affirmative action, however, does not, standing alone, suffice as the basis for a constitutional violation.²³⁹ But proponents of this objection assert that it is because of their race that certain "innocent" whites are made to bear a disproportionate share of the burden imposed by affirmative

236. Cf. Bayles, *supra* note 183, at 305 (although race perhaps ought to be irrelevant to state conduct, being black can be made morally relevant *derivatively* by racism).

237. See *supra* notes 183-85 and accompanying text.

238. This does not mean, however, that injuries to other groups should not be redressed, only that injuries to blacks are sufficiently distinguishable from other injuries attributable to discrimination and to negative group stereotyping. Thus, the justification of race-based affirmative action by no means precludes the justification of gender-based affirmative action, for example, given that sexism has led to a decrease in women's prospects of success in the competition for public goods. Accordingly, both race-based and gender-based affirmative action may be necessary to ensure the complete integrity of a distributive system based on formal means-regarding equality of opportunity.

239. As Chief Justice Burger stated in *Fullilove v. Klutznick*, 448 U.S. 448, 484 (1980): "It is not a constitutional defect in this [affirmative action] program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such 'a sharing of the burden' by innocent parties is not impermissible."

action. And being harmed *because* of one's race seems indeed to amount to a constitutional wrong.²⁴⁰

To meet this objection, it must be demonstrated that compensatory race-based affirmative action does not violate the constitutionalized substantive equality rights of "innocent" whites — that is, consistent with our operative assumptions, their individual rights to equal dignity and respect and to formal means-regarding equality of opportunity.

Focusing first on equal dignity and respect rights, there is, to be sure, a superficial analogy between the unequal treatment of blacks under racist policies and that of whites pursuant to an affirmative action plan. When the two situations are placed in their proper context, however, it becomes apparent that they are fundamentally different. In the context of racism, a black candidate is truly denied an opportunity to compete for a scarce public good because of her race.²⁴¹ In the context of affirmative action, on the other hand, a white candidate is not harmed because of his race,²⁴² but as the result of a design to eliminate the present effects of past discrimination. Racial discrimination is intended to degrade and demean its victims and to cast them as inferiors. Compensatory affirmative action, however, is not meant to deprive whites of equal respect.²⁴³ The intent behind racial discrimination is exclusionary while that behind compensatory affirmative action is inclusionary,²⁴⁴ as it seeks to integrate the victims of racism into the mainstream of society. Furthermore, the effects of failure in the competition for scarce public goods are not likely to be the same for blacks and whites. Such a failure by a white is unlikely to lead to his being treated as a second-class citizen.²⁴⁵ A similar failure by a black, however, is likely to perpetuate the stigma of racial stereotypes

240. *Cf.* *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298-99, 309-10 (1978) (Bakke, an innocent individual, was being asked because of his race to bear the brunt of redressing group grievances which were not of his making. Consistent with the equal protection clause, an individual cannot be burdened for the benefit of a group unless this were to amount to a necessary means to a compelling state interest.).

241. *Cf.* 438 U.S. at 387-402 (Marshall, J., concurring in part and dissenting in part) (blacks are grossly under-represented in universities and the professions because of systematic discrimination).

242. It may appear that the innocent white is burdened "because of" his race, but that is a misleading impression based on a superficial and acontextual comparison with the black victims of racial discrimination. The latter are harmed "because of" — *i.e.*, for no other reason than — their race. Strictly speaking, the innocent white, however, is harmed for no other reason than that the compensatory claims of the victims of racism take precedence over his distributive claims.

243. *See* 438 U.S. at 357-58 (Brennan, J., concurring in part and dissenting in part) (whites are not stigmatized by preferential minority admissions program).

244. The distinction between exclusionary and inclusionary uses of race, and the compatibility of the latter with equal worth and the equal protection clause is emphasized by Justice Stevens in his dissent in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 316-17 (1986).

245. *See Bakke*, 438 U.S. at 375 (Brennan, J., concurring in part and dissenting in part)

and to inhibit the achievement of genuine equal dignity and respect.²⁴⁶ Ultimately, therefore, the burdens of compensatory affirmative action are not comparable to those of outright racial discrimination and do not deprive whites of equal respect.²⁴⁷

Although affirmative action treats whites unequally to blacks, it need not deprive them of any legitimate equal opportunity rights. Viewed from the proper contextual perspective, the only thing that affirmative action seems to take away from the "innocent" white person is the increased prospects of success gained as a consequence of the racially discriminatory acts (or omissions) of the state. The reduction in the prospects of blacks attributable to official racial discrimination has already produced a windfall in the form of increased prospects of success for all the other competitors seeking to obtain scarce public goods. In this sense, affirmative action merely restores the equal-opportunity balance, placing both blacks and whites in the position in which formal means-regarding equality of opportunity would have left them absent official racial discrimination. Consistent with this, affirmative action designed to remedy the present effects of past discrimination does not take away from "innocent" whites anything that they have rightfully earned, such as educational skills developed through hard work, and which they deserve to keep.²⁴⁸ Even if completely innocently acquired, the increased prospects of success gained through the unjust treatment of blacks are entirely undeserved. Thus, although the loss of these increased prospects may result in bitter disappointment, it does not amount to a violation of any equal opportunity right.

This analysis suggests that there is sound support for Justice Marshall's position in *Croson* to the effect that affirmative action is constitutionally permissible if used to remedy the present effects of past discrimination, or to prevent direct state subsidies from sustaining discriminatory private distributive schemes.²⁴⁹ A systematic and com-

(Bakke's rejection from medical school will not "affect him throughout his life the same way as the segregation of the Negro school children in *Brown I* would have affected them.").

246. See 438 U.S. at 375 (Brennan, J., concurring in part and dissenting in part).

247. For a philosophical argument that a dialogical process involving a complete reversal of perspectives would lead to a consensus among blacks and whites that race-based affirmative action to eliminate the present effects of past discrimination is compatible with equal respect and dignity for all, see M. ROSENFELD, *supra* note 24, chs. IX and X.

248. Thus, affirmative action is not objectionable in the same way as the achievement of prospect-regarding equality of opportunity since it never requires depriving members of society of the use of natural assets or social assets acquired through perseverance and hard work. See *supra* note 214.

249. Given the negative character of the duty imposed on the state by formal means-regarding equality of opportunity, the state has no obligation to intervene to remedy private discrimination. However, if the state decides to intervene in the economical sphere, it cannot avoid lending

prehensive justification for Justice Marshall's position could be formed around a theory of substantive equality that promotes equal opportunity and that possesses a sufficiently developed conception of it. Moreover, Justice Marshall's ecological mode of interpretation in *Croson*²⁵⁰ seems fully justified in light of the nature of the principle of formal means-regarding equality of opportunity and the far reaching probable effects of massive and pervasive violations of that principle. Justice O'Connor's atomistic mode of interpretation,²⁵¹ on the other hand, is plainly inadequate to track down the unjustly diminished prospects of success suffered by victims of racial discrimination.

From the standpoint of the constitutionalization of formal means-regarding equality of opportunity, Justice O'Connor's overly narrow compensatory approach in *Croson* — and, for that matter, Justice Scalia's — is even more fundamentally flawed. It is so restrictive that it does not allow for adequate compensation for violations of equal opportunity rights, and is thus incompatible with a state's voluntary efforts to reestablish or maintain the integrity of a distributive system built on equal opportunity.²⁵² Indeed, in the face of massive violations of equal opportunity rights with far-reaching effects such as those present in *Croson*, it will not do to limit compensation to isolated and well-defined violations that produce clear, distinct, and immediate injuries. Therefore, when closely examined in light of a sufficiently elaborated conception of substantive equality committed to the principle of equal opportunity, the respective positions articulated by Justices O'Connor and Scalia seem not only inadequate but, in fundamental respects, squarely at odds with that principle. More generally, any purely backward-looking approach, or one that too narrowly confines its forward-looking focus to the plight of "actual" victims, cannot be justified as consistent with a comprehensive compensatory and distributive scheme committed to the principle of formal means-regarding equality of opportunity. To further that principle, affirmative action must be constitutionally permissible if it is both backward- and for-

support and sustaining private discrimination unless it intervenes in a way that tends to eradicate the effects of past private discrimination. By intervening in the economic sphere, the state does not assume any compensatory duty for private discrimination. But if the intervening state does nothing to eliminate the effects of private discrimination, it is bound to violate its distributive obligations.

250. See *supra* text accompanying notes 173-81.

251. See *supra* text accompanying notes 158-72.

252. It is important to emphasize that the preceding analysis is limited to cases in which a government entity has voluntarily undertaken to set up an affirmative action plan. The present analysis does not address the question of whether a governmental wrongdoer can be forced, consistent with the Constitution, to implement an affirmative action plan designed to eliminate apparently remote and diffuse effects of that government entity's past racial discrimination.

ward-looking. It must be backward-looking to sort out past state-sanctioned deprivations of means and consequent reductions in prospects of success, from those for which the state bears no responsibility.²⁵³ At the same time, it must be forward-looking, so that it can identify distorting consequences of past state discrimination, and to ensure that such consequences have not subsided to the point where raising the prospects of success for racial minorities through affirmative action would subvert, rather than advance, distributive equal opportunity.²⁵⁴

Under the totality-of-circumstances approach suggested here as compatible with the constitutionalization of equal opportunity, *Croson* appears to be an easy case. Indeed, the combination of the city's long history of racial discrimination, of the virtual exclusion of blacks from the construction industry, and of the insignificant proportion of public construction contracting work awarded to MBEs, points almost inescapably — particularly in light of the absence of any actual evidence to the contrary²⁵⁵ — to the conclusion that MBEs enjoyed lower prospects of success than nonminority entrepreneurs, because of racially motivated violations of their equal opportunity rights. Other cases, undoubtedly, will be harder as the combination of relevant factors becomes more attenuated or diffuse. In *Croson*, for example, it was mere speculation for Justice O'Connor to assert that the virtual exclusion of blacks from the construction industry might have been the result of free career choices rather than the consequences of fierce, direct racial discrimination.²⁵⁶ In another case, however, it is entirely plausible that a statistical disparity is as reasonably explained as a function of factors involving no violations of equal opportunity rights as it is a direct consequence of racism. And in such a case, since affirmative action would be no more likely to promote equal opportunity than to frustrate it, it would not be constitutionally justified to uphold it.

In the last analysis, shifting the debate over the constitutionality of affirmative action to the terrain of substantive equality has definite advantages. While such a shift does not presage any earlier end to the debate itself, it permits a more systematic assessment of the various positions thus far advanced in the debate. Absent a clear conception of equal opportunity, Justice Marshall's position in *Croson* may well

253. For example, the state should not bear responsibility for deprivations attributable to the acts of a foreign sovereign, or for deprivations resulting from purely private racial discrimination unless the state has had (or is having) a hand in sustaining it.

254. This would occur where affirmative action would raise the prospects of success of racial minorities above what they would have been absent all racial discrimination.

255. 109 S. Ct. at 740 (Marshall, J., dissenting).

256. See *supra* text accompanying note 172.

appear, in essential respects, as ungrounded as Justice O'Connor's. Assuming the enshrinement of equal opportunity as the Constitution's accepted conception of substantive equality, however, Justice Marshall's opinion can be systematically rooted and justified, while those of Justices O'Connor and Scalia cannot. So long as one remains behind the mystifying veil of process-based approaches, it is impossible to evaluate the import of professed judicial commitment to the constitutionalization of equal opportunity. But if one is forced out into the open to defend one's substantive values, it seems most unlikely that the respective positions of Justices O'Connor and Scalia in *Croson*, and those of the proponents of the marginal equality position articulated in *Bakke*, could be reconciled with a genuine commitment to equal opportunity. Accordingly, once forced into the terrain of substantive equality, the proponents of these positions would either have to invoke a conception of substantive equality that does not rely on equal opportunity — a risky proposition, given the special place held by the principle of equal opportunity in the American ethos²⁵⁷ — or open themselves to the charge of betraying their own professed values. Indeed, from the standpoint of equal opportunity, stubborn adherence to the marginal equality position and to an overly narrow compensatory framework may well appear to be but the means employed to insure the preservation of unfair advantages gained through systematic racial discrimination. And that is certainly not an attractive prospect for any defender of constitutional equality.

CONCLUSION

Croson is a case of considerable importance, but not necessarily for the reasons that are apparent initially. Settling, for the first time, on a single judicial test for the determination of the constitutionality of race-based affirmative action is undoubtedly noteworthy. *Croson*'s principal importance, however, may in the long run lie elsewhere. As this Article has sought to demonstrate, what is most remarkable about the Supreme Court's decision in *Croson*, is the stark contrast between the apparent simplicity and clarity of the legal test that the Court embraces and that test's inability to account coherently for the complexities inherent in the controversy that it purports to resolve. Accordingly, far from bringing lasting order to the constitutional debate over affirmative action, *Croson* only manages to overcome hopeless fragmentation by systematically decontextualizing whatever stands in the way of its single-minded resolve to reach its ultimate

257. See *supra* note 207.

legal conclusion. Paradoxically, *Croson*'s systematic decontextualization designed to buttress the strict scrutiny test, more than any other single factor, points to the inherent limitations of that test, and to its essential unsuitability in the context of affirmative action. Thus, it is quite conceivable that, in their hour of triumph, the proponents of strict scrutiny have already planted the seeds of their own eventual defeat.

This Article has concluded that the constitutional issues posed by affirmative action cannot be coherently or systematically resolved except in terms of the constitutionalization of some conception of substantive equality. Moreover, assuming the constitutionalization of a conception based on formal means-regarding equal opportunity, this Article has indicated that the Plan in *Croson* would pass constitutional muster as a means to remedy the present effects of past discrimination resulting in continuing denials of equal opportunity rights. Consistent with the analysis presented in this Article, not only is *Croson* ultimately unsuccessful in making the case for integrating affirmative action jurisprudence into mainstream process-based equal protection jurisprudence, but it raises serious doubts about whether any process-based jurisprudence can be defended as sound. Actually, perhaps the ultimate irony of *Croson* will be that the stark contradiction between the superficial order it imposes and the deeper turmoil it helps reveal will eventually pave the way to a genuine reconciliation of the treatment of affirmative action with other equal protection issues under a vision of constitutional equality that draws explicitly on substantive values.